DOCKET

No. 07-219
Title: Exxon Shipping Company, et al., Petitioners
v.
Grant Baker, et al.
Docketed: August 21, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-35183)
Decision Date: December 22, 2006
Rehearing Denied: May 23, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 20 2007	Petition for a writ of certiorari filed. (Response due September 20, 2007)
Sep 13 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Sep 19 2007	Brief amici curiae of American Waterways Operators, et al. filed.
Sep 20 2007	Brief amici curiae of American Petroleum Institute, et al. filed.
Sep 20 2007	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Sep 20 2007	Brief amicus curiae of American Institute of Marine Underwriters filed.
Sep 20 2007	Brief amicus curiae of Keystone Shipping Co. filed.
Sep 20 2007	Brief amicus curiae of American Commercial Lines Inc. filed.
Sep 20 2007	Brief amicus curiae of Washington Legal Foundation filed.
Sep 20 2007	Brief amicus curiae of International Association of Drilling Contractors filed.
Sep 20 2007	Brief amici curiae of Transportation Institute, et al. filed.
Sep 20 2007	Brief amici curiae of International Chamber of Shipping, et al. filed.
Sep 20 2007	Brief of respondents Grant Baker, et al. in opposition filed.
Sep 20 2007	Brief amicus curiae of Maritime Law Association filed.
Sep 20 2007	Brief amici curiae of International Association of Independent Tanker Owners, et al. filed.
Sep 20 2007	Brief amici curiae of Professors David J. Bederman, et al. filed.
Oct 10 2007	DISTRIBUTED for Conference of October 26, 2007.
Oct 12 2007	Reply of petitioners Exxon Shipping Company, et al. filed. (Distributed)
Oct 29 2007	Petition GRANTED limited to Questions 1, 2, and 3(1) presented by the petition. Justice Alito took no part in the consideration or decision of this petition.
Dec 10 2007	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including December 17, 2007.
Dec 10 2007	The time within which to file respondents' brief on the merits is extended to and including January 22, 2008.
Dec 11 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondents.
Dec 14 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Dec 17 2007	Joint appendix filed (4 volumes). (Statement of costs received).
Dec 17 2007	Supplemental joint appendix filed (2 volumes). (Statement of costs received).

Dec 17 2007	Brief of petitioners Exxon Shipping Company, et al. filed.
Dec 20 2007	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Dec 21 2007	SET FOR ARGUMENT ON Wednesday, February 27, 2008.
Dec 21 2007	Brief amici curiae of Transportation Institute, et al. filed.
Dec 24 2007	Brief amici curiae of International Chamber of Shipping, et al. filed.
Dec 26 2007	Brief amici curiae of American Petroleum Institute, et al. filed.
Dec 26 2007	Brief amicus curiae of Washington Legal Foundation filed.
Dec 26 2007	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
Dec 26 2007	Brief amicus curiae of American Maritime Safety Inc. filed.
Jan 7 2008	Application (07A575) of respondents for leave to file the brief on the merits in excess of the word limitation, submitted to Justice Kennedy.
Jan 10 2008	Record received from U.S.C.A. for the 9th Circuit. (1 envelope)
Jan 10 2008	Application (07A575) of respondents for leave to file the brief on the merits in excess of the word limitation granted by Justice Kennedy.
Jan 11 2008	CIRCULATED.
Jan 15 2008	Brief amici curiae of Alaska Legislative Council, on behalf of Alaska State Legislature, and Former Alaska Governors filed.
Jan 22 2008	Brief of respondents Grant Baker, et al. filed. (Distributed)
Jan 22 2008	22 copies of a DVD containing Respondents' Submission of Select Trial Exhibits received from counsel for the respondents.
Jan 23 2008	Record received from U.S.D.C. for the District of Alaska. (1 envelope)
Jan 25 2008	Brief amici curiae of U.S. Senators Theodore F. Stevens, and Lisa Murkowski, and U.S. Reprensentative Don Young filed. (Distributed)
Jan 25 2008	Brief amici curiae of Trustees for Alaska, et al. filed. (Distributed)
Jan 28 2008	Brief amici curiae of Prince William Sound Regional Citizens' Advisory Council, et al. filed. (Distributed)
Jan 28 2008	Brief amicus curiae of Professor Thomas J. Schoenbaum filed.
Jan 29 2008	Motion of Alaska for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 29 2008	Brief amici curiae of National Congress of American Indians, et al. filed. (Distributed)
Jan 29 2008	Brief amicus curiae of Professor Arthur Miller filed. (Distributed)
Jan 29 2008	Brief amici curiae of Jean-Michel Cousteau and Other Natural Scientists filed. (Distributed)
Jan 29 2008	Brief amici curiae of Sociologists, Psychologists, and Law and Economics Scholars filed. (Distributed)
Jan 29 2008	Brief amicus curiae of National Fisheries Institute filed. (Distributed)
Jan 29 2008	Brief amici curiae of Maryland and 33 Other States filed. (Distributed)
Jan 29 2008	Brief amici curiae of American Association for Justice, and Public Justice PC filed. (Distributed)
Jan 29 2008	Brief amicus curiae of Pacific Coast Federation of Fishermen filed. (Distributed)
Jan 29 2008	Brief amicus curiae of Alaska filed. (Distributed)
Jan 29 2008	Brief amici curiae of Former Ship Masters and Expert Mariners, et al. filed. (Distributed)
Jan 29 2008	Motion for additional time to argue filed by respondents Grant Baker, et al.

Jan 29 2008	Brief amici curiae of Experts on Alcohol in the Workplace filed. (Distributed)
Feb 6 2008	Application (07A657) of petitioners for leave to file a reply brief on the merits in excess of the word limit, submitted to Justice Kennedy.
Feb 7 2008	Petitioners' opposition to motion of Alaska for leave to participate in oral argument as amicus curiae and for divided argument.
Feb 8 2008	Letter, dated February 6, 2008, received from counsel for petitioner.
Feb 11 2008	Reply letter of Alaska in support of motion for divided argument filed.
Feb 11 2008	Application (07A657) granted by Justice Kennedy of petitioners for leave to file a reply brief on the merits in excess of the word limit. provided that the brief does not exceed 9,000 words.
Feb 14 2008	Letter, dated February 11,2008, from counsel for respondents received. (Distributed).
Feb 15 2008	Motion for additional time to argue by respondent GRANTED. Justice Alito took no part in the consideration or decision of this motion.
Feb 15 2008	Motion of Alaska for leave to participate in oral argument as amicus curiae and for divided argument DENIED. Justice Alito took no part in the consideration or decision of this motion.
Feb 19 2008	Reply of petitioners Exxon Shipping Company, et al. filed. (Distributed)
Feb 26 2008	18 copies of Video Compilation No. 9 (at JA 1295) submitted by counsel for respondents.
Feb 27 2008	Argued. For petitioners: Walter Dellinger, Washington, D.C. For respondents: Jeffrey L. Fisher, Stanford, Cal.

PETITION
FOR
WRIT OF
CERTIORARI

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Supreme Court, U.S.
FILED

07-219 AUG 20 2007

No. 07- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An Alaska federal jury awarded $5 billion in punitive damages against Exxon under federal maritime law for the accidental grounding of the tanker EXXON VALDEZ and the resulting oil spill. The award did not punish for harm to the environment, which other proceedings had fully redressed, but only for lost income and similar economic harm to commercial fishermen and other private parties. Applying the Due Process Clause, the Ninth Circuit reduced the award to $2.5 billion—still 123 times the compensatory damages awarded and five times what the court found was the total, fully compensated loss to all private economic interests.

The questions presented are:

1. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?

3. Is this $2.5 billion punitive damages award, which is larger than the *total* of all punitive damages awards affirmed by all federal appellate courts in our history, within the limits allowed by (1) federal maritime law or (2) if maritime law could permit such an award, constitutional due process?

PARTIES TO THE PROCEEDING

Petitioners are Exxon Shipping Company (now known as SeaRiver Maritime, Inc.) and Exxon Mobil Corporation, defendants-appellants below. Joseph Hazelwood (the master of the EXXON VALDEZ) was also a defendant-appellant below and is therefore a respondent under Rule 12.6.

Plaintiffs-appellees below, who are respondents under Rule 12.6, are Grant Baker, Louie E. Alber, Ahmet Artuner, Jeffrey Bailey, William Bennett, Michael Wayne Bullock, Robyne L. Butler, Albert Ray Carroll, Larry L. Dooley, Mark Doumit, Douglas R. Jensen, Dennis G. Johnson, Donald P. Kompkoff, Sr., Josef Kopecky, Daniel Lowell, Andrean E. Martusheff, Carol Ann Maxwell, Jacquelan Jill Maxwell, Robert A. Maxwell, Sr., Michael McLenaghan, Elenore E. McMullen, Leslie R. Meredith, Leonard S. Ogle, Steven T. Olsen, August M. Pedersen, Jr., Mary Lou Redmond, Joseph David Stanton, Jean A. Tisdall, Darrell Wood, the Alaska Sport Fishing Ass'n, Debra Lee, Inc., Dew Drop, Inc., and the Native Village of Tatitlek. They are representatives of a punitive damages class certified by the district court and defined as "all persons who possess or assert a claim for punitive damages" arising out of the grounding of the EXXON VALDEZ and the resulting oil spill, except for certain governmental entities. App. 126a.[1]

RULE 29.6 DISCLOSURE

All of the stock of Exxon Shipping Company is owned directly or indirectly by Exxon Mobil Corporation. Exxon Mobil Corporation has no parent corporation and no person or entity owns 10% or more of its stock.

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[1] Citations to "App." indicate the Appendix to this Petition. Citations to "ER" and "RER" indicate materials available in Appellants' Joint Excerpts of Record and Appellants' Joint Rebuttal Excerpts of Record filed in the first Ninth Circuit appeal (No. 97-35191). Citations to "DX" indicate exhibits admitted at trial. Emphasis is supplied throughout, except where otherwise stated, and internal quotations and citations are omitted.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Exxon Shipping Company and Exxon Mobil Corporation (collectively, "Exxon") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The two opinions of the Ninth Circuit and the opinions of Judges Kozinski and Bea dissenting from denial of rehearing *en banc* are reported at 270 F.3d 1215 and 490 F.3d 1066 and reprinted at App. 1a-117a and 287a-293a. The district court's initial opinions on all issues are unreported and reprinted at App. 224a-284a. Its two later opinions on the size of the punitive award are reported at 236 F. Supp. 2d 1043 and 296 F. Supp. 2d 1071 and reprinted at App. 118a-223a.

JURISDICTION

The Ninth Circuit issued its opinions in this matter on November 7, 2001, and December 22, 2006, and amended the latter opinion on May 23, 2007, upon denial of Exxon's timely petition for rehearing. App. 285a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides: "No person shall be deprived of life, liberty, or property, without due process of law." Pertinent provisions of the Clean Water Act (CWA), 33 U.S.C. § 1311 *et seq.*, are given at App. 293a-299a.

INTRODUCTION

This petition seeks review of what is by far the largest punitive damage award ever affirmed by a federal appellate court. Unlike all the other punitive awards this Court has reviewed, which arose under state law, this award is purely the product of judge-made federal law and raises important federal questions *not* limited to whether the amount exceeds the boundaries of due process. Because the oil spill was a maritime tort, the award was made under maritime law, a species of federal common law which federal judges have responsibility to declare and shape in the same manner that state courts declare and shape the common law of their states, and of which this Court is the ultimate arbiter. The questions presented, of importance to the entire maritime community, must therefore start with whether the award was proper under maritime law. It was not.

First. The trial court instructed the jurors that if they found the ship's master had acted recklessly, they were *required* as a matter of law to impute his recklessness to the shipowner, even if the master's acts were contrary to the owner's properly enforced policies. As explained in Judge Kozinski's dissent, App. 287a-291a, in upholding these instructions the Ninth Circuit departed from 200 years of maritime law, and put itself squarely in conflict with decisions of the First, Fifth, Sixth, and Seventh Circuits.

Second. Congress established a detailed scheme of penalties and remedies for oil spills in the CWA, but did not authorize punitive damages. In holding that punitive damages were available, the Ninth Circuit departed from decisions of this Court and other circuits holding that judge-made maritime law cannot add remedies to those Congress has provided in an applicable statute, including the CWA. The decision also conflicts with multiple maritime-law decisions of other circuits barring judge-made punitive damages where pertinent federal statutes do not authorize them.

Third. The Ninth Circuit refused to recognize that substantive maritime law limits the size of the award independently of due process. Indeed, the court said that absent a due process limit, the jury might permissibly have awarded the full $5 billion on the theory that Exxon "ought to have a year without profit" as punishment for the spill. App. 91a. In so holding, the Ninth Circuit ignored maritime law's core objectives of uniformity, predictability, and avoidance of undue burdens on maritime commerce. It also contradicted decisions of other circuits that punitive awards made under federal law must comply not only with outer limits imposed by due process, but also with non-constitutional limits imposed by underlying federal law. The $2.5 billion award in this case vastly exceeds any amount supportable under maritime law. And for reasons including those discussed in Judge Bea's dissent, App. 292a-293a, the award also vastly exceeds the maximum permitted by due process.

STATEMENT OF THE CASE

A. Factual Background

1. On March 24, 1989, the EXXON VALDEZ, a modern, well-equipped tanker fully loaded with crude oil, ran aground on Bligh Reef in Prince William Sound, Alaska. The immediate cause of the grounding was the failure of Third Mate Cousins to turn the vessel away from the reef, the last step in a routine maneuver to avoid ice in the shipping lanes. The vessel's master, Captain Hazelwood, instructed Cousins when and where to make the turn, but then left the bridge—a violation of Exxon's explicit policy requiring two officers to be present. For reasons never explained, Cousins failed to make the turn as instructed, and the ship went aground, spilling 258,000 barrels of oil. App. 61a-64a.

Upon learning of the grounding, Exxon dispatched an emergency response team which successfully prevented the discharge of the remaining 80 per cent of the vessel's cargo. RER 287-91. Exxon acknowledged responsibility for the spill and initiated a massive cleanup, ultimately spending $2.1 billion on that effort—almost double Exxon's annual profit at that time from all petroleum operations in the United States. App. 64a; RER 312; DX-6347. Exxon also established a claims program which paid, without litigation and mostly without requiring releases, over $300 million to compensate commercial fishermen, seafood processors, and other persons claiming that the spill had disrupted their businesses. App. 64a. And Exxon undertook comprehensive remedial measures to reduce the risk of future shipping accidents and spills. ER 108-09.

2. The State of Alaska sued Exxon for compensatory and punitive damages as *parens patriae*, and the United States indicted Exxon for violating the CWA, 33 U.S.C. § 1311(a), and other statutes. ER 1, 88. Both governments also sued Exxon for natural resource damages under CWA § 1321(f). App. 70a. Exxon resolved all these claims in a federal consent decree and plea agreement entered in October 1991. Exxon paid the governments $900 million for natural resource damages, and they dismissed or released all pending or potential claims asserted on behalf of the general public, including Alaska's *parens patriae* claim for punitive damages. App. 65a; ER 242A. Exxon also pled guilty to certain misdemeanors, including negligent discharge of oil in violation of CWA § 1319(c)(1)(A), and was sentenced under 18 U.S.C. § 3571(d) to pay a fine of $150 million and restitution to the United States and Alaska of $100 million. App. 103a. The fine was remitted to $25 million in recognition of Exxon's exemplary post-spill conduct, including its extensive remedial measures and payment of $2.1 billion for cleanup and $300 million to compensate private losses. App. 103a; ER 101-13. The net sentence of $125 million exceeded the total of all fines previously imposed by the United States in environmental cases. ER 124. Exxon's pretrial payments, settlements, and fines exceeded $3.4 billion. App. 100a.

At the 1991 sentencing hearing, the Attorney General's representative affirmed that the criminal sentence by itself "clearly" achieved "adequate deterrence." ER 155-56. The Attorney General of Alaska concurred, stating that a $150 million fine was "a number which the State can hold up to other polluters … and that certainly should be sufficient … to give pause to those who do not show the proper regard for the Alaska environment." ER 169. The district court agreed, noting that it "says to others in the industry … that you can expect fines that are off the chart in response to oil spills that are off the chart[,] … [b]ut it also says … [that] if you live up to your legal responsibilities [after such a spill] … you will get credit for it." The court found that "Exxon has …

been a good corporate citizen[,] … sensitive to its environmental obligations[,] … [who] immediately after the spill … stepped forward with both its people and its pocketbook and did what had to be done in difficult circumstances, … [and] will do its utmost to prevent another [spill]." ER 194-97. The court approved the sentence as containing both "an appropriate amount of punishment" and "an appropriate element of encouragement of respect for the law." App. 103a; ER 197.

B. Proceedings Below

1. The punitive damage claims were tried in 1994 together with claims by commercial fishermen who alleged that the spill had caused greater economic losses than Exxon compensated in the claims program. (The claims were mostly for business interruption—the State closed the fisheries to protect the market reputation of Alaska salmon.) To allow resolution of all punitive damage claims in a single trial, the district court certified a class of all persons who "possess[ed] or assert[ed]" a punitive damage claim arising from the spill. App. 126a. The class asserted punitive damage claims under federal maritime law against Captain Hazelwood individually and also against Exxon, Hazelwood's employer and the owner of the vessel and cargo. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, 1333, 1441, and 1442.

For purposes of the trial, Exxon stipulated that the two Exxon entities could be treated as one. Exxon also stipulated that Hazelwood had been negligent in leaving the bridge in violation of Exxon's two-officer policy. Plaintiffs contended that Hazelwood had been *reckless*—the required predicate for punitive damages—both by leaving the bridge and by allowing alcohol to impair his judgment before that. Exxon disputed these contentions, but if Hazelwood was impaired on duty, that too violated Exxon's explicit policy. App. 89a.[2]

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[2] In separate criminal proceedings, an Alaska jury convicted Hazelwood of negligently spilling oil, but *acquitted* him of the more serious charge of operating the vessel while impaired by alcohol. ER 43-45.

As the master of a tanker, Hazelwood was a "managerial officer or employee" of Exxon as the jury instructions defined that term. App. 300a. Over Exxon's objection, the district court instructed the jury that "the reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." App. 300a. The district court further instructed the jury, again over Exxon's objection, that this was so "whether or not those acts are contrary to the employer's [established and adequately enforced] policies or instructions." App. 301a.

Plaintiffs also argued to the jury that Hazelwood was an alcoholic, Exxon knew it, and Exxon had been independently reckless for allowing Hazelwood to serve as master and not supervising him sufficiently. The evidence on all these points was highly disputed. The Ninth Circuit acknowledged that based on the record the jury "could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk." App. 88a-89a. But the district court's instructions made it unnecessary for the jury to reach these questions.

2. In the first phase of the trial, the jury returned a verdict that Hazelwood had been reckless. Having been instructed that any reckless conduct of Hazelwood was "held in law" to be reckless conduct of Exxon whether or not contrary to Exxon's policies or instructions, the jury also duly returned a verdict that Exxon had been reckless. App. 300a. In the next phase, the jury substantially rejected the fishermen's claims for $800 million in damages based on low fish prices, finding that the spill did not cause prices to decline after 1989. ER 460-62. (Exxon's proof showed that a worldwide salmon glut drove down prices.) After offsetting prior claims payments, the district court entered judgment for $19.6 million in compensatory damages. App. 67a. A state court judgment added $700,000 more, for a total of $20.3 million. App. 32a.

In the final phase of the trial, made necessary by the verdicts on recklessness, the jury was asked to determine what amount of punitive damages should be awarded against Hazelwood and Exxon. The district court instructed the jury that in determining these amounts, it should not consider harm to the environment because "[a]ny liability for punitive damages relating to those harms was resolved" in the government proceedings, App. 96a-97a, a result in any case required by res judicata. App. 73a. After hearing evidence about Exxon's net worth and income, the jury awarded punitive damages of $5000 against Hazelwood and $5 *billion* against Exxon. The district court denied Exxon's post-trial motions, App. 224a-280a, and entered judgment for the full $5 billion punitive award. ER 781. Exxon appealed.

3. The Ninth Circuit issued its first opinion in November 2001. App. 57a. The court rejected Exxon's arguments that no punitive damages were authorized, but with significant caveats. On the propriety of the jury instructions authorizing vicarious punitive damages liability, the court pronounced itself bound by its own earlier decision in *Protectus Alpha Nav. Co.* v. *North Pac. Grain Growers*, 767 F.2d 1379 (9th Cir. 1979), but acknowledged that *Protectus* conflicted with the historic maritime-law rule as well as with modern maritime decisions of three other circuits. App. 85a-86a & n.84. Addressing whether judge-made maritime remedies could be added to those contained in the Clean Water Act, the court acknowledged that the question was "serious," "not without doubt," and "close." App. 75a, 77a. And while the court would not accept Exxon's argument that maritime law and due process bar punitive damages when prior sanctions and liabilities have fully vindicated any reasonable public interest in punishment and deterrence, it acknowledged that the argument had "force as logic and policy." App. 68a.

The Ninth Circuit did, however, hold that a $5 billion award could not stand. Applying the due process guideposts announced in *BMW of North America* v. *Gore*, 517 U.S. 559 (1996), the court held that Exxon's conduct was not sufficiently reprehensible to justify so high an award because the spill was not intentional, punishment was for economic injuries only, "fuel for the United States at moderate expense has great social value," and the company had spent billions to mitigate harm in the aftermath of the accident. The court further held that pretrial claims payments and settlements generally should not be included in the harm used to analyze the ratio between punitive and compensatory damages, and that a high ratio was unnecessary for deterrence because the $3.4 billion Exxon had already paid constituted a "massive deterrent" independent of any punitive damages. Finally, the court noted that the case was "unusually rich" in comparable penalties—including the $125 million criminal sanction deemed sufficient punishment and deterrence by the Attorneys General of the United States and Alaska—none of which supported a punitive award of $5 billion. App. 95a-104a.[3]

4. The Ninth Circuit remanded the case for the district court to determine the size of an appropriate remittitur. The district court, however, declined to follow the Ninth Circuit's reasoning. It reduced the award to $4 billion, but asserted at the same time that it saw no "principled" basis for any reduction at all. App. 222a-223a. Exxon again appealed, but before any briefs were filed, the Ninth Circuit *sua sponte* remanded the case for reconsideration in light of this Court's decision in *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003). This time the district court *increased* the award to $4.5 billion, asserting that *State Farm* presumptively validated punitive damages of up to nine times the total harm (which the district court calculated to be $500 million). App. 179a-180a. Exxon appealed for the third time.

5. The Ninth Circuit issued its second opinion in December 2006. App. 1a. The court again reviewed the award under

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[3] The court implicitly assumed that the Fifth Amendment due process analysis applicable to this federal-law judgment would be at least as rigorous as the Fourteenth Amendment due process analysis applicable to the state-court judgment in *Gore*. Exxon agrees.

the *Gore* guideposts, but this time with a different emphasis seemingly aimed at rationalizing a multibillion dollar award. On reprehensibility, for example, the court emphasized that the spill had physically endangered the crew and rescuers of the vessel, even though no one was injured and none of the crew or rescuers was a plaintiff in the lawsuit. App. 26a-28a. On ratio, the court repudiated its earlier statement that pretrial payments and settlements should not be included in the harm, stating incorrectly that the facts of *State Farm* mandated this change of view. App. 32a-35a, 287a. Accepting the district court's calculation of $500 million in total losses—and declining to follow *State Farm*'s admonition that when "compensatory damages are substantial," even a 1:1 ratio of punitive to compensatory damages may "reach the outermost limit of the due process guarantee," 538 U.S. at 425—the court held that due process would permit a 5:1 ratio because the tort fell within the "mid range" of reprehensibility. App. 31a-40a. By this reasoning, the court upheld an unprecedented punitive award of $2.5 billion. Although this award was billions more than the applicable (and substantial) legislatively enacted civil penalties for oil spills of this magnitude—the third *Gore* guidepost—the court opined that *State Farm* had reduced this guidepost to a mere check on whether legislatures dealt with similar misconduct "seriously." App. 40a-41a. Finding that legislative penalties for oil spills were serious, the court held this guidepost satisfied. Judge Browning dissented, and would have affirmed the full award. App. 42a-56a.

6. Exxon filed a timely petition for panel rehearing and rehearing *en banc*. The court denied it on May 23, 2007, amending its decision to remove its incorrect statement about the facts of *State Farm*, but not otherwise changing its result or attempting to justify the repudiation of its prior decision. App. 285a-286a. Two judges filed dissents from the denial of *en banc* review. Judge Kozinski dissented on the ground that the court had unjustifiably departed from 200 years of maritime precedent prohibiting vicarious punitive damages, in

conflict with every other circuit that had considered the issue. App. 287a-292a. Judge Bea agreed with Judge Kozinski that punitive damages should not have been awarded against Exxon and dissented on the additional ground that a $2.5 billion award was excessive under *State Farm*. App. 292a-293a.

REASONS FOR GRANTING THE PETITION

This record punitive award[4] unquestionably raises important issues of constitutional dimension. The Ninth Circuit's emphasis on concededly unrealized dangers to non-parties, its disregard of *State Farm*'s admonition against high punitive multipliers in cases with substantial compensatory damages, and its trivialization of the third *Gore* guidepost all raise important and recurring due process questions on which this Court's guidance is urgently needed. *See* Part III.B *infra*.

But the award raises equally important issues under maritime law. Federal courts have a "unique role in admiralty cases," since the "need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998). In maritime cases, federal courts have the opportunity and duty to determine the rules of maritime law, consistent with the policies that underlie the grant of admiralty jurisdiction, in the same way that state courts determine the common law of their states. *Norfolk Southern Ry. Co.* v. *Kirby*, 543 U.S. 14, 22-25 (2004); *McDermott, Inc.* v. *AmClyde*, 511 U.S. 202, 207-08 (1994); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975).

Parts I, II, and III.A of this petition, therefore, do not invoke this Court's authority as the final judge of constitutional questions but rather its "traditional responsibility to vindicate the policies of maritime law." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 396-97 (1970). This Court has the duty to clarify, shape, and ultimately declare, like a common-law court, the uniform general maritime law applicable in the United States to the issue of punitive damages. The decision below creates clear circuit conflicts on maritime-law questions—the permissibility of vicarious punishment, the availability of punitive damages when Congress has not authorized them in applicable maritime statutes, and the substantive maritime-law limits on the size of punitive awards—that are of immense importance to the maritime community, and have significance extending far beyond this case or even oil spills generally.

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[4] The largest award previously affirmed by a federal appellate court under U.S. law, state or federal, is $58.5 million—a fortieth of this one. *United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207 (10th Cir. 2000). The largest for an unintentional tort is $12.5 million, for wrongful death. *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991).

I. The Court Should Grant Certiorari to Resolve the Conflict in the Circuits on Whether Maritime Law Permits Vicarious Punitive Damages.

As acknowledged by the panel and detailed in Judge Kozinski's dissent, the Ninth Circuit's decision to uphold vicarious punitive liability based on the misconduct of a vessel's master, contrary to the shipowner's policy and hostile to its vital interests, departs from the maritime-law rule to which every other circuit confronting this issue adheres. In *The Amiable Nancy*, 16 U.S. 546 (1818), the Court, speaking through Justice Story, its leading maritime-law scholar, held that punitive damages may not be imposed against the owner of a vessel for tortious acts of the master and crew unless the owner "directed," "countenanced," or "participated in" the wrong. *Id.* at 559. The Court reiterated that principle in *Lake Shore & M.S. Ry. Co.* v. *Prentice*, 147 U.S. 101 (1893), a non-maritime case, and declared the *Amiable Nancy* rule to be in accord with "the preponderance of well-considered precedents." *Id.* at 107-17. For 150 years, federal courts faithfully applied the rule, and refused vicarious punitive damages in maritime cases. *E.g.*, *The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896); *Pacific Packing & Nav. Co.* v. *Fielding*, 136 F. 577, 579-80 (9th Cir. 1905).

Outside the Ninth Circuit, that rule remains. In *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), the Sixth Circuit, emphasizing the maritime reality that a ship's master must have full authority to direct operations at sea, held that "punitive damages are not recoverable against the owner of a vessel for the acts of the master unless it can be shown that the owner authorized or ratified the acts," or that "the acts ... were those of an unfit master and the owner was reckless in employing him." *Id.* at 1148. In *In re P&E Boat Rentals*, 872 F.2d 642 (5th Cir. 1989) (*en banc*), the Fifth Circuit held that "punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct." *Id.* at 652. And in *CEH, Inc.* v. *F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), the First Circuit confirmed that maritime law bars imposition of punitive damages against an employer for the misconduct of a vessel's master absent "some level of culpability" on the part of the employer. *Id.* at 705.

The Ninth Circuit, by contrast, abandoned the maritime rule against vicarious punitive damages in *Protectus*, *supra*, a 1985 case in which that court chose to apply instead the new rule of vicarious liability for acts of "managerial" employees proposed by the authors of the Restatement (Second) of Torts § 909. 767 F.2d at 1386. No other circuit has followed *Protectus*, and the Fifth and First Circuit decisions in *P&E Boat Rentals* and *CEH* expressly rejected it. In the decision below, however, the panel declared itself "bound by *Protectus*," App. 86a, and confirmed the Ninth Circuit's conflict with the First, Fifth, Sixth, and Seventh Circuits on this important point of maritime law. App. 85a n.84.

The panel below suggested that Exxon was not in the same position as the owners of THE AMIABLE NANCY because the jury might have found that Exxon was independently reckless for not relieving Captain Hazelwood of his command. App. 83a. But as the court tacitly acknowledged by not ending its discussion there, that point is legally irrelevant in light of the instructions to the jury. The court conceded that a jury verdict as to Exxon's independent recklessness could have gone either way, on the basis of highly disputed evidence. App. 88a-89a. The instructions, however (quoted *supra* at 6), *required* the jurors to find Exxon reckless if they found Captain Hazelwood reckless, whether or not they reached any conclusion about Exxon's independent recklessness.[5] As this Court's decisions make clear, when it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground, "the judgment must be reversed." *Greenbelt Co-op Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 11 (1970); *see Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459-60 (1993). The conflict with the other circuits is thus squarely presented.

The Ninth Circuit's other stated reasons for abandoning the traditional maritime rule do nothing to explain away or lessen the decisional conflict. The panel relied heavily on this Court's holding in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15 (1991), that vicarious punitive damages are not unconstitutional, but the question is not whether the *Constitution* permits such liability. It is whether *maritime law* does so. The answer turns on the maritime-law precedents, not on cases interpreting the outer limits of due process.

Protectus rested on the idea that "no reasonable distinction can be made between the guilt of the employee ... and the guilt of the corporation." 767 F.2d at 1386. But as the other circuits have recognized, whatever the merits of that idea when an employee's acts implement company policy, it is self-evidently untrue when, as here, the employee's act is forbidden by his employer and hostile to its vital interests. *Fuhrman*, 407 F.2d at 1148; *P&E Boat Rentals*, 872 F.2d at 651-52. The *Protectus* panel also asserted that the Restatement's provision for purely vicarious punitive damages "better reflects the reality of modern corporate America." 767 F.2d at 1386. Since no evidence was taken about the "reality of modern corporate America," this appears to mean simply that the *Protectus* panel thought changing maritime law to adopt the Restatement was a progressive thing to do. But as Judge Kozinski pointed out, "nothing has changed in the relationship between ship owner and captain that would justify importing this innovation into maritime law." App. 288a n.1.

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[5] In fact, jurors told the press they could not determine if Hazelwood was impaired by alcohol, they found him reckless for leaving the bridge, and they followed their instructions by imputing his conduct to Exxon. ER 638-39, 652-54.

Moreover, courts take very different positions as to whether vicarious punitive liability is permissible even in land-based cases. Indeed, since the decision in *Protectus*, *this Court itself* has expressly rejected the Restatement position as a matter of federal civil rights policy, *see Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 539-46 (1999), just as federal appellate courts other than the Ninth Circuit have rejected it as a matter of federal maritime policy. In *Kolstad*, the Court held that implementation and enforcement of good faith policies to prevent misconduct is a defense to vicarious punitive damages for acts of managerial employees. The instructions in this case stated the opposite.

The conflict among the circuits is not only stark, it is of great importance to maritime commerce both nationally and internationally. As Judge Kozinski observed, App. 290a-291a:

> The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction—a staggeringly huge area—to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious liability, ship owners won't be able to protect themselves ... through careful hiring practices. Accidents at sea happen—ships sink, collide and run aground—often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the understanding that they

> won't be subject to punitive damages if they "[n]either directed it, nor countenanced it, nor participated in" the wrong ....
>
> ... Moreover, the effects of this opinion are not limited to shippers and docks based in the Ninth Circuit: The shipping business knows no circuit, or even national, boundaries. Shippers everywhere will be put on notice: If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

II. The Court Should Grant Certiorari to Resolve the Conflict in the Circuits on Whether Maritime Law Permits Judge-Made Remedies When Congress Has Not Authorized Them in Applicable Statutes.

The decision below further contravenes decisions of this Court and other circuits on the important maritime-law question of whether judges may create punitive damages remedies for conduct already governed by a statutory remedial scheme that does not include punitive damages. In the Clean Water Act (CWA), Congress specifically addressed the punishment and deterrence of maritime oil spills by enacting both criminal and civil penalties. 33 U.S.C. § 1319(c)-(d) (criminal and civil penalties for negligent or intentional discharge of oil in violation of § 1311(a)); *id.* § 1321(b)(6)(B) (alternative civil penalties for unauthorized discharge of oil). Supplemented by 18 U.S.C. § 3571(d) (authorizing criminal fines of up to double third-party pecuniary losses), the penalties are substantial. Indeed, the enforcement of these provisions by the federal government led to the record fine imposed on Exxon in this case. The CWA also creates limited liability to the federal government for cleanup costs and natural resource damages, but eliminates the liability limitation in cases of "willful misconduct within the privity and knowledge of the shipowner." 33 U.S.C. § 1321(f). But the

CWA does not authorize private punitive damages, even for willful misconduct.[6]

The CWA thus embodies a legislative judgment that cleanup costs, natural resource damages, and potential criminal and civil penalties provide sufficient punishment and deterrence for oil spills. As such, it implicates the rule—established in an unbroken line of cases beginning with *Mobil Oil Co.* v. *Higginbotham*, 436 U.S. 618 (1978), and *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), and continuing with *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), and *Dooley* v. *Korean Air Lines Co.*, 524 U.S. 116 (1998)—that when Congress has spoken to an issue of federal tort law, the statute (not judge-made federal common law) determines the scope of the available remedies.

In *Mobil*, this Court held that the Death on the High Seas Act (DOHSA) precluded loss of society damages under maritime law for a death on the high seas because Congress had "limited survivors to recovery of their pecuniary losses." 436 U.S. at 623. The Court rejected the contention that judge-made maritime law could supplement the statutory remedy provided in DOHSA, holding that "Congress has struck the balance for us." *Id.* "In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.* at 625.

In *Milwaukee*, this Court held that the CWA's "comprehensive regulatory program" for water pollution, which prohibits the unauthorized discharge of any pollutant, displaced a non-maritime federal common-law nuisance remedy for interstate water pollution. 451 U.S. at 317-26. Citing *Mobil*, the Court held that when Congress has "spoke[n] directly to a question," judge-made federal law may not supplement the remedies Congress has chosen. *Id.* at 315. It further held that "when the question is whether federal statutory or federal common law governs," there is no presumption against preemption, *contrary* to the rule for state law. Rather, "we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 316-17; *see also id.* at 315 ("Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem.").

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[6] The CWA provisions applicable to this oil spill are reproduced at App. 294a. After the spill, Congress increased the statutory civil penalties for such spills—subject to reduction on account of mitigation efforts, prior penalties, etc., *see* § 1321(b)(7)-(8), enacted as part of the Oil Pollution Act of 1990—but still did not authorize private punitive damages.

In *Sea Clammers*, this Court held that *Milwaukee* precluded a common-law nuisance claim for damage to the fishing, clamming, and lobster industries allegedly caused by ocean pollution in violation of CWA permits. 453 U.S. at 21-22. And in *Miles*, the Court held that a survival action by the heirs of Jones Act seamen under general maritime law could give no remedies not provided by the Jones Act. 498 U.S. at 32 ("It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action"). The unanimous decision in *Miles* emphasized not only the subordinate role of judge-made federal law in matters addressed by Congress, but also the strong maritime policy of uniformity:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will .... Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created.

498 U.S. at 36-37. This Court most recently reaffirmed these principles in *Dooley*, declining, again unanimously, to approve a general maritime law survivorship remedy for pre-

death pain and suffering damages not recoverable under DOHSA. 524 U.S. at 121-24.

Federal circuit courts outside the Ninth Circuit have faithfully applied these principles. *E.g.*, *Conner* v. *Aerovox, Inc.*, 730 F.2d 835, 838-42 (1st Cir. 1984) (*Milwaukee* and *Sea Clammers* equally foreclose judge-made *maritime*-law nuisance claims for pollution damage to fishing grounds); *In re Oswego Barge Corp.*, 664 F.2d 327, 339-44 (2d Cir. 1981) (CWA forecloses maritime-law negligence claims for government cleanup costs exceeding government's maximum recovery under the CWA). And multiple circuits have held that these principles bar recovery of *punitive* damages under judge-made maritime law when federal statutes do not authorize them. *E.g.*, *Miller* v. *American President Lines*, 989 F.2d 1450, 1454-59 (6th Cir. 1993) (no punitive damages for survivors of Jones Act seamen in maritime wrongful death claim); *Wahlstrom* v. *Kawasaki Heavy Indus.*, 4 F.3d 1084, 1091-94 (2d Cir. 1993) (no punitive damages for survivors of non-seamen killed in territorial waters); *Horsley* v. *Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (no punitive damages for injured Jones Act seamen in maritime unseaworthiness claim); *Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1500-13 (5th Cir. 1995) (*en banc*) (no punitive damages for seamen for shipowner's failure to pay maintenance and cure). As Judge Kozinski accurately noted, the modern cases reaffirm maritime law's historic reluctance to impose punitive damages at all. App. 290a; *see* note 8 *infra*.

By contrast, the Ninth Circuit here refused to apply these principles despite its acknowledgement that the CWA provides a "carefully calibrated set of civil penalties for oil spills, generally with ceilings on penalties, even if the spills were grossly negligent or willful." App. 74a. But the panel's efforts to distinguish decisions of this Court and the other federal circuits do not withstand scrutiny. The opinion below brushed aside *Miles* as pertinent only to the "specialized and traditionally limited" tort of wrongful death. App. 75a. In doing so, the opinion not only ignored that this Court, in

Milwaukee and *Sea Clammers*, applied the same rule of deference—originally drawn from *Mobil*—to federal pollution statutes, but put the Ninth Circuit in conflict with other circuits (cited above) that have applied *Miles* to bar judge-made punitive damages for non-death maritime-law claims.

The Ninth Circuit also purported to distinguish *Sea Clammers* (and *Conner*) on the ground that the judge-made claims in those cases would have interfered with administrative determinations of the permissible amount of pollution. App. 77a. But the operative principle is not merely that judge-made federal law may not interfere with federal administrative determinations. The operative principle—in all the cases cited above—is that when Congress has spoken to an issue, federal courts applying judge-made federal law are not free to expand the remedies provided by Congress so as to disrupt the balance Congress has struck. In the CWA, Congress plainly spoke to the issue of punishment and deterrence of oil spills by enacting both criminal and civil penalties and various special liability provisions. A judge-made punitive damages remedy literally billions of dollars higher than the penalties Congress has provided not only disrupts the balance Congress has struck but *obliterates* it.

Nor is there any merit to the Ninth Circuit's novel suggestion that Congress should be deemed to have intended the CWA to punish only "public" as distinguished from "private" harm from oil spills. App. 77a. Nothing in the CWA suggests or supports such a distinction, and indeed, the provisions of 18 U.S.C. § 3571(d) used to authorize the record criminal fine in this case gauged the amount of the fine by reference to the losses incurred by private parties. Moreover, if the court meant that private punitive damages are intended to serve anything other than *public* interests, its opinion fundamentally misconceived both the nature and purpose of punitive damages. As Justice Kennedy has written:

> [Punitive damages plaintiffs] act as private attorneys general to effect the deterrence and retribution functions of [punitive damages]. So far is this from being

> a fundamental personal right that it is not truly personal in nature at all. It is rather a public interest.

In re Paris Air Crash, 622 F.2d 1315, 1319-20 (9th Cir. 1980) (Kennedy, J.); *see State Farm*, 538 U.S. at 417 (punitive damages "serve the same purpose as criminal penalties"). Under the cases cited above, because Congress addressed the public interest in punishing and deterring oil spills in a duly enacted statute, federal courts are not free to expand on the remedies Congress has provided by awarding punitive damages under judge-made maritime law.[7]

The Ninth Circuit acknowledged that this question was "serious," "not without doubt," and "close." App. 75a-77a. Its resolution of the issue, however, departs from the principles established in the decisions of this Court and other circuits. For the same reasons expressed in Judge Kozinski's dissent on vicarious punishment, the issue has immense significance for the maritime community, not only in pollution cases but in every other area in which the issue of statutory displacement of judge-made punitive damage claims arises. This Court should grant certiorari to confirm that judge-made punitive damages remedies are not available when Congress has already addressed the problem.

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[7] The Ninth Circuit noted that some CWA provisions expressly state that they are not intended to affect other remedies. App. 76a (citing CWA §§ 1321(o)(1) and 1365(e)). Section 1321(o)(1), however, provides only that that "[n]othing in this section"—*i.e.*, § 1321, which establishes civil penalties for oil spills and potentially limits liability to the government for cleanup costs and natural resource damages—"shall affect or modify in any way the obligations of any owner or operator of any vessel ... for damages to any publicly owned or privately owned property resulting from a discharge of ... oil." On its face, this provision states only that the section does not affect liability for "damages to ... property" from spilled oil. It says nothing about *punitive* damages. Section 1365(e) is part of the CWA's "citizen suit" provision. It provides that "[n]othing in this section"—*i.e.*, the citizen suit provision—"shall restrict any right which any person ... may have ... to seek any other relief." In *Milwaukee*, this Court confirmed that § 1365(e) means only that the citizen suit provision (*i.e.*, "this section") does not in and of itself revoke other remedies. 451 U.S. at 328-29. "It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions." *Id.* Neither section suggests that Congress intended to authorize federal courts to create punitive damages remedies dwarfing the CWA's careful scheme of criminal penalties, civil penalties, and liability limits.

III. The Court Should Grant Certiorari to Remedy Confusion in the Lower Courts and Make Clear the Permissible Size of Punitive Damage Awards under Maritime Law and under the Due Process Clause.

A. Maritime Law. In this maritime case, the Ninth Circuit gave no consideration to how the substantive maritime law should affect the permissible size of any punitive damage award. Despite Exxon's express request, the Ninth Circuit affirmatively declined to perform its duty as a maritime court to effectuate the policies of maritime law, to articulate based on those policies the maritime-law rules that should govern punitive damages, and to reduce the award accordingly. It held that the only applicable limit on the size of the award was the constitutional one. App. 68a-70a, 90a-91a. The petition should be granted so that this Court, as the ultimate arbiter of maritime law, can articulate and clarify the appropriate standards for maritime punitive damage awards.

The Ninth Circuit's conclusion that only the Constitution limits the size of punitive damage awards was contrary to decisions of this Court and of other circuits. In *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), the Court held that common-law judicial review of the size of punitive damage awards is a vital part of the traditional justification for allowing juries to make such awards, and that it cannot be omitted consistent with procedural due process. *See also Gore*, 517 U.S. at 598 (Scalia, J.). As the Second Circuit has said:

> [E]ven where the punitive award is not beyond the outer constitutional limit marked out … by the three *Gore* guideposts, we retain an appellate responsibility to review punitive awards for excessiveness in applying federal statutes …. [T]he appellate function must be exercised, and review of punitive awards for exces-

> siveness is an especially appropriate context in which the reflective role of a court of appeals follows the often dramatic arena of a trial court.

Mathie v. *Fries*, 121 F.3d 808, 816-17 (2d Cir. 1997); *see Lee* v. *Edwards*, 101 F.3d 805, 809 (2d Cir. 1996); *Gaffney* v. *Riverboat Services of Indiana, Inc.*, 451 F.3d 424, 464 & n.39 (7th Cir. 2006); *see also TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 458 n.24 (1993) (non-constitutional state law reasonableness requirements).

Individual Justices have also emphasized the power and duty of common-law courts to make rules governing punitive damages. *E.g.*, *Haslip*, 499 U.S. at 42 (Kennedy, J.) ("We do not have the authority, *as do judges in some of the states*, to alter the rules of the common law .... *Were we sitting as state court judges*, the size and recurring unpredictability of punitive damage awards might be a convincing argument to reconsider those rules."); *TXO*, 509 U.S. at 472 (1993) (Scalia, J.) ("State ... courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime."); *State Farm*, 538 U.S. at 438 (Ginsburg, J.) ("state high courts" could "cap punitive damages"). In maritime cases, however, this Court performs the same function as state high courts do when ruling on state common law. This case thus offers the Court an ideal opportunity to lead by example and show how standards for punitive damages awards should operate in practice.

The appropriate standards for the award of punitive damages under maritime law of course depend on the policies underlying the grant to this Court of admiralty and maritime jurisdiction, U.S. Const. Art III, § 2, cl.1, and the ensuing responsibility to shape maritime law. This Court has reiterated that the "fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Kirby*, 543 U.S. at 25; *accord Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990); *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674 (1982). Maritime commerce entails risks not found on land. Accidents can never be avoided entirely, and mariners must often make difficult decisions. Therefore "[t]hrough long experience, the law of the sea ... is concerned with ... limitation of liability." *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249, 270 (1972). This Court has also reiterated that maritime law demands the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 88 U.S. 558, 575 (1874); *American Dredging Co.* v. *Miller*, 510 U.S. 443, 451 (1994). And this Court has referred from time to time to admiralty's policies of fair compensation for injury, promotion of settlement, and judicial economy. *Moragne*, 398 U.S. at 387; *McDermott*, 511 U.S. at 211.

None of these policies supports enormous punitive damages.[8] Such awards penalize maritime commerce rather than protecting it; they expand rather than limit liability; they are unpredictable and inconsistent; they have nothing to do with compensation for actual injury; and they impede rather than promote settlement and judicial economy. Because of the unique role of federal courts in shaping maritime law, federal courts are the "proper institutions of our society to undertake th[e] task," *TXO*, 509 U.S. at 472 (Scalia, J.), of specifying, based on maritime policies, the permissible size of maritime punitive damages. The Ninth Circuit's inability to discern or even acknowledge any substantive maritime-law principles limiting the size of this extraordinary punitive award demonstrates the urgency of the need for this Court to articulate such limits.

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[8] Indeed, maritime law has traditionally restricted or disallowed punitive damages. *Guevara*, 59 F.3d at 1508 n.11; *CEH*, 70 F.3d at 699-702 Prior to this case, punitive damages were never awarded for an oil spill, while the largest maritime punitive damages award affirmed by a federal appellate court, in *Protectus*, was $500,000, or 1/14 of the $7 million in compensatories, 767 F.2d at 1381, for a deliberate act that resulted in a death, in stark contrast to the award here, for lost commercial income from an unintentional spill that caused no personal injury. App. 98a.

Here the answer is clear. The decision below to uphold a $2.5 billion punitive award is contrary to every maritime policy that this Court or other federal courts have ever recognized. Yet the Ninth Circuit did not even consider whether the award was consistent with those policies or with maritime law. This case accordingly provides a particularly suitable vehicle for this Court to hold that federal courts considering maritime punitive damage awards must determine whether such awards are consistent with the policies of maritime law. Exxon submits that a $2.5 billion punitive damages award *cannot* be a proper exercise of the federal courts' authority to make maritime law when, as here, all the following conditions obtain.

- *Prior criminal and civil sanctions and other payments have already vindicated any reasonable public interest in punishment or deterrence.* In *Haslip*, this Court recognized that the only proper purpose of punitive damages was to vindicate the public interest in retribution and deterrence. 499 U.S. at 19; *accord Gore*, 517 U.S. at 568. In *State Farm*, the Court recognized that punitive damages should be awarded only when compensatory damages are not sufficient "to achieve punishment or deterrence." 538 U.S. at 419; *see Gore*, 517 U.S. at 584-85 (requiring consideration of whether "less drastic remedies could be expected" to achieve punishment and deterrence). The Ninth Circuit itself acknowledged the "force and logic" of Exxon's argument that punitive damages should be limited to what is necessary to achieve deterrence and punishment, and that such damages should be precluded when $3.4 billion in prior payments, liabilities, and fines achieved "massive deterren[ce]," and when the Attorneys General of both the United States and Alaska, the authorized representatives of the *public* interest in punishment, agreed that the record fine imposed was sufficient to achieve appropriate punishment. App. 68a. In such circumstances, punitive damages achieve nothing but overkill; they pile liability upon liability to give a windfall to plaintiffs already fully compensated. The strong maritime policies of uniformity, predictability, and avoiding undue burdens on maritime commerce compel the conclusion that, as a matter of maritime law, no additional punitive damages are reasonable in these circumstances.

- *Compensatory damages are substantial.* Many state courts and state legislatures have now imposed caps on punitive damages awards, generally by requiring that they not exceed a fixed multiple of compensatory damages. *See Gore*, 517 U.S. at 615-16 (Ginsburg, J.). In *State Farm*, this Court stated that when compensatory damages are substantial, "then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *See* Part III.B.1 *infra*. Because the Court was interpreting the Constitution in *State Farm*, it did not make this principle into a rule applicable in every situation. But if a 1:1 ratio when damages are substantial can reach the "outer limit" of what the *Constitution* permits, surely that ratio represents the most the Court should permit when it is not marking the outer boundary permissible to a sovereign state in the pursuit of its own policies, but determining for itself, as the ultimate arbiter of maritime law, the correct rule based on federal maritime law and policy. Accordingly the same considerations of "size and recurring unpredictability" that have led state courts and legislatures to impose caps should lead the Court to set a limit here. *See Haslip*, 499 U.S. at 42 (Kennedy, J.). Enforcing such a limit would of course serve the maritime policies of uniformity and predictability. It would also promote the maritime policies of settlement and judicial economy by creating an incentive for prompt payment of compensation, since compensation paid by way of settlements could no longer be the predicate "harm" for a punitive damages award.

- *The award is greater than the civil penalties Congress has prescribed for the same conduct.* Maritime conduct has long been heavily regulated by Congress, and the statutes in question typically provide an array of substantial civil penalties and other punishments for infractions of what Congress has ordained. Even if these enactments were not sufficient to preclude punitive damages altogether, *but see* Part II *supra*, respect for the pre-eminent role of Congress in the maritime area means that federal courts should not impose, through punitive damages, civil punishment that results in a total penalty greater than what Congress has prescribed. When Congress has specified by statute the available civil penalties, federal courts are "not free" to impose additional civil punishment, and thereby "to rewrite rules that Congress has affirmatively and specifically enacted," *Dooley*, 524 U.S. at 122. Aligning punitive awards with statutory civil penalties would also serve the maritime-law policies of predictability and uniformity by ensuring that civil punishment for particular conduct does not vary depending on whether it is imposed by public authorities or by juries in private lawsuits.

- *The jury was allowed to consider the net worth of the corporate defendant.* Plaintiffs' evidence in Phase III of the trial was entirely devoted to Exxon's income and net worth, and the jury was instructed it could consider that evidence in determining the proper size of the award. ER 517-19. Punishment on such a theory is clearly contrary to the maritime policies of predictability and uniformity, since it implies that the punishment of different actors for the same conduct may be different. It rests on an economically irrational foundation, a false analogy between the wealth of individuals and corporate net worth, as Judge Easterbrook has explained clearly, *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508-09 (7th Cir. 1992), and its effect is to punish companies disproportionately based on size, which is directly contrary to the fundamental maritime-law policy of encouraging adequate capitalization for risky activities. Finally, allowing juries to base punishment on corporate net worth invites them to vent "raw redistributionist impulses," *TXO*, 509 U.S. at 468 (Kennedy, J.), lets them "use their verdicts to express biases," *Honda*, 512 U.S. at 432, and "provides an open-ended basis for inflating awards." *Gore*, 517 U.S. at 591 (Breyer, J.). None of this serves the policies of maritime law.

No case illustrates better than this one the need for simple, reasonable, and easily administered *standards* to constrain unfettered discretion in the award of punitive damages. *See Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062 (2007); *Gore*, 517 U.S. at 587 (Breyer, J.). Punishment and deterrence, to the satisfaction of the public representatives of the United States and Alaska, were achieved in 1991. Compensation for natural resource damages and nearly all private damages was accomplished by 1991 or a few years after. Given those facts, no maritime policy and no principle of maritime law supports a punitive damage award. Even if punitive damages may be awarded in maritime cases where Congress has not provided them by statute, *but see* Part II *supra*, it is for the federal courts, under this Court's leadership, to make sure that such awards correspond to what maritime law and policy permit. Because the courts below failed to provide such standards, for the past 15 years the parties have been litigating almost exclusively the propriety of an additional multibillion dollar windfall to private plaintiffs who were fully compensated long ago. The Court should grant the petition and provide the guidance to the lower federal courts that will prevent another such case.

B. Due Process. 1. "[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419. And "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. Here Exxon paid $3.4 billion in cleanup costs, natural resource damages, claims payments, fines, and penalties—more than enough to deter and punish anyone for anything. Under the *State Farm* test, no "further sanctions" are necessary "to achieve punishment or deterrence." The compensatory damages awarded came to $20.3 million—a figure that is "substantial" by any standard, especially given that $1 million was held "substantial" in *State Farm*, *id.* at 412, 426. The Ninth Circuit calculated "harm" at $500 million and used that as the predicate for punitive damages, yet still thought it appropriate to use a 5:1 "ratio" and approve an award of $2.5 billion. As Judge Bea recognized in his dissent, App. 293a, this is entirely inconsistent with this Court's teaching that in such circumstances a 1:1 ratio "can reach the outermost limit of the due process guarantee." 538 U.S. at 425.[9]

Indeed, the Ninth Circuit's reasoning was exactly backwards. The ratio prong of *Gore* and *State Farm* is not an excuse to multiply large compensatory damages to manufacture an even larger punitive award. Rather, the overriding principle is that an award should be no greater than what is reasonably necessary to punish and deter, and a large compensatory award, like large cleanup costs, fines, and penalties, itself provides punishment and deterrence and thereby *reduces* the need for an award of punitive damages. Taking *Haslip*, *Gore*, and *State Farm* together, the point is clear. Yet many lower courts have ignored this Court's message. They continue to resist the concept that they should give meaningful consideration to what is necessary overall to punish and deter, not simply find a "ratio" based on reprehensibility and multiply that by whatever "harm" the plaintiff can persuade them occurred. The cases are in disarray, and there is a clear need for further guidance from the Court. *See* note 9 *supra*.

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[9] Some courts have followed *State Farm* faithfully, limiting punitive damages to a 1:1 ratio when compensatory damages are substantial, even in cases of intentional and egregious wrongdoing. *E.g.*, *Estate of Moreland* v. *Dieter*, 395 F.3d 747, 757-58 (7th Cir. 2005) (beating and death); *Stamathis* v. *Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir. 2004) (defamation and malicious prosecution). Others, like the Ninth Circuit here, have permitted much higher ratios, effectively ignoring *State Farm*. *E.g.*, *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1371-72 (Fed. Cir. 2003) (3.33:1 ratio based on $15 million in compensatories); *Bogle* v. *McClure*, 332 F.3d 1347, 1359, 1362 (11th Cir. 2003) (4:1 ratio based on $3.5 million in compensatories for emotional distress); *Bullock* v. *Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 176 (Cal. Ct. App. 2006) (33:1 ratio based on $850,000 in compensatories); *Superior Federal Bank* v. *Jones & Mackey Const. Co.*, 219 S.W.3d 643, 653 (Ark. Ct. App. 2005) (17.6:1 ratio based on $175,000 in compensatories).

2. The Ninth Circuit's use of a 5:1 ratio depended on its conclusion that Exxon's conduct was in the "mid range" of reprehensibility. App. 31a. Of course this entire analysis was flawed, since the court assumed that the jury found that Exxon's own conduct, as opposed to Hazelwood's, was reckless. *See* Part I *supra*. There was thus a complete disconnect between the conduct the Ninth Circuit considered reprehensible and the facts the jury's instructions required it to find. For all anyone knows, jurors agreed on *none* of the "facts" the Ninth Circuit recited.

Even leaving that critical defect in reasoning aside, the Ninth Circuit's reprehensibility discussion had few points of contact with this Court's analysis in *Gore*, 517 U.S. at 576-77, or *State Farm*, 538 U.S. at 419. The panel did acknowledge that the spill was not intentional, that there was no fraud or trickery, and that plaintiffs were not financially vulnerable "targets." App. 29a. It conceded that injury to the plaintiffs was solely economic, but invented a "non-economic injury" of "loss of livelihood"—even though no "livelihood" was lost since Exxon voluntarily paid compensation quickly and, as the jury verdict showed, fairly. It conceded that plaintiffs' health and safety were never at risk, but pointed to the theoretical danger to the crew of the EXXON VALDEZ, none of whom was injured, and none of whom was a member of the plaintiff class. App. 26a. This was an improper attempt to "adjudicate the merits of other parties' hypothetical claims" in the guise of reprehensibility analysis, *State Farm*, 538 U.S. at 423, and to punish Exxon for harms, not even real ones, to persons not before the court, *see Philip Morris*, 127 S. Ct 1057. (Remarkably, the Ninth Circuit increased punitive damages against Exxon based on *hypothetical* injury to the VALDEZ crew, whereas if any seamen had *actually* been injured, *Miles*, *Miller*, and *Horsley* would have barred punitive damages based on those injuries, *see* Part II *supra*.) The panel pretended that Exxon was guilty of repeated misconduct, App. 29a, although there was clearly only one spill and only one decision to let Hazelwood resume command. Correctly analyzed, reprehensibility here was in a very low range, and did not come close to justifying a multiple of five times $500 million.

3. Finally, the Ninth Circuit's decision conflicts with *State Farm* and *Gore*, and with decisions of other circuits, *e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 607 (6th Cir. 2006), because it failed to give any weight at all to the third guidepost this Court has identified for assessing the constitutionality of a punitive damages award—comparable civil penalties. According to that guidepost, a reviewing court must give "substantial deference to legislative judgments concerning the appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583. In *State Farm*, the Court made plain that only civil penalties should be considered, not criminal ones. 538 U.S. at 428. Combined federal and state civil penalties for this oil spill could not have exceeded about $80 million, and therefore an award of $2.5 *billion* could not conceivably be justified under this guidepost. Even though it recognized that this case was "unusually rich in comparables," App. 101a, the Ninth Circuit ignored all of them, holding that the third guidepost imposes *no* quantitative constraint on punitive damage awards. According to the Ninth Circuit, this guidepost addresses "only … whether or not the misconduct was dealt with seriously under state civil or criminal laws." App 41a. Having concluded that the state and federal governments take oil spills "seriously," the Ninth Circuit refused to accord any deference whatever to the "legislative judgments concerning appropriate sanctions for the conduct at issue," let alone the "substantial deference" that *Gore* requires. 577 U.S. at 583. In other words, the Ninth Circuit wrote the third guidepost out of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 20, 2007

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APPENDIX A

United States Court of Appeals
For The Ninth Circuit.

In re: The EXXON VALDEZ,

Grant Baker; Sea Hawk Seafoods, Inc.; Cook Inlet Processors, Inc.; Sagaya Corp.; William Mcmurren; Patrick L. Mcmurren; William W. King; George C. Norris; Hunter Cranz; Richard Feenstra; Wilderness Sailing Safaris; Seafood Sales, Inc.; Rapid Systems Pacific Ltd.; Nautilus Marine Enterprises, Inc.; William Findlay Abbott, Jr.,

Plaintiffs-Appellees,

v.

Exxon Mobile Corp; Exxon Shipping Co.,

Defendants-Appellants.

No. 04-35183

D.C. No.
CV-89-00095-HRH
OPINION

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief Judge, Presiding

Argued and Submitted
January 27, 2006-San Francisco, California

Filed December 22, 2006

[As amended May 23, 2007]

Before Mary M. Schroeder, Chief Judge,
James R. Browning and Andrew J. Kleinfeld, Circuit Judges.

Per Curiam Opinion;
Dissent by Judge Browning.

COUNSEL

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OPINION

PER CURIAM.

I. INTRODUCTION

We look for the third time at the punitive damages imposed in this litigation as a result of the 1989 grounding of the oil tanker *Exxon Valdez,* and the resulting economic harm to many who earned their livelihood from the resources of that area. *See Baker v. Hazelwood (In re the Exxon Valdez),* 270 F.3d 1215 (9th Cir. 2001)[hereinafter *Punitive Damages Opinion I*]; *Sea Hawk Seafoods, Inc. v. Exxon Corp.,* No. 03-35166 (9th Cir., Aug. 18, 2003). We are precluded, as the jury was, from punishing Exxon for befouling the beautiful region where the oil was spilled, because that punishment has already been imposed in separate litigation that has been settled. *See Punitive Damages Opinion I,* 270 F.3d at 1242. As we explained in *Punitive Damages Opinion I,* the plaintiffs' punitive damages case was saved from preemption and res judicata because the award "vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment." *Id.* "The plaintiffs' claims for punitive damages expressly excluded consideration of harm to the environment." *In re the Exxon Valdez,* 296 F. Supp. 2d 1071, 1090 (D. Alaska 2004).

The resolution of punitive damages has been delayed because the course of this litigation has paralleled the course followed by the Supreme Court when, in 1991, it embarked on a series of decisions outlining the relationship of punitive damages to the principles of due process embodied in our

Constitution. *See, e.g., Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.,* 509 U.S. 443 (1993) (plurality); *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). Intervening Supreme Court decisions have caused us to remand the matter twice to the district court for reconsideration of punitives in light of evolving Supreme Court law. The district court's opinion, after our last remand for it to consider the impact of the Supreme Court's decision in *State Farm,* is published at *In re the Exxon Valdez,* 296 F. Supp. 2d 1071 (D. Alaska 2004) [hereinafter *District Court Opinion*]. It is the subject of this appeal.

Now, with the guidance of the Supreme Court's decisions, the district judge's thoughtful consideration of the issues, and our own prior decisions in the litigation, we trust we are able to bring this phase of the litigation to an end. While we agree with much of the analysis of the district court, we are required to review de novo the district court's legal analysis in applying the Supreme Court's guideposts. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 436 (2001).

While the original punitive damages award was $5 billion and in accord with the jury's verdict, the district court reduced it to $4 billion after our first remand. *In re the Exxon Valdez,* 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002), *vacated by Sea Hawk,* No. 03-35166. Then, after our second remand, it entered an award of $4.5 billion. *District Court Opinion,* 296 F. Supp. 2d at 1110. For the reasons outlined further in the factual development and the analysis of this opinion, we conclude that the ratio of punitive damages to actual economic harm resulting from the spill, reflected in the district court's award of $4.5 billion, exceeds by a material factor a ratio that would be appropriate under *Punitive Damages Opinion I* and the current controlling Supreme Court analysis. *See State Farm,* 538 U.S. at 425. We order a remittitur of $2 billion, resulting in punitive damages of $2.5 billion. We do so because, in assessing the reprehensibility of Exxon's misconduct, the most important guidepost according to the Supreme

Court's opinion in *State Farm,* there are several mitigating facts. *See id.* at 419. These include prompt action taken by Exxon both to clean up the oil and to compensate the plaintiffs for economic losses. These mollify, at least to some material degree, the reprehensibility in economic terms of Exxon's original misconduct. *Punitive Damages Opinion I,* 270 F.3d at 1242. In addition, in considering the relationship between the size of the award and the amount of harm, we concluded in our earlier punitive damages opinion that the substantial costs that Exxon had already borne in clean up and loss of cargo lessen the need for deterrence in the future. *Id.* at 1244. We disagree, however, with Exxon's ultimate contention that, as a result of two sentences in *Punitive Damages Opinion I,* written five years ago and before the Supreme Court's opinion in *State Farm,* Exxon is entitled to have punitive damages assessed at no higher than $25 million. *See id.*

Our dissenting colleague goes to the other extreme. Exxon's misconduct was placing a relapsed alcoholic in charge of a supertanker. *Punitive Damages Opinion I,* 270 F.3d at 1234. Yet, the dissent claims that we should ignore our unanimous conclusion in *Punitive Damages Opinion I,* 270 F.3d at 1242, that Exxon's conduct with respect to the spill was not intentional. The dissent effectively treats Exxon as though it calculatingly and maliciously steered the ship into disaster. Purporting to rely on the intervening Supreme Court decision in *State Farm,* the dissent also refuses to apply our earlier holding that Exxon's mitigation efforts reduce the reprehensibility of its conduct. This amounts to a rejection of the bedrock principle of stare decisis.

State Farm was an insurance contract case. Nothing in it suggests that this court's decision in *Punitive Damages Opinion I* was improper. The Supreme Court did not explicitly or implicitly hold that mitigation plays no role in determining the constitutionality of a punitive damages award. Such a lack of discussion in an insurance contract case cannot supplant our express holding in the toxic-tort arena that mitigation efforts are a factor in assessing the punitive damages award in this case. Controlling authority should not be ignored or distorted. As Learned Hand famously once said, "a victory gained by sweeping the chess pieces off the table is not enduring." Learned Hand, Mr. Justice Cardozo, 52 Harv. L. Rev.. 361, 362 (1939).

We reiterate our previous holding that Exxon's conduct was not willful. Accordingly, a punitive damages award that corresponds with the highest degree of reprehensibility does not comport with due process when Exxon's conduct falls squarely in the middle of a fault continuum.

Because the history of this litigation tracks the recent jurisprudential history of punitive damages, our analysis is best made in light of a thorough understanding of that history. We therefore outline that history with what we hope is sufficient clarity and thoroughness.

II. LEGAL AND FACTUAL BACKGROUND

A. *From the Time of the Accident through the First Punitive Damages Award and Denial of Motion for New Trial: The Common Law through the Supreme Court Decision in* TXO.

The *Exxon Valdez* ran aground on Bligh Reef in Alaska's Prince William Sound on March 24, 1989. Punitive damages at that time were governed by general common law principles. at common law, the jury determined the punitives, and the trial judge conducted a limited review to determine whether the jury's verdict was the product of passion and prejudice, or whether the award was one that shocked the conscience. *See* Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth Century America,* 71 Notre Dame L.Rev. 505, 542-51 (1996); Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages,* 27 Harv. J.L. & Pub. Pol'y 231, 246-48 (2003); *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 278 n. 24 (1989) (affirming district court's application of Vermont's "grossly and manifestly excessive" standard for judicial review); *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 n. 10 (1994).

Although there were cases dating from the *Lochner* era that had suggested that there may be a due process ceiling on punitive damages, at the time of this accident in 1989, the Supreme Court had never invalidated an award on grounds that the size of the award violated due process. *See BMW v. Gore,* 517 U.S. at 600-01 (Scalia, J., dissenting) (discussing the history of due process review of punitive damages awards) (citing *Seaboard Air Line Ry. v. Seegers,* 207 U.S. 73, 78 (1907); *Southwestern Tel. & Tel. Co. v. Danaher,* 238 U.S. 482, 489-91 (1915); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 111-12 (1909); *Standard Oil Co. of Ind. v. Missouri,* 224 U.S. 270, 286, 290 (1912); *St. Louis, I.M. & S.R. Co. v. Williams,* 251 U.S. 63, 66-67 (1919)).

In 1991, however, the Supreme Court decided *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991). There, for the first time in the modern era, the Court conducted a substantive review of an award of punitive damages. *Haslip* was an insurance fraud case, in which the agent pocketed the premiums and caused the plaintiff's insurance to lapse. *Id.* at 4-5. The Court upheld a punitive damages award that amounted to four times the award of compensatory damages and 200 times the out-of-pocket costs of the defrauded insured. *Id.* at 23-24. The Court noted that the ratios might be "close to the line," but said the award had to be upheld because it "did not lack objective criteria." *Id.* The Court therefore concluded that the punitive damages did not "cross the line into the area of constitutional impropriety." *Id.* The Supreme Court did not, at that time, and has not since, defined any bright line of constitutional impropriety. It has, repeatedly, indicated that there is none. *See, e.g., State Farm,* 538 U.S. at 424-25.

In 1993, two years after *Haslip*, the Court took on another major punitive damages case. In *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443 (1993), the Court reviewed a jury award of $19,000 in compensatory damages and $10 million in punitive damages. *Id.* at 451. That case arose out of an oil and gas development fraud scheme. *Id.* at 447-51. The case produced no majority opinion. The plurality, reiterating that due process places some limit on punitive damages, said that the award was not so "grossly excessive" that it should be overturned, thus invoking the standard used in *Haslip*. *Id.* at 462. The Court declined to provide any particular guidance in determining when an award would be "grossly excessive." *Id.* The plurality chose instead to say that the dramatic disparity between the actual financial loss and the punitive award was not controlling. *Id.* The award was upheld. *Id.*

It was against this background that the jury in this case was instructed in 1994. The jury was told to take into account the reprehensibility of the misconduct, the amount of actual or potential harm arising from the misconduct, and, additionally, to take into account mitigating factors such as the clean up costs and fines already imposed as deterrents. *District Court Opinion,* 296 F. Supp. 2d at 1081-82. The instructions were the product of mutual effort of the parties and the district court, and have not been seriously challenged. *Id.* They are not questioned here and were, in retrospect, quite forward looking.

On September 16, 1994, the jury returned a $5 billion punitive damages verdict, having some time earlier imposed a compensatory award of $287 million. The district court accepted the punitive award and entered judgment. Citing *Haslip* and *TXO,* the district court denied Exxon's motion for a new trial in January of 1995.

B. *The Appeal of the Damage Allocation Plan and Our Decisions in* Baker *and* Icicle.

Prior to trial, several plaintiffs, many of the sea food processors, had entered into settlement agreements with Exxon. *Icicle Seafoods, Inc. v. Baker (In re the Exxon Valdez),* 229 F.3d 790, 792 (9th Cir. 2000) [hereinafter *Icicle*]; *Baker v. Exxon Corp. (In re the Exxon Valdez),* 239 F.3d 985, 986 (9th Cir. 2001) [hereinafter *Baker*]. The agreements anticipated a sizable punitive damages award. *See Icicle,* 229 F.3d at 793; *Baker,* 239 F.3d at 986-87. In return for receiving substantial millions in payments from Exxon, the settling plaintiffs, in two separate agreements, agreed to allocate a portion of their punitive award to Exxon. One agreement was a so called "cede back agreement," *Icicle*, 229 F.3d at 793, and the other was an assignment of the future award, *Baker*, 239 F.3d at 986-87.

The district court, however, did not know of the agreements during trial. *Icicle*, 229 F.3d at 793. When the court did learn of them, during consideration of the parties' proposed damage allocation plan, and after the punitives had been imposed in accordance with the jury's verdict, the district court frowned on the settlements. *Id.* at 794. In the district court's view, Exxon should have told the jury about the agreements so that the jury would have known how much Exxon was actually going to have to pay in punitive damages. *Id.* The district court, therefore, refused to permit the settling plaintiffs to receive any of the punitive damages award, on the theory that Exxon should not benefit from the settlements. *Id.*; *Baker*, 239 F.3d at 987. Exxon pursued two appeals from the district court's refusal to enforce the agreements: one involving the cede back agreement, *Icicle*, 229 F.3d at 793, and the other involving the assignment agreement, *Baker*, 239 F.3d at 987-88.

The two different forms of agreement were intended to have essentially the same effect: allowing Exxon to keep some portion of the eventual punitive award in exchange for settling compensatory damage claims. In *Icicle*, this panel considered the cede back agreement. In a thorough opinion, we held that the cede back agreement was valid and enforceable and that the jury quite properly was not told of its existence. *Icicle*, 229 F.3d at 800. We reasoned that had the jury been told of the agreement, it might well have compensated for the settlement by imposing more damages. *Id.* at 798. This, in turn, would have frustrated the efforts of parties to reach settlements. We pointed out that settlements should be encouraged, particularly in large class actions like this one. *Id.* "Far from being unethical, cede back agreements make it easier to administer mandatory class actions for the assessment of punitive damages and encourage settlement in mass tort cases. As a result, such agreements should typically be enforced." *Id.*

The second appeal, *Baker,* considered an assignment agreement. *Baker,* 239 F.3d at 987-88. Following the *Icicle* reasoning, this panel reached the same conclusion. *Id.* at 988.

C. *The Supreme Court's Decision in BMW v. Gore.*

As the parties were beginning their preparation for the first appeal of the $5 billion punitive damages award, the Supreme Court issued its first major due process/punitive damages decision after *TXO.* In 1996, it decided *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). This was the Supreme Court's first attempt to describe specific factors that a court should consider in reviewing a jury's award of punitive damages. *See id.* at 575. The Court invoked the traditional concepts of due process to describe the purpose of the review as an assurance of fair notice to the defendant of the consequences of its conduct. *Id.* at 574.

The Court described three factors to be considered. *Id.* at 575. The first was the reprehensibility of the conduct. *Id.* The Court explained that reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award," and said that an award should reflect "the enormity" of the offense. *Id.* (citations omitted).

The second factor was the disparity between the actual or potential harm to the plaintiffs flowing from that conduct, and the punitive damages assessed by the jury. The Court said that the disparity factor was the most commonly cited. *Id.* at 580. The Court reasoned this factor is important because it "has a long pedigree" extending back to English statutes from 1275 to 1753 providing for double, treble or quadruple damages. *Id.* at 580-81. Thus the critical measure here is the ratio between the punitive award and the amount of harm inflicted on the plaintiff, or plaintiffs, before the court.

The third factor was the difference between the punitives and the civil and criminal penalties authorized by the state for that conduct. *Id.* at 583. The Court indicated that reviewing courts should use this factor to "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* at 583 (internal quotations omitted).

In *BMW v. Gore,* the defendant had engaged in a practice of repainting damaged cars and passing them off as never-damaged cars with their original paint. *Id.* at 563-64. The plaintiff who had purchased one of these cars was awarded $4,000 in compensatory damages and $4 million in punitives. *Id.* at 565. The Alabama Supreme Court reduced the punitives to $2 million, and the defendant petitioned for certiorari review. *Id.* at 567. The Supreme Court held the punitives were excessive. *Id.* at 585.

In examining the reprehensibility of the conduct, the Supreme Court in *BMW v. Gore* stressed that the only harm inflicted by the defendant was economic and not physical. *Id.* at 576. The Court also emphasized that the conduct to be considered was only the conduct of the defendant towards the plaintiff in the Alabama case and not other conduct that might be a part of a nationwide practice. *Id.* at 572. Justice Breyer's concurring opinion noted the danger in subjecting a defendant to punishment multiple times for the same conduct. *Id.* at 593 (Breyer, J., concurring).

Thus, in looking at the ratio between the punitives and the harm, and in stressing that the ratio must be a reasonable one, the Court was holding that the ratio must be measured by the ratio of punitive damages to the harm suffered by the plaintiff in that case, without regard to harm that might have been experienced by others and for which the defendant might also be responsible. *Id.* at 580. It concluded that a ratio of 500 to 1 was grossly excessive. *Id.* at 583. Such an excessive ratio resulted from the jury's improperly measuring the punitives in relation to the damage inflicted on a nation of potential plaintiffs rather than the damage to the plaintiff before that jury. *Id.* at 573.

With respect to the third factor, the relationship between the punitive damages and the comparable penalties under state law, *BMW v. Gore* looked to the Court's federalism jurisprudence. The Court's opinion stressed that reviewing courts should be mindful of the need to pay due deference to the legislative judgments of states in assessing the reprehensibility of conduct. *Id.* at 583 ("[A] reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'") (quoting *Browning-Ferris,* 492 U.S. at 3019 (O'Connor, J., concurring in part, dissenting in part)).

Again refusing to draw any kind of mathematical bright line between acceptable and unacceptable ratios, the Court described the 500 to 1 ratio in *BMW v. Gore* as "breathtaking." *Id.* It remanded for further, not inconsistent, proceedings, because, unlike *Haslip,* where the Court affirmed a questionable award, the Court in *BMW* was "fully convinced" that this award was "grossly excessive." *Id.* at 585-86.

D. *The First Punitive Damages Appeal.*

It was against this background that briefing in the first appeal of the original $5 billion punitive damages award in this case went forward. Exxon contended the amount of the award violated due process principles, as described in *BMW v. Gore. Punitive Damages Opinion I,* 270 F.3d at 1241. The district court had not had an opportunity to review *BMW v. Gore* before its original judgment became final and appealable upon denial of Exxon's motion for a new trial. *Id.*

In its appeal from the $5 billion award, Exxon, in addition to challenging the amount of the punitive damages, challenged the sufficiency of the evidence supporting punitive damages; the jury instructions; the allowability of any punitive damages as a matter of public policy, maritime law and res judicata; and the preemption of punitive damages by other federal law. Needless to say, briefing was extensive. After appellate proceedings were stayed from January 1998 to

September 1998 for the parties to pursue a limited remand, this panel heard argument in May of 1999.

While the case was under submission, the Supreme Court granted certiorari in another Ninth Circuit case, and in May 2001, decided *Cooper v. Leatherman Tool Group.* The Court there held our review of punitive damages was to be de novo. *Cooper,* 532 U.S. at 436. This did not ease our task.

E. *Punitive Damages Opinion I.*

We issued our first opinion on punitives damages in November, 2001. Our opinion went in detail through the facts of the disaster and the conduct of Exxon, and of Captain Hazelwood, because they bore so heavily on the consideration of the issues on appeal. *Punitive Damages Opinion I,* 270 F.3d at 1221-24. In an opinion of more than 40 pages, we rejected Captain Hazelwood's separate appeal, and dealt at some length with all of the issues raised by Exxon. We ultimately rejected all of them except the challenge to the amount of punitive damages. *Id.* at 1254.

Referring to the "unique body of law" that governs punitive damages, we focused on the two Supreme Court opinions that had been decided after the district court's decision in the case, and we termed them "critical." *Id.* at 1239. These were *BMW v. Gore* and *Cooper v. Leatherman Tool Group.* We said:

> In *BMW,* the Supreme Court held that a punitive damage award violated the Due Process Clause of the Fourteenth Amendment because it was so grossly excessive that the defendant lacked fair notice that it would be imposed. Dr. Gore's car was damaged in transit, and BMW repainted it but did not tell Dr. Gore about the repainting when it sold him the car. The jury found that to be fraudulent, and awarded $4,000 in compensatory damages for reduced value of the car and $4 million in punitive damages. The Alabama Supreme Court cut the award to $2 million, but the Court held that it was still so high as to deny BMW

> due process of law for lack of notice, because the award exceeded the amounts justified under the three "guideposts." The *BMW* guideposts are: (1) the degree of reprehensibility of the person's conduct; (2) the disparity between the harm or potential harm suffered by the victim and his punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. We apply these three guideposts to evaluate whether a defendant lacked fair notice of the *severity* of a punitive damages award, and to stabilize the law by assuring the uniform treatment of similarly situated persons.

Id. at 1240-41 (internal quotations omitted). We noted that in *Cooper v. Leatherman Tool Group* the Supreme Court decided that "considerations of institutional competence" require de novo review of punitive damages awards. *Id.* at 1240 (quoting *Cooper,* 532 U.S. at 440).

We went on to observe that the district court had not reviewed the award under the standards announced in those cases because neither case had been decided by the time the jury returned its verdict, and Exxon had never challenged the amount of the award on constitutional grounds until after the jury's verdict. *Id.* at 1241. In view of the need for de novo review and the intervening decisions of *BMW v. Gore* and *Cooper v. Leatherman Tool Group,* we remanded for reconsideration of punitive damages. *Id.* We also provided some observations on possible alternative analyses of punitive damages under the *BMW v. Gore* factors. *Id.* at 1241-46.

These observations began with the factor of reprehensibility, quoting the Supreme Court's admonition in *BMW v. Gore* that it is "[p]erhaps the most important indicium of the reasonableness of a punitive damage award." *Id.* at 1241. We pointed to the Court's analogy to criminal cases, and its statement that nonviolent crimes are less reprehensible than violent ones. *Id.* We drew an analogy to the facts of this case, where Exxon's conduct was reckless, but there was no intentional spilling of oil "as in a midnight dumping case." *Id.* at 1242. We agreed with the plaintiffs that Exxon's conduct was reprehensible in that it knew of the risk of an oil spill in transporting huge quantities of oil through the Sound, and it knew Hazelwood was a relapsed alcoholic. *Id.* at 1242. We observed, however, that such reprehensibility went more to justify punitive damages than to justify such a high amount. *Id.* We noted some mitigating factors, including prompt ameliorative action and the millions spent in clean up. *Id.*

We then turned to the ratio of actual harm caused by the misconduct to punitive damages awarded. *Id.* at 1243. Again analyzing *BMW v. Gore,* we said that it was difficult to determine what we called the "numerator," that is, the value of the harm caused by the spill. *Id.* We used the jury award of $287 million in compensatory damages as one possible numerator and also, as alternative numerators, the district court's estimates of harm, which at that time ranged from $290 million to $418 million. *Id.* We noted that if compensatory liability were used, any amounts Exxon had voluntarily paid in settlements should not be taken into account. We said that

> [t]he amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment. "[T]he general policy of federal courts to promote settlement before trial is even stronger in the context of large scale class actions."

Id. at 1244 (citing *Icicle,* 229 F.3d at 795; *Baker,* 239 F.3d at 988).

As a final observation on the relationship between the punitive damages award and the harm, we pointed out that the substantial clean up costs and other losses to Exxon from the oil spill had already had considerable deterrent effect. We indicated such deterrence should, depending on the circumstances, call for a lower, rather than a higher ratio. *Id.*

Turning to the third *BMW v. Gore* factor, we observed that the nature of criminal fines, which are potential state and federal penalties, might be useful in reviewing punitives. *Id.* at 1245. We observed that "[c]riminal fines are particularly informative because punitive damages are quasicriminal." *Id.* We then looked to the general federal statutory measure for fines and discussed a number of alternative guideposts. *Id.* We noted the federal fines could range from $200,000 to $1.03 billion. *Id.* We looked as well at the ceiling of civil liability under the Trans-Alaska Pipeline Act and noted it was $100 million in strict liability for anyone who spills oil from the pipeline. *Id.*

In addition to those possible penalties, we looked at the actual penal evaluation made in the case by the Attorneys General of the United States and of the state of Alaska. *Id.* at 1245-46. Agreeing with the district court that they did not establish a limit, we noted that they did represent an adversarial judgment, by executive officers, of an appropriate level of punishment. *Id.* at 1246. Finally, without necessarily exhausting available analogies in the penalty field, we noted that Congress had subsequently amended the statute to increase the amount of civil penalties for grossly negligent conduct, and that the maximum penalty here under the new federal statute would be a maximum of $786 million. *Id.* The federal penalties are based upon the number of barrels of oil spilled. 33 U.S.C. § 1321(b)(7).

In suggesting various possible guidelines to assess whether the $5 billion was "grossly excessive" we did not imply that any single guidepost would be controlling. Concluding that the $5 billion was too high to withstand the review we were required to give it under *BMW v. Gore* and *Cooper v. Leatherman Tool Group,* and noting that those cases came down after the district court had ruled, we remanded for it to apply the due process analysis required under those decisions, with what we hoped would be helpful guidance from our opinion. *Id.* at 1241. No district court analysis of *BMW v. Gore* was before us and we thus could not have decided any specific issue arising from any such analysis arising from its guideposts. *Id.* We offered only guidance culled from what was then controlling Supreme Court precedent and general principles applicable to the calculation of damage liability. *Id.*

F. *The District Court Opinion on our First Remand.*

The district court again did an extensive analysis of the relative reprehensibility of Exxon's misconduct and of the harm it caused. *In re the Exxon Valdez,* 236 F. Supp. 2d at 1054-60. Though noting that an accurate assessment of the full extent of the plaintiffs' actual harm was impossible, the district court attempted to reconstruct that harm by adding together the jury's compensatory damages verdict of $287 million, judgments in related cases, as well as payments and settlements made to plaintiffs before and during the punitive damages litigation. *Id.* at 1058-60. The district court concluded that the actual harm was just over $500 million. *Id.* at 1060. The district court also concluded that the circumstances of this case justified a ratio of punitive damages to harm of 10 to 1. *Id.* at 1065. This calculation would have supported the original $5 billion award. *Id.* The district court nevertheless reduced the punitive damages to $4 billion, to conform to what it viewed as our mandate. *Id.* at 1068.

G. *The Second Appeal, the Supreme Court's Opinion in* State Farm, *and our Second Remand.*

Not surprisingly, Exxon appealed again. And, not surprisingly, the Supreme Court issued an opinion in still another punitive damages case while the appeal was pending. *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003).

The plaintiffs in *State Farm,* the Campbells, were involved in a head-on collision and sued their automobile insurer, State Farm, for bad faith. *Id.* at 413. The claim was based on State Farm's rejection of an offer to settle the Campbells' claims at the policy limit, State Farm's assurances to them that they had no liability for the accident, State Farm's resulting decision to take the case to court despite the substantial likelihood of an excess judgment, and its subsequent refusal to pay an adverse judgment over three times the policy limits. *Id.* at 413-14. The case was similar to *BMW v. Gore* in that there were only two plaintiffs before the jury. *Id.* Nevertheless, as in *BMW v. Gore,* the jury was allowed to consider the effects of similar but unrelated misconduct on many potential plaintiffs who were not before the court. *Id.* at 415. Final judgment after appeal to the Utah Supreme Court was for $1 million in compensatory and $145 million in punitive damages. *Id.* at 412. The United States Supreme Court remanded for the Utah courts to reduce the award. *Id.* at 429.

The Supreme Court in *State Farm* once again emphasized that the "most important indicium" of a punitive damages award's reasonableness is the relative reprehensibility of the defendant's conduct. *Id.* at 419; *see also BMW v. Gore,* 517 U.S. at 575. Yet *State Farm* significantly refined the reprehensibility analysis by instructing courts to weigh five specific considerations: (1) whether the harm caused was physical as opposed to economic; (2) whether the conduct causing the plaintiff's harm showed "indifference to or a reckless disregard of the health or safety of others;" (3) whether the "target of the conduct" was financially vulnerable; (4) whether the defendant's conduct involved repeated actions as opposed to an isolated incident; and (5) whether the harm caused was the result of "intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419. The Court did not rank these factors. It did explain, however, that only one factor weighing in a plaintiff's favor may not be sufficient to support a punitive damages award, and the absence of all factors makes any such award "suspect." *Id.*

As to *BMW v. Gore's* second guidepost, the ratio between harm or potential harm to the plaintiff and the punitive damages award, the Court "decline[d] again to impose a brightline ratio which a punitive damages award cannot exceed." *Id.* at 425. But it provided some sharper guidance than it had in previous cases.

First, it indicated that ratios in excess of single-digits would raise serious constitutional questions, and that single-digit ratios were "more likely to comport with due process." *Id.* fact, despite the Court's disclaimer that "there are no rigid benchmarks that a punitive damages award may not surpass," the Court strongly indicated the proportion of punitive damages to harm could generally not exceed a ratio of 9 to 1. *Id.* at 425 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

Second, the Court discussed particular combinations of factors that would justify relatively higher or lower ratios. For example, where a "particularly egregious act has resulted in only a small amount of economic damages" or where "the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine," ratios in the high single-digits and perhaps even higher might be warranted. *Id.* (quoting *BMW v. Gore,* 517 U.S. at 582). Conversely, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

Finally, the Court minimized the relevance of criminal penalties as a guide, saying that they were not particularly helpful in determining fair notice. *Id.* at 428. Indeed, the Court did not analyze State Farm's potential criminal penalty at all, characterizing it as a "remote possibility." *Id.* As to civil penalties, the Court noted only that the $145 million punitive damages award "dwarfed" the $10,000 maximum applicable fine. *Id.*

The Supreme Court's opinion in *State Farm* was filed in 2003, after the district court, on our first remand, had already reviewed the punitive damages award. Because the district court performed its review without the benefit of the more focused guidance provided by the Court in *State Farm,* we remanded the second appeal summarily for the district court to reconsider the punitive damages award in light of *State Farm. Sea Hawk,* No. 03-39166.

H. *The District Court Opinion on our Third Remand and this Appeal.*

On remand for the third time, the district court, in an assessment similar to that in its opinion after our first remand, calculated plaintiffs' harm at $513.1 million. *District Court Opinion,* 296 F. Supp. 2d at 1103. Interpreting *State Farm* as holding that "single-digit multipliers pass constitutional muster for highly reprehensible conduct," and citing our decision in *Zhang v. American Gem Seafoods, Inc.,* 339 F.3d 1020 (9th Cir. 2003), the district court decided to increase punitives from $4 billion to $4.5 billion. 296 F. Supp. 2d at 1110. The final punitive damages award represented a ratio of just under 9 to 1. *Id.*

Once again, Exxon appealed. The plaintiffs also appealed, seeking to reinstate the jury's full $5 billion punitive damages verdict.

In this appeal, Exxon has focused intensively on the sentences in our earlier opinion where we noted that prejudgment payments generally should not be part of the "numerator" to avoid deterring pre-judgment settlements. *Punitive Damages Opinion I,* 270 F.3d at 1242. Exxon has argued strenuously in the district court and to us that all of its settlement and other pre-judgment compensatory payments to plaintiffs must be subtracted from the over $500 million amount of actual harm in the ratio of punitive damages we use to review the award pursuant to the *BMW v. Gore/State Farm* factors. This would reduce the harm to the relatively paltry figure of $20.3 million.

We recognized in *Punitive Damages Opinion I* that Exxon, soon after the spill, instituted a claims payment system that almost fully compensated plaintiffs for their economic losses and did so promptly. *Id.* We also recognized that Exxon's prompt payment of compensatory damages should be a substantial mitigating factor in our review of punitives. *Id.*

In Exxon's appeal, major issues therefore relate to how, after *State Farm,* to assess the reprehensibility of Exxon's conduct and the effect of the mitigating factors. An important subsidiary issue is the extent to which we are bound to give literal effect to the sentences in our earlier opinion concerning subtracting the pre-judgment payments from actual harm, even though *State Farm* suggests the mitigating factors should be taken into account differently. For the reasons more fully explained in this opinion, we do not accept the minimal bottom line figure urged by Exxon and properly rejected by the district court. We do, however, conclude there is merit to Exxon's contention that punitives should be reduced.

In their cross appeal, plaintiffs seek a reinstatement of the original $5 billion punitive award. We do not fully adopt their position either because doing so would peg the ratio of punitive damages to harm at a level *State Farm* reserves only for the most egregious misconduct. There was no intentional infliction of harm in this case. In addition, because Exxon's mitigating efforts after the accident diminish the relative reprehensibility of its original misconduct for purposes of reviewing punitive damages, such a high ratio is not warranted in this case.

III. ANALYSIS

A. *Lessons From History.*

The history of the experience of the Supreme Court with punitive damages over the last decade-and-a-half reflects an evolutionary, not a revolutionary, course. In its first opinion in *Haslip,* the Court suggested that there might be a bright line of demarcation between punitive damages that comport with constitutional protections, and punitive damages that do not. *Haslip,* 499 U.S. at 23. Although it did not say what "the line" would be, it termed ratios of punitive damages to compensatory damages of 4 to 1, and to out-of-pocket costs of 200 to 1, to be close to it. *Id.*

In subsequent cases, however, the Court expressly avoided a rigid mathematical formula or limit, while refining its ratio analysis, concluding in *State Farm* that a ratio of punitive damages to actual harm of less than 10 to 1 was more likely to comport with due process than an award with a higher ratio. *State Farm,* 538 U.S. at 425. Along the way, the Court's experience reflects efforts to comport with the tried and true concepts inherent in due process, i.e., those of notice and fairness. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Int'l Shoe Co. v. Washington,* 326 U.S. 310 (1945).

In *State Farm,* the Court expressly noted its concern that the jury had been allowed to take into account the effect of conduct that may have taken place nationwide on thousands of potential plaintiffs. *State Farm,* 538 U.S. at 422. The unfairness of a defendant being hit with punitive damages many times for the same conduct was central to the Court's analysis in remanding. *Id.* The Court explained, "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case non-parties are not bound by the judgment some other plaintiff obtains." *Id.* at 423.

Indeed, in *State Farm,* the Court stressed that the most important factor is the reprehensibility of the particular conduct in the case. *State Farm,* 538 U.S. at 419. This is because, in assessing the foreseeability of the possible effects of the defendant's conduct as it might bear on punitive damages, the reviewing court is in reality dealing with the traditional concept of the need for fair notice of the possible legal consequences of one's misconduct. *Id.* at 417.

Perhaps because such traditional elements of due process are flexible, the Supreme Court has not often taken on the task of reviewing the amount of punitive damages and has, in fact, overturned only two punitive awards because of their size. Each of them exceeded by a multiple of more than 100 the amount of compensatory payments necessary to compensate a plaintiff for the actual harm caused by the defendant's misconduct. *BMW v. Gore,* 517 U.S. at 582 (striking down a 500:1 ratio); *State Farm,* 538 U.S. at 429 (striking down a 145:1 ratio).

B. *BMW v. Gore/State Farm Guideposts.*

BMW v. Gore identified three guideposts for reviewing punitive damages, and *State Farm* added important refinements. The guideposts are (1) the reprehensibility of the defendant's misconduct, (2) the ratio of punitives to harm, and (3) comparable statutory penalties. They need not be rigidly or exclusively applied, for we agree with our sister circuit that "[t]hese guideposts should not be taken as an analytical straight jacket." *Zimmerman v. Direct Federal Credit Union,* 262 F.3d 70, 81 (1st Cir. 2001). We must, nevertheless, examine them in the context of this case.

1. *Reprehensibility.*

The most important guidepost is the reprehensibility of Exxon's misconduct. *State Farm,* 538 U.S. at 419 (quoting *BMW v. Gore,* 517 U.S. at 575). In our prior opinion, we defined the relevant misconduct supporting punitive damages as Exxon's keeping Hazelwood in command with knowledge of Hazelwood's relapse into alcoholism. We said that "Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound." *Punitive Damages Opinion I,* 270 F.3d at 1237-38. We see no need to reconsider this issue, despite Exxon's invitation to do so.

To evaluate the reprehensibility of the misconduct, *State Farm* refers to five sub-factors: (1) the type of harm, (2) whether there was reckless disregard for health and safety of others, (3) whether there were financially vulnerable targets, (4) whether there was repeated misconduct and (5) whether it involved intentional malice, trickery, or deceit, rather than mere accident. *State Farm,* 538 U.S. at 419.

We must also consider mitigating factors. In *Punitive Damages Opinion I,* in the context of this particular case, we looked to Exxon's response to the catastrophe, including its prompt cleanup and compensatory payments. We held they were factors mitigating the reprehensibility of the original misconduct. *Punitive Damages Opinion I,* 270 F.3d at 1242. "Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior." *Id.*

The dissent takes issue with two components of our *BMW v. Gore* analysis. Its reasons, however, are surprising, because they contradict our unanimous holding in *Punitive Damages Opinion I,* 270 F.3d at 1242, that the spill was not intentional nor Exxon's conduct malicious. *See Dissent* at 633 [56a] (characterizing Exxon's conduct as "malicious"). Then, the dissent misapplies the Supreme Court's mandate that we must perform an exacting appellate review to ensure that "an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm,* 538 U.S. at 418 (citing *BMW v. Gore,* 517 U.S. at 587).

First, the dissent maintains that the value of defendant's pre-litigation mitigation efforts should not affect punitive damages because the Supreme Court did not explicitly provide for such a calculus in *State Farm. Dissent* at 628 [46a-47a]. Thus, the dissent would reject the principle of *stare decisis* and the law of the case and overturn our holding in *Punitive Damages Opinion I,* 270 F.3d at 1242, that Exxon's voluntary compensation to the plaintiffs effectuated good public policy in making an injured party whole as quickly as possible. We are not prepared to question the soundness of our unanimous conclusion in *Punitive Damages Opinion I* merely because intervening Supreme Court jurisprudence in the insurance context did not address the issue. *See State Farm,* 538 U.S. 408. By contrast here, we have already held that mitigation is both relevant and conscientious in the toxic-tort setting. It would be unwise in reviewing punitive damages to ignore the prompt steps of a defendant to take curative action in a mass tort case.

The dissent also claims that we improperly treat *BMW's* fifth factor, the fault analysis, as a dichotomy with two mutually exclusive options: finding Exxon's conduct intentional and thus grossly reprehensible, or finding it accidental and thus to a large degree excusable. *Dissent* at 630 [51a]. This is not our analysis. We acknowledge that Exxon's conduct was not intended to cause an oil spill, but neither was allowing a relapsed alcoholic to command a supertanker "mere accident." *Majority* at 617 [30a]. Exxon's reckless malfeasance falls in the middle of a continuum between accidental and intentional conduct. Accordingly, the fifth subfactor of the reprehensibility analysis supports neither high nor low reprehensibility on the part of Exxon.

The Supreme Court has reserved the upper echelons of constitutional punitive damages (a 9 to 1 ratio) for conduct done with the most vile of intentions. Thus, an affirmance of the district court's application of such a ratio in this case, where the defendant's conduct was reckless but not intentional, would transgress the requisite constitutional boundaries as the Supreme Court has explained them to date.

We turn now to the specific *State Farm* reprehensibility subfactors. These demonstrate that a 5 to 1 ratio more appropriately comports with due process.

a. *Type of Harm-Physical versus Economic.*

To evaluate the type of harm, *State Farm* instructs us to consider whether "the harm was physical as opposed to economic," because conduct producing physical harm is more reprehensible. *State Farm,* 538 U.S. at 419. In this case the district court found that Exxon's conduct caused no actual physical harm to people, but caused more than mere economic harm to them, because the economic effects of its misconduct produced severe emotional harm as well. We agree with the district court's explanation that "the spilling of 11 million gallons of crude oil into Prince William Sound and Lower Cook Inlet disrupted the lives (and livelihood) of thousands of claimants for years." *District Court Opinion,* 296 F. Supp. 2d at 1094.

The Supreme Court has recognized conduct causing emotional as well as economic harm can be more reprehensible than conduct causing mere economic harm. *See BMW v. Gore,* 517 U.S. at 576 n. 24. There it cited *Blanchard v. Morris,* 15 Ill. 35, 36 (1853), a case affirming a $700 punitive award against individuals who caused no physical harm and only $13 of economic harm, but used mental torture to extort it.

In *Bains LLC v. Arco Products Co.,* 405 F.3d 764, 775 (9th Cir. 2005), we held that "intentional, repeated ethnic harassment" increased the level of reprehensibility beyond the merely economic. *See also Swinton v. Potomac Corp.,* 270 F.3d 794, 818 (9th Cir. 2001). The gratuitous, intentional mental oppression of the victims made it "highly reprehensible conduct, though not threatening to life or limb." *Id.* at 777. In *Planned Parenthood v. American Coalition of Life Activists,* 422 F.3d 949, 958 (9th Cir. 2005), we held that a "true threat" increased reprehensibility even though it was not carried out, because the threat was intended to intimidate, and the economic component went beyond reducing the victim's wealth or income to trying to drive the victims away from their practices of medicine. Our *Planned Parenthood* decision was consistent with *BMW's* citation with approval of older decisions upholding awards based on the "mental fear, torture, and agony of mind" caused by the threat of violence. *BMW,* 517 U.S. at 575-76, n. 24.

The district court concluded that the mental distress caused by the oil spill to the fishermen and property owners who were harmed economically justified a higher level of reprehensibility, and Exxon urges that emotional distress damages were not before the jury. Because our review must be *de novo* under *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 436 (2001), we are not bound by the district court's rationale. The cases discussed above show that punitive damages can-and traditionally do-consider the effects of the tortfeasor's conduct on the victim's mentality, not just his pocketbook. On the other hand, they may not go so far, and we need not, as to justify punitive damages for accidentally causing mental distress. *State Farm* states that compensatory damages for mental distress generally include a punitive element, so including mental distress in punitive damages may be duplicative. 538 U.S. at 426.

What comes to something near the same result in this case, though it would not in most cases, is the entirely foreseeable disruption to the way tens of thousands people live their lives if a giant oil tanker were to run aground and spill its cargo. When tens of thousands of people have to change the way they make their living, their mental distress is not comparable to a BMW owner, or even a large number of BMW owners, being distressed because their cars were scratched or dented during shipment and repaired without their knowledge. Anyone setting an oil tanker loose on the seas under command of a relapsed alcoholic has to know that he is imposing this massive risk. Though spilling the oil is an accident, putting the relapsed alcoholic in charge of the tanker is a deliberate act. The massive disruption of lives is entirely predictable when a giant oil tanker goes astray. Thus, Exxon's reprehensibility goes considerably beyond the mere careless imposition of economic harm.

b. *Reckless Disregard for Health and Safety of Others.*

The second subfactor we consider in assessing reprehensibility is whether Exxon displayed a reckless disregard for the health and safety of others. *State Farm,* 538 U.S. at 418. We conclude this subfactor also militates toward greater reprehensibility. When Exxon trusted an officer it knew was incompetent to command the *Exxon Valdez* through the treacherous waters of Prince William Sound, Exxon acted with reckless disregard for the health and safety of all those in the vicinity.

The *Exxon Valdez* grounding created a grave risk of physical harm for the crew and those who had to come to its rescue. The district court found that something as simple as an electro-static discharge could have ignited the crude oil and incinerated everyone in the vicinity. *District Court Opinion,* 296 F. Supp. 2d at 1095. We therefore agree with the district court that Exxon acted with reckless disregard of the health and safety of others when it put in command a person not competent to perform that role.

Exxon argues that *State Farm* requires us to ignore Exxon's disregard of the potential harm to the crew and rescuers because they are not plaintiffs to this litigation. Exxon misreads *State Farm. State Farm* disapproved punishing defendants for conduct in other states in which it might be lawful. 538 U.S. at 421. Likewise, we had held in *White v. Ford Motor Company*, before *State Farm* came down, that a jury's punitive damages award based on extraterritorial conduct (plaintiff's lawyer had made a "send them a message" argument addressing nationwide conduct) violated principles of federalism established in *BMW v. Gore.* 312 F.3d 998, 1013-14 (9th Cir. 2002). These cases do not prohibit consideration of the potential harm to individuals merely because they are not plaintiffs. *See* 538 U.S. at 420-22. The lesson is that the award in the other litigation "should have been analyzed in the context of the reprehensibility guidepost only." *Id.; BMW v. Gore,* 517 U.S. at 574 n.21. *State Farm* therefore holds it is appropriate to look at the risk to others in analyzing reprehensibility. *State Farm,* 538 U.S. at 427.

State Farm does warn against considering dissimilar acts of the defendant, or what is described as acts "independent from the acts upon which liability was premised." *Id.* at 422. The Court explained this is because "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. Here, however, the conduct that threatened the safety of the crew and rescuers is the same conduct that harmed the plaintiffs, and is the conduct that underlies this punitive damages litigation: Exxon's knowingly placing a relapsed alcoholic in charge of the *Exxon Valdez.* The prohibition in *State Farm* against considering dissimilar acts does not apply here because taking into account the potential harm to the crew and rescuers punishes Exxon for the same conduct that harmed the plaintiffs. We have made this point before. See, for example, *Hangarter v. Provident Life and Accident Insurance Co.*, 373 F.3d 998, 1015 n. 11 (9th Cir. 2004), where we analyzed company-wide policies in a single-plaintiff lawsuit and distinguished *State Farm's* warning against considering dissimilar acts. We said "unlike in *State Farm*, a legally sufficient nexus existed between Defendant's allegedly widespread corporate policies and the termination of [the plaintiff's] benefits." *Id.*

Accordingly, where the same conduct risked harm to all, the risk to all can be considered as a factor in assessing reprehensibility. The district court did not err in recognizing that Exxon recklessly disregarded the physical safety of the crew and rescuers, and thereby increased the reprehensibility of its conduct in putting Hazelwood in command.

c. *Financially Vulnerable Targets.*

The district court found Exxon's conduct harmed financially vulnerable subsistence fishermen. *District Court Opinion*, 296 F. Supp. 2d at 1095. Exxon does not dispute that subsistence fishermen were financially vulnerable or that its reckless actions harmed them. It does contend that this factor applies only in fraud cases when a defendant intentionally defrauds financially vulnerable targets, such as the sick or elderly. While we do not believe the subfactor is so limited, we agree there must be some kind of intentional aiming or targeting of the vulnerable that did not occur here.

The purpose of reprehensibility analysis is to determine "the enormity" of the offense, which "reflects the accepted view that some wrongs are more blameworthy than others." *BMW v. Gore,* 517 U.S. at 575. The notion of "targeting" connotes some element of intent to harm particular individuals or categories of individuals. *See Planned Parenthood,* 422 F.3d at 958-59 (holding plaintiffs were financially vulnerable because the defendants' threats attempted to scare the plaintiffs into quitting the jobs on which the plaintiffs' livelihoods depended). Exxon did not intentionally target subsistence fishermen.

We conclude in this case that this consideration does not materially affect our assessment of the reprehensibility of Exxon's conduct.

d. *Repeated Action*

The district court found that the conduct was repetitive because Exxon repeatedly allowed Hazelwood to command its supertankers for three years after it knew he had resumed drinking. *District Court Opinion,* 296 F. Supp. 2d at 1096. As the district court observed, Exxon did so, even though Exxon was fully aware of the tremendous risk of harm that it entailed. *Id.* "Over and over again, Exxon did nothing to prevent Captain Hazelwood [from sailing] into and out of Prince William Sound with a full load of crude oil." *Id.*

Exxon argues that the relevant conduct is the grounding, not the knowledge of Hazelwood's incapacity to command. That is not consistent with our description of the relevant misconduct in *Punitive Damages Opinion I* as putting (and leaving) Captain Hazelwood in command. *Punitive Damages Opinion I,* 270 F.3d at 1237-38. The district court's finding of repetitive misconduct was not clearly erroneous. *Planned Parenthood,* 422 F.3d at 954. It militates in favor of increased reprehensibility.

e. *Intentional Malice or Mere Accident.*

Putting Captain Hazelwood in command of the supertanker was knowing and reckless misconduct. We agree with the district court that this misconduct was not "mere accident." *District Court Opinion,* 296 F. Supp. 2d at 1096.

Exxon points out that relieving Hazelwood of command would have denied Hazelwood an employment opportunity on the basis of alcoholism and theoretically subjected Exxon to a disability discrimination lawsuit. While Exxon's concerns may have been appropriate considerations in its evaluation of the risk, they do not justify the dangers its decision created to the livelihoods of tens of thousands of individuals. Spilling the oil was an accident, but putting a relapsed alcoholic in charge of a supertanker was not. And anyone doing so would know they were imposing a tremendous risk on a tremendous number of people who could not do anything about it. Exxon's knowing disregard of the interests of commercial fishermen, subsistence fishermen, fish processors, cannery workers, tenders, seafood brokers and others dependent on Prince William Sound for their livelihoods, cannot be regarded as merely accidental.

At the same time, we must acknowledge that Exxon acted with no intentional malice towards the plaintiffs. We have consistently treated intentional conduct as more reprehensible than other forms of conduct subject to punitive damages. *See Zhang,* 339 F.3d at 1043; *Bains LLC v. Arco Products Co.,* 405 F.3d 764, 775 (9th Cir. 2005); *Southern Union Co. v. Southwest Gas Corp.,* 415 F.3d 1001, 1011 (9th Cir. 2005). In this case, however, as we have already recognized, "as bad as the oil spill was, Exxon did not spill the oil on purpose." *Punitive Damages Opinion I,* 270 F.3d at 1242-43. While the reprehensibility of Exxon's conduct that produced economic harm to thousands of individuals is high, the conduct did not result in intentional damage to anyone. This subfactor thus militates against viewing Exxon's misconduct as highly reprehensible. *Id.*

f. *Mitigation of Reprehensibility.*

In assessing reprehensibility, we must not only take into account the reprehensibility of the original misconduct, but we have held that we must also take into account what has been done to mitigate the harm that the misconduct caused. *Punitive Damages Opinion I,* 270 F.3d at 1242; *see also Swinton,* 270 F.3d at 814-15 (discussing weight and relevance of post-tort mitigation evidence). As we said in *Punitive Damages Opinion I,* mitigation is to be considered "in order to encourage such socially beneficial behavior." *Punitive Damges Opinion I,* 270 F.3d at 1242. Here, Exxon instituted a system of voluntary payments to plaintiffs and it undertook prompt cleanup efforts. We agree with what we said before: "Exxon spent millions of dollars to compensate many people after the oil spill, thereby mitigating the harm to them and the reprehensibility of its conduct." *Id.*

g. *Evaluation of Reprehensibility.*

Placing a relapsed alcoholic in control of a supertanker was highly reprehensible conduct. As a result, Exxon disrupted the lives of thousands of people who depend on Prince William Sound for their livelihoods, and endangered its own crew and their rescuers. Over the span of three years, Exxon could and should have relieved Captain Hazelwood of command of supertankers, but it did not do so. at the same time, however, Exxon did not act with malice toward plaintiffs or anyone else; Exxon did not intend to damage plaintiffs' livelihoods or cause them the emotional grief that went with the economic loss.

Thus, Exxon's conduct is in the higher realm of reprehensibility, but not in the highest realm. In addition Exxon's post-grounding efforts to mitigate the harm serve materially to reduce the reprehensibility of the original misconduct. They reduce the reprehensibility for purposes of our review to, at most, a mid range.

2. *Ratio of Harm to Punitives.*

The second *BMW* guidepost, as reiterated and refined by *State Farm,* is the "ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm,* 538 U.S. at 424. The goal of our review at this guidepost is to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426.

a. *Calculating The Harm.*

In this case, the figure the district court used to represent the harm to plaintiffs was $513.1 million. *District Court Opinion,* 296 F. Supp. 2d at 1103. Calculating the total harm to plaintiffs proved to be difficult because, in addition to considerable economic losses, the spill caused other undeniable, if not easily quantifiable, harms. *See id.* at 1094. The district court eventually calculated the harm figure by adding the compensatory damages verdict from the second phase of the trial to the actual judgments, settlements, and other recoveries various plaintiffs obtained as a result of the spill. *Id.* at 1099-1101.

Exxon does not dispute that the district court's finding of $513.1 million in harm is fundamentally a valid measure of the actual harm caused by the spill. However, it disagrees that it should be the figure we ultimately use as part of the ratio of punitive damages to harm that we review as the second guidepost.

Exxon's principal contention is that, before establishing the harm figure in the ratio, we must first deduct millions of dollars of payments and costs from the figure representing the total actual harm caused by the spill. Exxon would have us subtract a sum of about $493 million representing amounts paid to plaintiffs through Exxon's voluntary claims program and other settlements. Exxon would then have us use that reduced figure to represent the total harm in assessing the ratio of punitives to harm.

This brings us to the central argument Exxon makes in this appeal. Exxon focuses on the language of our prior opinion in Punitive *Damages Opinion I* where we said, in a lengthy discussion of formulating possible ratios pursuant to *BMW v. Gore,* "[t]he amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would generally deter settlements prior to judgment." 270 F.3d at 1244. Exxon contends this now means that in assessing the ratio of harm to punitives after *State Farm,* we should ignore the total harm in favor of a figure that in fact more closely approximates Exxon's remaining post-judgment liability for compensatory damages.

If we were to adopt Exxon's interpretation of that sentence as binding us now, the measure of harm would be a meager $20.3 million. Applying the ratio of close to 1 to 1 that Exxon asserts is appropriate, Exxon contends we should cap punitive damages at $25 million. Under Exxon's theory, even using a ratio of 9 to 1, which approaches the highest allowable under *State Farm,* punitive damages would be capped at $182.7 million. This would be the limit, even though Exxon's recklessness led to more than $500 million in harm. We said, in discussing the nature of the relationship between punitive damages and harm:

> The "reasonable relationship" is intrinsically somewhat indeterminate. The numerator is "the harm likely to result from the defendant's conduct." [*BMW v. Gore,* 517 U.S. at 581]. The denominator is the amount of punitive damages. Because the numerator is ordinarily arguable, applying a mathematical bright line as though that were an objective measure of how high the punitive damages can go would give a false suggestion of precision. That is one reason why the Supreme Court has emphasized that it is not possible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." [*BMW v. Gore,* 517 U.S. at 576]....
>
> Although it is difficult to determine the value of the harm from the oil spill in the case at bar, the jury awarded $287 million in compensatory damages, and the ratio of $5 billion punitive damages to $287 million in compensatory damages is 17.42 to 1. The district court determined that "total harm could range from $287 million to $418.7 million," which produces a ratio between 12 to 1 and 17 to 1. This ratio greatly exceeds the 4 to 1 ratio that the Supreme Court called "close to the line" in *Pacific Mutual Life Ins. Co. v. Haslip* [, 499 U.S. at 23].
>
> The amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment. "[T]he general policy of federal

> courts to promote settlement before trial is even stronger in the context of large scale class actions," such as this one. [*Cf. Icicle*, 229 F.3d at 795; *Baker*, 239 F.3d at 988].

Punitive Damages Opinion I, 270 F.3d at 1243-44.

The district court rejected the proposition that voluntary payments before judgment should not generally be used as part of the calculation of harm. But our prior decision did not constrain the ratio analysis so firmly as Exxon contends. We did not say that voluntary payments before judgment could not be considered in calculating the numerator for purposes of comparing the numerator with the amount of the award; we said that they "generally" could not. Considerations of settlement, critical to our analysis in *Icicle*, 229 F.3d 790, bear on the due process concerns at the heart of *BMW's* discussion. Whenever a defendant governed by a board is sued for conduct egregious enough to create a genuine risk of punitive damages, those making its litigation decisions have to try to predict what may happen in court. Some may recommend obdurate resistance, and some may recommend settlement, or prejudgment payments even without settlement, each making arguments based on predictions. Those recommending payment can reasonably predict that the entity will not be hammered as hard as if it obstinately resisted acceptance of any responsibility. And their prediction would be reasonable. Criminal penalties have always been somewhat more lenient for those who accepted responsibility prior to judgment, *see United States v. Gonzalez*, 897 F.2d 1018, 1021 (9th Cir. 1990) (upholding the constitutionality of U.S.S.G. § 3E1.1), and punitive damages are but a civil version of punishment for wrongdoing. It makes no practical sense to disarm all those in the future who want their boards to accept some responsibility by cutting out all the benefit their firms would get.

There is a limit, however, to how far acceptance of responsibility goes in both contexts. No criminal defendant guilty of a serious wrong ordinarily resulting in lengthy imprisonment could reasonably assume that he would receive no imprisonment at all if he promptly pleaded guilty. And no defendant's board could reasonably predict that the defendant could escape all punishment by paying predicted compensatory damages before judgment. While "generally" prepayments should not be used as part of the calculation of harm, *Punitive Damages Opinion I,* 270 F.3d at 1244, that is not a mechanical arithmetic limit, just as the nine to one limit is not a mechanical arithmetic limit. *See State Farm,* 538 U.S. at 425; *Planned Parenthood,* 422 F.3d at 962; *Bains,* 405 F.3d at 776-77. Due process considerations limit punitive damages to what the wrongdoer could reasonably foresee, and that works both ways.

Therefore, Exxon's argument goes too far. It would produce, in Exxon's analysis, a $25 million limit on punitive damages where the harm was $513 million but $493 million was paid before judgment. For purposes of notice to a tortfeasor of its liability risk, $25 million for causing a half billion loss would obviously be too good to be true. A defendant cannot buy full immunity from punitive damages by paying the likely amount of compensatory damages before judgment.

There are also some secondary issues relating to calculating harm. One concerns payments made by Alyeska Pipe Lines Service Corporation. Exxon asks us to set off $98 million that its original co-defendant Alyeska Pipe Lines Service Corporation paid in settlement of plaintiffs' claims. A consortium of oil companies, including Exxon, had contracted with Alyeska to respond to any oil spill in the area. After the *Exxon Valdez* disaster, plaintiffs sued Alyeska for negligence in its response to the spill, and eventually settled all claims against Alyeska, including punitive damages, for $98 million. Exxon's argument here is that this $98 million payment represents harm attributable to Alyeska's negligence, not Exxon's recklessness, and therefore should not be used to calculate damages designed to punish and deter Exxon's own harmful conduct.

There are two major reasons why Exxon's position is not correct. First, the harm caused by the oil spill is attributable to

Exxon under tort law principles. Exxon knowingly placed a relapsed alcoholic in control of a supertanker loaded with millions of gallons of oil. When it did so, Exxon accepted the foreseeable risk from its choice of captain that the tanker would have an accident causing an oil spill, and that Alyeska might further aggravate the harm. *See* Restatement (Second) of Torts §§ 433(a) cmt. c, 447(c),[1] cmt. e.[2] In fact, William Stevens, the President of Exxon, testified before Congress that Exxon knew Alyeska was not prepared to contain a spill of the size caused by the *Exxon Valdez*. Because Exxon could be held liable for this foreseeable risk, the district court properly included the harm caused by Alyeska's response as the natural consequence of the harm caused by Exxon.

Second, the situation Exxon now complains of is strictly of its own making. In 1994, the Supreme Court held that the proportional fault rule governs calculation of non-settling defendant's liability for compensatory damages in maritime torts. *See McDermott, Inc. v. AmClyde,* 511 U.S. 202 (1994). Instead of following *McDermott,* Exxon agreed with plaintiffs to proceed as if a pro tanto rule with respect to co-defendants' settlements still governed.[3] Exxon apparently thought it more advantageous at the time to have the $98 million deducted from the final compensatory damage award after the fact, rather than have the jury make a proportionate fault finding. Since Exxon has already agreed that the $98 million does not represent harm attributable to Alyeska, Exxon is not warranted in asserting that this is what it represents now.

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[1] "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if ... (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent."

[2] "The words 'extraordinarily negligent' denote the fact that men of ordinary experience and reasonable judgment, looking at the matter after the event and taking into account the prevalence of that 'occasional negligence,' which is one of the incidents of human life,' would not regard it as extraordinary that the third person's intervening act should have been done in the negligent manner in which it was done. Since the third person's action is a product of the actor's negligent conduct, there is good reason for holding him responsible for its effects, even though it be done in a negligent manner, unless the nature of the negligence is altogether unusual."

[3] The stipulation between the parties reads in relevant part:

Exxon also contends that some $34 million included in the district court's harm finding should not properly be considered harm at all. This figure represents an apparent $9 million overpayment by the Trans-Alaska Pipeline Liability Fund, $13.4 million from the Phase IV settlement Exxon claims is already accounted for elsewhere in the district court's calculations, and $11.5 million paid to Native corporations and municipalities for environmental clean up.

We conclude that the $9 million overpayment, inadvertently included in the district court's findings, should be subtracted from the total harm. Because Exxon does not specify where the $13.4 million in double-counting is reflected in other parts of the district court's calculation, however, we are unable to determine from our own review of the record where they might be included. Therefore, Exxon has failed to convince us that this figure should be reduced from the harm.

Finally, the $11.5 million Exxon paid to the plaintiffs for

"[N]otwithstanding the rule of proportionate shares set out in *McDermott, Inc. v. AmClyde,* credit for the Aleyska settlement ... shall be deducted from the sum that would, in the absence of this stipulation, be the aggregate amount of any judgment or judgment in favor of plaintiffs ... and the liability of Exxon and Shipping for compensatory damages to any and all plaintiffs herein shall be reduced by the aggregate sum of $98 million.... The parties expressly recognize and agree that the sum of $98 million is not necessarily a fair measure of what would be Alyeska's proportionate share of liability to plaintiffs[,] but the parties are entering into this Stipulation in order to avoid the alteration of their trial preparation that would result from a last-minute overturning of the parties' assumption that[the pro tanto approach] would govern at trial and from requiring litigation of Alyeska's proportionate share."

clean up, like its early settlement of plaintiffs' prospective commercial losses, is a mitigating factor relevant to our judgment about whether this punitive damages award is appropriate. Like the earlier settlements the proper place for its influence is as a mitigating circumstance to be considered in our overall determination of the ratio's reasonableness. It does, however, represent a part of the total harm for which Exxon is accountable.

In sum, the district court's attempt to approximate the actual harm by adding together the various judgments, settlements, and liabilities that Exxon had already acknowledged was sound. Subtracting the $9 million Trans-Alaska Pipeline Liability Fund overpayment that the district court inadvertently overlooked, we conclude this record supports a total harm component of $504.1 million for purposes of analyzing the ratio of harm to punitives.

b. *Evaluating the Reasonableness of the Ratio of Harm to Punitives.*

After our second remand, the district court reduced the original punitive damages award of $5 billion to $4.5 billion. This yielded a punitive damages to harm ratio of 8.77 to 1. After our $9 million adjustment to the harm figure, that ratio now stands at 8.93 to 1-a proportion bordering on the presumption of constitutional questionability. *See State Farm,* 538 U.S. at 425

In *State Farm,* the Supreme Court explained that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. Relatively high single-digit ratios and perhaps even double-digit ratios may comply with due process where "a particularly egregious act has resulted in only a small amount of economic damages" or where "the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine." *Id.* (quoting *BMW v. Gore,* 517 U.S. at 582). Conversely, lower single-digit ratios, even as low as 1 to 1, might mark the outer limits of due process where compensatory damages are substantial. *Id.* This strongly suggests the ratio here is too high.

Our own decisions are also helpful. In *Planned Parenthood,* we used this guidance from *State Farm* to construct a "rough framework" for determining the appropriate ratio of punitive damages to harm. *See* 422 F.3d at 962. We held that in cases where there are "significant economic damages" but behavior is not "particularly egregious," a ratio of up to 4 to 1 "serves as a good proxy for the limits of constitutionality." *Id.* (citing *State Farm,* 538 U.S. at 425). In cases with significant economic damages and "more egregious behavior," however, a single-digit ratio higher than 4 to 1 "might be constitutional." *Id.* (citing *Zhang,* 339 F.3d at 1043-44; *Bains,* 405 F.3d at 776-77). Finally, in cases where there are "insignificant" economic damages and the behavior is "particularly egregious," we said that "the single-digit ratio may not be a good proxy for constitutionality." *Id.*

The circumstances of this case fit into the second class of cases in the *Planned Parenthood* framework. Exxon's reckless decision to risk the livelihood of thousands by placing a relapsed alcoholic in command of a supertanker, while mollified by its prompt settlement and clean up policies, was "particularly egregious." Moreover, the $500 million of loss is well within the range of "significant" economic damages. Thus, under *Planned Parenthood,* an appropriate ratio would be above 4 to 1.

Our review of the reprehensibility and mitigation under the first guidepost of reprehensibility, however, compels us to conclude the award should be toward the lower end of that range. Our cases have generally reserved high single-digit ratios for the most egregious forms of intentional misconduct, such as threats of violence and intentional racial discrimination. *See Zhang,* 339 F.3d at 1044 (upholding a ratio of 7:1 for intentional racism); *Bains,* 405 F.3d at 776-77 (remanding for district court to set a ratio between 6:1 and 9:1 for intentional racism); *Planned Parenthood* 422 F.3d at 952, 963 (remitting to a 9:1 ratio for threats of violence). Exxon's conduct in this case, while inexcusable, did not involve any intentional conduct that would normally be required to support a punitive damages award with a high single-digit ratio.

Here mitigating factors also come into play. Exxon instituted prompt efforts to clean up the spill and to compensate the plaintiffs for their economic harm. As we earlier observed, if a defendant acts promptly to ameliorate harm for which it is responsible, the size of a punitive damages award should be reduced to encourage socially beneficial behavior. *Punitive Damages Opinion I,* 270 F.3d at 1242. Moreover, the costs that Exxon incurred in compensating the plaintiffs and cleaning up the oil spill have already substantially served the purposes of deterrence, lessening the need for a high punitive damages award. *Id.* at 1244.

Thus, Exxon's conduct was particularly egregious and involved significant economic damages. Nevertheless, its conduct was not intentional and it promptly took steps to ameliorate the harm it caused. With these considerations in mind, we conclude that a punitive damages to harm ratio of more than 5 to 1 would violate due process standards under current controlling Supreme Court and Ninth Circuit authority.

3. *Comparable Penalties.*

The third *BMW v. Gore/State Farm* guidepost is comparable legislative penalties. Given the emphasis on this factor in *BMW v. Gore,* we went to some lengths in *Punitive Damages Opinion I* to extrapolate the comparable penalties that would be imposed under state and federal law for the spill, the highest being approximately $1.03 billion dollars.

In *State Farm,* however, the Supreme Court stated that "need not dwell long on this guidepost." *State Farm,* 538 U.S. at 428. In that case, the comparable penalties were not particularly informative: the comparable civil penalty was easily "dwarfed" by the punitive award, and as to criminal penalties, the Court explained that although their existence "does have bearing on the seriousness with which a State views the wrongful action," they had "less utility" "[w]hen used to determine the dollar amount of the award." *Id.*

In our own circuit's more recent post-*BMW v. Gore* and *State Farm* cases, we have generally not attempted to quantify legislative penalties. We have looked only to whether or not the misconduct was dealt with seriously under state civil or criminal laws. *See, e.g., Planned Parenthood,* 422 F.3d at 963. In several recent decisions we have not discussed the factor at all. *See Southern Union Co.,* 415 F.3d at 1009-11 (9th Cir. 2005); *Hangarter,* 373 F.3d at 1014-15. This may be because legislative judgments, unlike jury verdicts, do not represent an individualized assessment of reprehensibility.

Here, the matter of spilling oil in navigable water has clearly been taken quite seriously by legislatures, with Congress enacting a specific statute after the spill, and state and federal law having already authorized substantial penalties. *See Punitive Damages Opinion I,* 270 F.3d at 1245-46. Thus, the third *BMW v. Gore/State Farm* factor, substantial legislative penalties, supports our conclusion that Exxon's reckless conduct merits substantial punitive damages.

IV. CONCLUSION

For the foregoing reasons, Exxon's reckless misconduct in placing a known relapsed alcoholic in command of a supertanker, loaded with millions of barrels of oil, to navigate the pristine and resource abundant waters of Prince William Sound was reckless and warrants severe sanctions. The misconduct did not, however, warrant sanctions at the highest range allowable under the due process analysis, as explained in the Supreme Court's most recent opinion in *State Farm.*

The district court's imposition of punitive damages of $4.5 billion, entered after our remand to reconsider due process in light of *State Farm,* represents damages at the very highest range, and is not warranted. It is not consistent with the Supreme Court's opinion in *State Farm* or with the most important tenets of our prior opinion in *Punitive Damages Opinion I* relating to Exxon's mitigation of reprehensibility.

Although a one to one ratio marked the upper limit in *State Farm,* the conduct here was far more egregious and justifies a considerably higher ratio. An award of damages representing a ratio of punitives to harm of 5 to 1 is consistent with both.

The judgment of the district court is VACATED, and the matter is remanded with instructions that the district court further reduce the punitive damages award to the amount of $2.5 billion. We have decided pursuant to the *de novo* standard of review imposed by *Leatherman,* 532 U.S. at 436, that this is the appropriate limit on punitive damages in this case under the prevailing legal precedent. Thus, we do not remand for further consideration of what the limit may be. It is time for this protracted litigation to end.

VACATED AND REMANDED.

BROWNING, Circuit Judge, dissenting.

Because I believe the punitive damages award in this case is not "grossly excessive," I would affirm. In reviewing the size of a punitive damages award, our sole duty is to ensure its imposition does not violate due process. Where an award lies within the bounds of due process, as this one does, we may not substitute a figure we consider more reasonable for one fairly awarded by a jury and properly reviewed by a district court. Therefore, I respectfully dissent.

1. Due Process Review of Punitive Damages

To comport with the Constitution, a punitive damages award must strike the proper balance between the state goals of deterrence and retribution and a defendant's due process right to be free from arbitrary punishment. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416-17 (2003). The Supreme Court has determined the balance is upset at the point an award becomes "grossly excessive," reasoning that, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417 (citing *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 42 (1991)).

But as the majority notes, *ante* at 612 [20a], the Court has shown little inclination to define "grossly excessive" more concretely. *See State Farm*, 538 U.S. at 424; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996). While it has several times hinted at the possibility of establishing a 4 to 1 bench-mark ratio of punitive damages to compensatory damages, it has never explicitly done so. *See State Farm*, 538 U.S. at 425 (citing *BMW*, 517 U.S. at 581; *Haslip*, 499 U.S. at 23-24). Instead, the one constitutional limit the Court has identified is that generally found between single-digit and double-digit multipliers. *See id.* ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.... Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [or] 145 to 1." (internal citations omitted)).

The Supreme Court's reluctance to establish a more concrete limit, or to adopt any other sort of categorical approach, counsels that in cases such as the one at bar, "[t]he judicial function is to police a range, not a point." *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (citing *BMW*, 517 U.S. at 582-83; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993)). We should let this punitive damages award stand unless the *BMW* factors indicate with some certainty that it was the product of caprice or bias such that its imposition violates Exxon's right to due process.[4] "Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so." *TXO,* 509 U.S. at 457 (plurality opinion) (internal citations omitted).

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[4] The majority correctly recognizes, *ante* at 602 [3a], that a determination that an award is "grossly excessive" is reviewed de novo. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). De novo review, however, is only applied to determine the constitutional upper limit on a punitive damages award in a given case. If the award does not exceed this ceiling, we owe deference to the determination of the district court and jury. *See id.* at 433-34 (noting that within substantive limits on an award, the jury has discretion in establishing the precise number). *Cooper* does not give us free reign to pick the number we would have chosen had we sat as the jury or district court.

No procedural concerns are present here that, at the outset, might weaken the "strong presumption of validity" to which this award is entitled. *See BMW,* 517 U.S. at 586-87 (Breyer, J., concurring) (citing *TXO,* 509 U.S. at 457; *Haslip,* 499 U.S. at 40-42); *see also id.* at 583("In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis."). The jury received thorough, almost prescient, punitive damages instructions.[5] And although Exxon is a large corporation, there is no indication that the size of this punitive damages award resulted from an improper "emphasis on the wealth of the wrongdoer" at trial, *see TXO,* 509 U.S. at 464, or from an attempt by Plaintiffs or the jury to "make up for the failure of other factors, such as 'reprehensibility,'" *see BMW,* 517 U.S. at 591 (Breyer, J., concurring).[6]

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[5] The district court explained the retributive and deterrent purposes of punitive damages and the "appropriate," i.e., non-environmental, countervailing "Alaska-oriented" interests of the plaintiffs; cautioned the jury that punitive damages must have a rational basis in the record and bear a reasonable relationship to the harm; admonished the jury not to be arbitrary; and, perhaps most importantly, alerted them that they could take Exxon's mitigation efforts into account when determining both whether punitive damages were warranted and, if so, the size of the award. *See In re Exxon Valdez,* 296 F. Supp. 2d 1071, 1091 (D. Alaska 2004). Considering that *BMW* and *State Farm* were decided after the jury trial, these instructions indeed were, as the majority notes, *ante* at 604 [7a], "in retrospect, quite forward looking."

[6] Indeed to the contrary, there is evidence in the record comparing this award to Exxon's wealth in a manner that suggests the award was neither capricious nor an instance of over-deterrence. *See In re Exxon Valdez,* 296 F. Supp. 2d at 1105-06 ("[A]fter judgment was entered on the punitive damages award, Exxon's treasurer advised the court that 'the full payment of the Judgment would not have a material impact on the corporation or its credit quality.'").

Furthermore, Exxon's conduct implicates a strong state interest in punishing reckless behavior and deterring its future repetition. Our constitutional review must consider punitive damages in the context of these state interests. *See id.* at 568 ("Only when an award can fairly be categorized as 'grossly excessive' *in relation to these interests* does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." (emphasis added)). In both *State Farm* and *BMW,* the Court's guidepost analysis was not an entirely separate endeavor, but instead gave structure to its constitutional concern that the defendants' due process rights were violated by judgments incorporating punishment for conduct not properly before the awarding court. *See State Farm,* 538 U.S. at 419-24 (discussing out-of-state conduct and conduct unrelated to plaintiffs' injuries); *BMW,* 517 U.S. at 568-73 (describing out-of-state conduct).

In stark contrast, there is no concern here that the scope of appropriate state interests has been exceeded. This punitive damages award was imposed pursuant to strong, but properly circumscribed, state interests. As the district court noted, Plaintiffs' collection of federal and state claims all arise out of harm to "Alaska fisheries, Alaska business,[and] Alaska property" caused by Exxon's conduct having "a direct nexus with the grounding of the Exxon Valdez on Bligh Reef in Prince William Sound." *See In re Exxon Valdez,* 296 F. Supp. 2d at 1090-91.

Thus, before engaging in the multi-factored analysis introduced in *BMW* and reiterated in *State Farm,* it is important to note that we are not faced here with any of the major constitutional concerns present in those cases.

2. BMW *Guidepost Analysis*

Although I agree with much of the majority's analysis under *BMW* and *State Farm,* I cannot agree with it all. Despite clear guidance from the Court that reprehensibility is the critical factor, the majority, *ante* at 613 [22a], 618 [30a], gives defining weight to a consideration entirely of its own creation.

It then engages, *ante* at 623-24 [38a-40a], in what appears to be the very "categorical approach" the Supreme Court has consistently rejected. *See BMW,* 517 U.S. at 582. An appropriate evaluation of the award in question demonstrates it is constitutionally permissible.

(a) Reprehensibility

In its most recent punitive damages opinion, the Supreme Court gave direct instruction to courts evaluating reprehensibility. *State Farm,* 538 U.S. at 419. As the majority correctly notes, *ante* at 610 [17a], we must weigh five factors: (1) whether the harm was solely economic, (2) whether the conduct showed indifference to or reckless disregard for others' health and safety, (3) whether the conduct's target was financially vulnerable, (4) whether the conduct involved repeated actions, and (5) whether the harm resulted from intentional malice or mere accident. *State Farm,* 538 U.S. at 419. Somewhat inexplicably, though, the majority adds to the *State Farm* factors one of its own creation-post-tort mitigation. *See ante* at 613 [22a] ("We must also consider mitigating factors."); *id.* at 618 [30a]. I do not agree that mitigation should be considered in a reprehensibility analysis. Furthermore, unlike the majority, I believe that all five *State Farm* factors weigh in favor of finding that Exxon's reckless conduct was highly reprehensible.

(i) Mitigation

I cannot agree with the majority's assertion that we must consider Exxon's post-tort mitigation in evaluating the reprehensibility of its original misconduct. *See ante* at 613 [22a]. The majority is correct that when we previously considered Exxon's conduct, we suggested mitigation should be considered as part of the reprehensibility analysis. *See Baker v. Hazelwood (In re the Exxon Valdez)*, 270 F.3d 1215, 1242 (9th Cir. 2001) [hereinafter *Punitive Damages Opinion I*]. However, subsequent to our decision in *Punitive Damages Opinion I,* the Supreme Court decided *State Farm,* which significantly refined the Court's punitive damages jurisprudence. The analysis of reprehensibility in *State Farm* differs from our analysis in *Punitive Damages Opinion I*, and, as intervening controlling authority, gives us reason to reconsider our prior approach. *See United States v. Bad Marriage*, 439 F.3d 534, 538 (9th Cir. 2006) (noting that a court may reexamine an issue it previously decided if "intervening controlling authority makes reconsideration appropriate").

When we considered mitigation in *Punitive Damages Opinion I*, Supreme Court precedent provided limited guidance for the reprehensibility analysis. In *State Farm*, however, the Supreme Court explained that courts should use five specific factors to evaluate reprehensibility. 538 U.S. at 419. Although there was evidence of mitigation in *State Farm*, *id.* at 426, the Court did not include mitigation as one of the factors in the reprehensibility analysis. Given such explicit guidance, this omission acquires particular significance and suggests we reconsider our prior statement about mitigation.[7] As explained below, upon reconsideration I find that including mitigation in the reprehensibility analysis is neither good law nor good policy.

Aside from a single mention of mitigation in *Punitive Damages I*, the majority's approach is supported by neither Supreme Court precedent nor our own precedent. The majority cites *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001), as support, even though *Swinton*, like *Punitive Damages Opinion I*, was decided prior to *State Farm*. Therefore, it did not have the benefit of the Supreme Court's most recent and comprehensive analysis of reprehensibility. Furthermore, *Swinton* did not consider whether mitigation warrants a reduction in a punitive damages award imposed by a jury. Rather, our analysis was limited to the question of whether the district court erred in excluding evidence of mitigation efforts in an employment discrimination suit. *See id.* at 811, 815. We refused in that case to create a generalized rule in the employment context or anywhere else. *See id.* at 814-15. Instead, we left it to the discretion of the district courts to decide the relevancy of mitigation efforts on a case-by-case basis.

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[7] The majority suggests *State Farm* is distinguishable because the dispute concerned an insurance contract rather than a toxic tort. *See ante* at 602 [4a], 614 [23a]. However, the five-part reprehensibility analysis in *State Farm* is designed to evaluate a broad range of conduct, and nothing in the opinion indicates this framework applies only to insurance cases.

We also expressly rejected the idea that the Supreme Court endorses the categorical relevance of mitigation in punitive damages calculations. *See id.* at 812 ("We do not interpret the language in *BMW* and *Cooper* as relying on evidence of post-occurrence remediation for overturning the punitive damages awards; rather the Court appears simply to have been recounting a full history of the litigation to give a complete picture of the proceedings."). While post-tort mitigation by a defendant may or may not be relevant to a jury's determination of whether and in what amount to award punitive damages, *Swinton* gives no support to the majority's position that mitigation is properly considered as part of the reprehensibility analysis in a constitutional review.

Additionally, the majority's approach makes little sense as a matter of policy, for it runs directly counter to the twin goals of punitive damages: deterrence and retribution. *See State Farm,* 538 U.S. at 416 ("[P]unitive damages serve a broader function; they are aimed at deterrence and retribution."); Theodore Eisenberg, *Damage Awards in Perspective,* 36 Wake Forest L.Rev. 1129, 1145 (2001) ("[A] wrongdoing party's voluntary-to the extent payments are truly voluntary after being 'caught'-remediation payment does not reduce the propriety of punishing or deterring."). While including mitigation in the reprehensibility analysis doubtlessly increases the incentive to remediate, it does so at the expense of undermining deterrence and retribution. The majority's approach minimizes deterrence by creating a post-tort means of limiting punitive damages. This allows potential tortfeasors to engage in risky behavior, safe in the knowledge they can minimize liability for any resulting harm by prompt payment of foreseeable damages. It also cripples the state's interest in retribution, as it allows the tortfeasor, rather than the jury, to recharacterize the reprehensibility of its misconduct after a tort has been committed. *Cf. Cooper,* 532 U.S. at 432 (recognizing that the "imposition of punitive damages is an expression of [the jury's] moral condemnation").

Nonetheless, the majority insists that including mitigation in the reprehensibility analysis is good public policy because it encourages socially beneficial conduct. *Ante* at 618 [30a]. A company in Exxon's position, however, already has significant incentives to clean up its mess. Had Exxon not taken prompt action to clean up the oil spill and compensate injured parties, *see ante* at 602 [4a], the actual harm caused could well have exceeded the $504.1 million figure we use as the numerator in our ratio analysis. *See ante* at 623 [38a]. Specifically, if eleven billion gallons of oil were left indefinitely in Prince William Sound, and injured parties were without resources to start their lives anew, both economic and social harm would have grown. This would have increased Exxon's liability not only for compensatory damages, but also for punitive damages. Greater actual harm translates to a larger punitive damages numerator and a higher ceiling for the punitive damages award. Thus, mitigation is already reflected in the calculation of compensatory damages and in our constitutional review of the jury's punitive damage award.

Moreover, I am not convinced the majority's approach will ultimately encourage defendants to settle. *Cf. Franklin v. Kaypro Corp.,* 884 F.2d 1222, 1229 (9th Cir.1989) (noting there is an "overriding public interest" in promoting settlement). Instead, I fear it has the unintended consequence of giving tortfeasor defendants a way to reduce the risk of litigation *without* reaching a settlement with injured parties. Under our past precedent, the threat of a significant punitive damages award created a strong incentive for defendants to pay injured parties in exchange for a release or similar arrangement.[8] The majority's approach, however, allows defendants to limit their exposure to punitive damages by taking unilateral steps, even token ones, to remediate harm. I am concerned this will frequently lead to more protracted litigation, as injured parties will not necessarily be satisfied with defendants' mitigation efforts, and defendants will have less incentive to reach settlement agreements. Thus, policy implications support the legal conclusion that it is not appropriate to add mitigation to the *State Farm* factors.

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[8] In this case, the certification of a mandatory punitive damages class meant that individual plaintiffs could not reduce the ultimate punitive

(ii) State Farm *Factors*

Because I see no basis for the majority's inclusion of mitigation in our due process reprehensibility analysis, I consider only the five factors outlined by the Supreme Court. I agree with the majority that the first, second, and fourth factors[9] suggest Exxon's conduct was highly reprehensible and capable of supporting a substantial award. However, I cannot agree with the analysis concerning the fifth factor, whether

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damages award by releasing their claims. *See In re Exxon Valdez,* 229 F.3d 790, 793 (9th Cir. 2000) ("Claims for compensatory damages could be easily disposed of by exchanging payment for releases, but a plaintiff's release of its slice of the future lump-sum punitive damages award merely reduced the number of claimants sharing the punitive damages pie, not the size of the pie itself."). However, several plaintiffs nonetheless used the looming punitive damages award as a bargaining chip by allocating Exxon a portion of any award they might receive. *See ante* at 604 [7a-8a].

[9] I am not convinced by the majority's analysis of the third factor, but I do agree that it plays a relatively small role in this case and therefore does not warrant an extended discussion. The majority classified as neutral the third factor, whether "the target of the conduct had financial vulnerability," *see State Farm,* 538 U.S. at 419. As the majority admits, *ante* at 617 [30a], by recklessly placing a "relapsed alcoholic in charge of a supertanker," Exxon knew that it was "imposing a tremendous risk on a tremendous number of people who could not do anything about it." Not only were many of those people "financially vulnerable" by virtue of being subsistence fishermen, but they were also particularly vulnerable to the specific risk imposed on them by Exxon. *See In re Exxon Valdez,* 296 F. Supp. 2d at 1094-95. Thus, I would find this factor indeed suggests Exxon's reckless conduct was highly reprehensible. *See BMW,* 517 U.S. at 576 ("To be sure, infliction of economic injury, especially ... when the target is financially vulnerable, can warrant a substantial penalty.")

"the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm,* 538 U.S. at 419. As the majority recognizes, Exxon's decision to put a relapsed alcoholic in charge of a supertanker constituted knowing and reckless misconduct, which was neither intentionally malicious nor a mere accident. *Ante* at 617-18 [30a]. However, faced with conduct that does not fit squarely in either category mentioned in *State Farm,* the majority arbitrarily determines this factor weighs against high reprehensibility because Exxon "did not spill the oil on purpose." *Id.,* at 618. I cannot agree with this conclusion for two reasons.

First, if we read this *State Farm* factor to recognize only two categories of conduct, the fact that Exxon's acts fall in neither category could suggest this is a neutral factor, weighing neither for nor against high reprehensibility. However, if the majority is correct that we must determine whether Exxon's conduct is more similar to one category or the other,[10] I believe it is closer to "intentional malice, trickery, or deceit" than to "mere accident." *State Farm,* 538 U.S. at 419; *Cf. Black's Law Dictionary* 968 (7th ed.1999) (defining malice as, *inter alia,* "[r]eckless disregard of the law or of a person's legal rights"). The jury held Exxon responsible not merely for spilling oil, but rather for knowingly giving command of a supertanker "carrying over 53 million gallons of volatile, toxic, crude oil" to a relapsed alcoholic. *See In re Exxon Valdez,* 296 F. Supp. 2d at 1097. Exxon did so for three years with full knowledge of the tremendous risk of serious harm to the health, safety, and livelihood of many people. *See ante* at 615-16 [26a]. This cannot fairly be described as an accident. Given the extreme recklessness of Exxon's conduct, I would conclude the fifth factor militates in favor of finding Exxon's behavior highly reprehensible. *Accord Swinton,* 270 F.3d at 818 (holding that conduct which was, at most, reckless disregard for others' health and safety, easily "constitutes highly reprehensible conduct justifying a significant punitive damages award").

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[10] Contrary to the majority's assertion, *ante* at 614 [24a], I do not suggest it views Exxon's conduct as a largely excusable accident. Rather, I note that in finding this factor "militates against viewing Exxon's misconduct as highly reprehensible," *ante* at 618, the majority treats Exxon's reckless misconduct as it would treat an accident. This is not consistent with the majority's own statement that "the reprehensibility of Exxon's conduct that produced economic harm to thousands of individuals is high ..." *Id.*

Thus, unlike the majority, I find that all five of *State Farm's* reprehensibility factors suggest that Exxon's reckless conduct in this case-the malicious endangerment of the property and livelihood of thousands of Alaskans-was highly, if not extremely, reprehensible and capable of "warrant [ing] a substantial penalty." *See BMW,* 517 U.S. at 576.

(b) Ratio

Under the second *BMW* guidepost, we must analyze "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *See id.* at 418. While I agree with the majority's "calculation of harm," or "numerator," analysis, *ante* at 623 [38a], I cannot agree with its conclusion, *id.* at 624 [40a], that the Constitution prohibits a ratio in this case above 5 to 1. The majority arrives at this constitutional limit through two steps. First, it uses the "rough framework" of *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists,* 422 F.3d 949 (9th Cir. 2005), to arrive at the conclusion that the appropriate ratio in this case is above 4 to 1, but no greater than 9 to 1. *Ante* at 623 [39a-40a]. However, it then asserts the proper ratio cannot be much greater than 4 to 1 because Exxon's conduct was not intentional and because Exxon attempted to mitigate the harm it caused. *Ante* at 623-24 [40a]. I cannot agree with this.

In *Planned Parenthood*, we established a three-tiered "rough framework" to guide us in determining an appropriate ratio.[11] Applying *Planned Parenthood* to this case, the majority concludes a 4 to 1 benchmark is appropriate based on its determination that the economic damages are "significant." *Ante* at 623 [39a]. As an initial matter, the majority's assessment of economic damages focuses on a number devoid of its context. An award is significant not because it is numerically large, but rather because it approaches full compensation for the plaintiff's harms. *See State Farm*, 538 U.S. at 426 ("The compensatory award in this case was substantial;[the plaintiffs] were awarded $1 million for a year and a half of emotional distress. This was complete compensation."). I am not convinced that a compensatory damages award that equates to a mere $10,000 per plaintiff is actually "substantial" in the way the Supreme Court uses the term. *Cf. id.* at 425 (providing, as an example of "small" economic damages, cases where the injury was hard to detect or not fully economic in nature).

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[11] Where the economic damages are significant but the behavior not "particularly egregious," a ratio of less than 4 to 1 is warranted. *Planned*

Even if the majority were correct that the economic damages awarded in this case are "significant," *Planned Parenthood* still does not support a 4 to 1 benchmark in this case. In *Planned Parenthood*, we refused to remit the award to less than a 9 to 1 ratio because not all of the plaintiff's damages were quantifiable, not all of it was compensated, and the plaintiffs were likely to incur further costs. 422 F.3d at 963. All three are true here as well. The oil spill disrupted the social fabric of the plaintiffs' community. *See In re Exxon Valdez*, 296 F. Supp. 2d at 1094. This type of harm is not easily quantifiable. Moreover, the plaintiffs' recovery in this case was limited to economic harm. It therefore did not compensate the plaintiffs for harm attributable to increased "social conflict, cultural disruption and psychological stress." *Id.* Finally, there is evidence the plaintiffs have incurred substantial further costs. *See id.* Thus, it cannot be said the

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Parenthood, 422 F.3d at 962. If the economic damages are significant but the behavior "more egregious," a ratio greater than 4 to 1 might be acceptable. *Id.* Finally, if the economic damages are insignificant but the behavior is "particularly egregious," ratios beyond single digits may be appropriate. *Id.*

compensatory damages in this case are so large or sufficiently comprehensive they warrant a lower punitive damages award.

Nor, in my mind, does the majority find support in *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), or *Bains LLC v. Arco Products Co.*, 405 F.3d 764 (9th Cir. 2005). That we upheld an award in the 7 to 1 range in *Zhang*, and remanded for a similar award in *Bains*-both for intentional racial discrimination in the employment context-says little if nothing about the constitutionality of this award for the reckless endangerment of the property and livelihood of tens of thousands of people. While it is true any given conduct is more reprehensible if intentional than if reckless, it does not necessarily follow that all intentional conduct is more reprehensible than all reckless conduct. Indeed, because we are the first court to review an award for misconduct resulting in harm of the type and scale at issue here, I find it unhelpful to note that our cases to date "have generally reserved high single-digit ratios for the most egregious forms of intentional misconduct, such as threats of violence and intentional racial discrimination." *See ante* at 623 [39a]. Instead, every indicator in this case suggests that Exxon's reckless conduct-leaving for three years a known alcoholic in command of a supertanker in treacherous waters upon which thousands of people depend-is egregious enough to support an award within the 9 to 1 range. *Accord Swinton*, 270 F.3d at 818-20 (upholding a 28 to 1 ratio despite recognizing that the conduct at issue involved no acts or threats of violence and, therefore, "[did] not amount to the worst kind of tortious conduct a defendant can commit").

One final consideration convinces me that the 8.93 to 1 ratio in this case does not indicate that Exxon has been subject to a "grossly excessive" punitive damages award. In State Farm, the Supreme Court reiterated that it is appropriate to consider for purposes of ratio calculation not only the actual harm caused, but the potential harm that a defendant's misconduct could have foreseeably caused. *See* 538 U.S. at 418 (describing the second guidepost as requiring consideration of "the actual or potential harm suffered" (emphasis added) (citing *BMW*, 517 U.S. at 575)); *accord TXO*, 509 U.S. at 460 ("Taking account of the potential harm that might result from the defendant's conduct in calculating punitive damages was consistent with the views we expressed in *Haslip*." (internal citation omitted)). As the majority recognizes, *ante* at 615 [26a], the potential harm from Exxon's decision to keep Hazelwood in command of the *Exxon Valdez* was both massive and foreseeable. But despite the propriety of such consideration, the calculation of harm in this case explicitly incorporates only an estimate of actual, and not of potential, harm. *See In re Exxon Valdez*, 296 F. Supp. 2d at 1103; *ante* at 623 [38a]. Thus, if anything, the jury's punitive damages award potentially undervalued the harm.

Conclusion

In accordance with *State Farm* and its predecessors, we are required to subject this award to "exacting [de novo] appellate review" in order to ensure it is "based upon an application of law, rather than a decisionmaker's caprice." *See* 538 U.S. at 418 (internal quotation marks omitted) (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). But that review does not empower us to substitute our own, perhaps more finely-tuned, award for one that was fairly awarded and already lies within the range of constitutional awards. *See BMW*, 517 U.S. at 583 (noting that most awards fall within a "constitutionally acceptable *range*" (emphasis added)).

After thorough and concerned analysis of this punitive damages award, I conclude that its imposition does not violate Exxon's constitutional right to due process. The award was levied as a result of fair procedure and in pursuit of the undisputedly strong, and properly circumscribed, state interests in punishing Exxon for its misconduct, and in deterring any similar behavior by Exxon in waters it continues to frequent. While the award is large, it addresses what must be characterized as extremely reprehensible misconduct. There is simply no excuse for allowing a relapsed alcoholic to pilot a supertanker in any waters, much less for three years in the treacherous and treasured waters of Prince William Sound. Exxon's knowing decision to do so was a malicious one that placed at massive risk, and ultimately seriously injured, the property and livelihood of tens of thousands of Alaskans. There is every indication the award before us reasonably addresses that egregious behavior, and nothing in the record that suggests it resulted from passion, bias, or caprice. I therefore agree with the district court's assessment that there is no principled means by which this award should be reduced. *See In re Exxon Valdez,* 296 F. Supp. 2d at 1110. Accordingly, and with respect, I dissent.

APPENDIX B

United States Court of Appeals,
for the Ninth Circuit.

In re: The EXXON VALDEZ,

Grant Baker, et al., as representatives of the Mandatory Punitive Damages Class,
Plaintiffs-Appellees,

v.

Joseph Hazelwood,
Defendant,
and Exxon Corporation;
Exxon Shipping Company,
Defendants-Appellants.

Grant Baker, et al., as representatives of the Mandatory Punitive Damages Class,
Plaintiffs-Appellees,

v.

Exxon Corporation;
Exxon Shipping Company,
Defendants,

And Joseph Hazelwood,
Defendant-Appellant.

Daniel R. Calhoun;
Bradford J. Chisholm;
David P. Clarke;
Thomas S. McAllister;
Phillip G. McCrudden;

No. 04-35183

D.C. No.
CV-89-00095-HRH
OPINION

Michael J. McClenaghan;
Guy Piercey;
Hugh Wisner;
Grant C. Baker;
Larry L. Dooley;
Kim J. Ewers;
John W. Herschleb;
Kent Herschleb;
David B. Horne;
Michael J. Owecke;
Gerald E. Thorne;
George A. Gordaoff;
Old Harbor Native Corporation;
Timberline, Inc.; Barbara Brown;
John Foges; Jamie L. Halladay;
Charles McMahon;
Jennifer Briggs; Terri Mast;
Mark T. Coles; Fred Galicano;
Mike Hollerbeke; Kathy Bryan;
Vincent Libed; Art Huddleston;
Robert Love; Roxane Villaueva;
Marcelo Rombaoa; Scott Hulbert;
Brian Gillis;
Frank Michael Carlson;
Elenor McMullen;
Native Village of Larsen Bay;
Native Village of Chenega Bay,
Plaintiffs-Appellants,

v.

Exxon Corporation;
Exxon Shipping Company; Joseph Hazelwood,
Defendants-Appellees.

Nos. 97-35191 to 97-35193 and 97-35235.

Appeal from the United States District Court
for the District of Alaska;
H. Russell Holland, District Judge, Presiding.
D.C. Nos. CV-89-00085-HRH, CV-89-00095-HRH.

Argued and Submitted May 3, 1999
Filed Nov. 7, 2001
Affirmed in part, vacated in part, and remanded.

COUNSEL

John F. Daum, O'Melveny & Myers, LLP, Los Angeles, California, for appellant Exxon Corporation.

David M. Heilbron (briefed), McCutchen, Doyle, Brown & Enersen, LLP, San Francisco, California, for appellant Exxon Shipping Company.

Thomas M. Russo (briefed), Chalos & Brown, P.C., New York, New York, for appellant Joseph Hazelwood.

David C. Tarshes (briefed), David W. Oesting, Stephen M. Rummage, Davis, Wright, Tremaine, LLP, Anchorage, Alaska, for the appellees.

Brian B. O'Neill (argued), Faegre & Benson, Minneapolis, Minnesota, James vanR. Springer, Dickstein Shapiro Morin & Oshinsky LLP, Washington, DC, for the appellees.

Before: SCHROEDER, Chief Judge,
BROWNING and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

This is an appeal of a $5 billion punitive damages award arising out of the *Exxon Valdez* oil spill. This is not a case about befouling the environment. This is a case about commercial fishing. The jury was specifically instructed that it could not award damages for environmental harm. The reason is that under a stipulation with the United States and Alaska, Exxon had already been punished for environmental harm.[1] The verdict in this case was for damage to economic expectations for commercial fishermen.

The plaintiffs here were almost entirely compensated for their damages years ago. The punitive damages at issue were awarded to punish Exxon,[2] not to pay back the plaintiffs. Among the issues are whether punitive damages should have been barred as a matter of law and whether the award was excessive. The law began changing shortly after judgment, and important aspects of this opinion are controlled by a Supreme Court decision that came down only last term, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[3]

Facts

Bligh Island and Bligh Reef have been known to navigators for a long time. Captain George Vancouver charted and named the island on his third voyage to the North Pacific on the *Discovery* in 1794.[4] The Bligh Island Reef has long been mapped on U.S. Coast and Geodetic Survey maps, shortened to Bligh Reef by the Coast and Geodetic Survey in 1930.[5] Captain William Bligh and Vancouver had been officers together sixteen years earlier, on the *Resolution,* when Captain

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[1] *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 774 (9th Cir.1994).

[2] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 1683 (2001); *Morgan v. Woessner,* 997 F.2d 1244 (9th Cir. 1993); *see also Hawkins v. United States,* 30 F.3d 1077, 1083-84 (9th Cir. 1994) (describing punitive damages as a windfall).

[3] 532 U.S. 424, 121 S. Ct. 1678 (2001).

[4] Hubert Howe Bancroft, *History of Alaska* 277-81 (1886); Donald J. Orth, *Dictionary of Alaska Place Names,* entries for Bligh Island, Bligh Reef (Geological Survey Professional Paper 567 1971), *available in Alaska Place Names Dictionary on CD-ROM* (Scarp Exploration, Inc.1998).

[5] Donald J. Orth, *Dictionary of Alaska Place Names,* entries for Bligh Island, Bligh Reef (Geological Survey Professional Paper 567 1971), *available in Alaska Place Names Dictionary on CD-ROM* (Scarp Exploration, Inc.1998).

James Cook, among the greatest navigators in history, explored Alaska and the South Pacific.[6]

Captain William Bligh is infamous from Fletcher Christian's mutiny on the *Bounty.*[7] The infamy was refreshed in 1989, the 200th anniversary of the mutiny on the *Bounty,* by Captain Joseph Hazelwood of the *Exxon Valdez.*

On March 24, 1989, the oil tanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, Alaska. It has never been altogether clear why the *Exxon Valdez* ran aground on this long known, well-marked reef. Because we are reviewing a case that resulted in a jury verdict, we interpret the evidence, and state our account, most favorably to the parties successful at trial.[8]

The vessel left the port of Valdez at night. In March, it is still dark at night in Valdez, the white nights of the summer solstice being three months away. There is an established sea lane that takes vessels well to the west of Bligh Reef, but Captain Hazelwood prudently took the vessel east of the shipping lanes to avoid a heavy concentration of ice in the shipping lane, which is a serious hazard. Plaintiffs have not claimed that Captain Hazelwood violated any law or regulation by traveling outside the sea lane. The problem with being outside the sea lane was that the ship's course was directly toward Bligh Reef.

Bligh Reef was not hard to avoid. All that needed to be done was to bear west about the time the ship got abeam of the navigation light at Busby Island, which is visible even at night, some distance north of the reef. The real puzzle of this case was how the ship managed to run aground on this known and foreseen hazard.

There was less than a mile between the ice in the water, visible at night only on radar, and the reef. Captain Michael Clark, an expert witness for the plaintiffs, testified that an oil tanker is hard to turn, more like a car on glare ice than a car on asphalt:

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[6] David Waters, Navigational Problems in Captain Cook's Day, *in Exploration in Alaska* 41, 55 (Antoinette Shalkop, ed.1980).

[7] IV *Encyclopdia Britannica* (11th Ed.1910).

[8] *See Underhill v. Royal,* 769 F.2d 1426, 1435 (9th Cir. 1985).

> Q: Let's talk a minute about how you turn one of these vessels. Now, this we're talking about a vessel here that's in excess of 900 feet long, all right? Over three football fields.
>
> What's it like to turn one of these?
>
> A: Well, it's not like turning a car or a fishing boat or something. There is a-as you are traveling in one direction and you put the rudder over, even though the head of the vessel will turn, your actual direction of travel keeps going in the old direction. Sort of like you're steering a car on ice; you turn the wheel and you just keep going in the same direction. Eventually you'll start to turn and move in the direction you're headed for.
>
> Q: Okay. Is it just as easy as turning a car?
>
> A: No.
>
> Q: And does it make any sense to try to compare changing course in one of these vessels fully laden to that of turning a corner with a car?
>
> A: No.
>
> Q: To make it turn on a vessel, there has to be a rudder command given?
>
> A: Yes.
>
> Q: And once you give that rudder command, is that the end of the turn?
>
> A: No. No, you have to watch and make sure that the rudder command is made as you ordered it and to make sure that it's having the desired effect.
>
> Q: Is there anything else that has to be done in order to put it on the course that you want it on?
>
> A: Yes, you usually have to give counter rudder to

slow the turn down.[9]

Considering the ice in the water, the darkness, the importance of turning the vessel away from Bligh Reef before hitting it, and the tricky nature of turning this behemoth, one would expect an experienced captain of the ship to manage this critical turn.

But Captain Hazelwood left the bridge. He went downstairs to his cabin, he said, to do some paperwork. A special license is needed to navigate the oil tanker in this part of Prince William Sound, and Captain Hazelwood was the only person on board with the license. There was testimony that captains simply do not leave the bridge during maneuvers such as this one and that there is no good reason for the captain to go to his cabin to do paperwork at such a time. Captain Hazelwood left the bridge just two minutes before the turn needed to be commenced, which makes it all the more strange that he left at all.

Before leaving, Captain Hazelwood added to the complexity of the maneuver that needed to be made: he put the vessel on autopilot, which is not usually done when a vessel is out of the shipping lanes, and the autopilot program sped the vessel up, making it approach the reef faster and reducing the time during which error could be corrected. As Captain Hazelwood left, he told Cousins, the third mate, to turn back into the shipping lane once the ship was abeam of Busby Light. Though this sounds plain enough, expert witnesses testified that it was a great deal less clear and precise than it sounds.

Captain Hazelwood's departure from the bridge, though unusual, was not inexplicable. The explanation put before the jury was that his judgment was impaired by alcohol. He was an alcoholic. He had been treated medically, in a 28 day residential program, but had dropped out of the rehabilitation program and fallen off the wagon. He had joined Alcoholics Anonymous, but had quit going to meetings and resumed drinking. Testimony established that prior to boarding his ship, he drank at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars in Valdez. The jury could have concluded from the evidence before them that leaving the bridge was an extraordinary lapse of judgment caused by Captain Hazelwood's intoxication. There was also testimony that the highest executives in Exxon Shipping knew Hazelwood had an alcohol problem, knew he had been treated for it, and knew that he had fallen off the wagon and was drinking on board their ships and in waterfront bars.

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[9] D.R. 10/1149.

There are supposed to be two officers on the bridge, but after Hazelwood left, there was only one. The bridge was left to the fatigued third mate, Gregory Cousins, a man in the habit of drinking sixteen cups of coffee per day to keep awake. Cousins was not supposed to be on watch-his watch was ending and he was supposed to be able to go to sleep-but his relief had not shown up, and Cousins felt that it was his responsibility not to abandon the bridge. He was assisted only by the helmsman, Robert Kagan. Kagan, meanwhile, had forgotten his jacket, ran back to his cabin for it, and returned to the bridge a couple of minutes before the time the turn had to be initiated. Cousins and Kagan thought they had conducted the maneuver, but evidently they had not. When Cousins realized that the vessel was not turning, he directed an emergency maneuver that did not work.

Shortly after midnight on March 24, 1989, the tanker ran onto Bligh Reef. The reef tore the hull open. Prince William Sound was polluted with eleven million gallons of oil.

Exxon spent over $2 billion on efforts to remove the oil from the water and from the adjacent shores, and even from the individual birds and other wildlife dirtied by the oil. It also began an extensive program of settling with property owners, fishermen and others, whose economic interests were harmed by the spill. Some were paid cash without providing releases, some released some claims but not all, and some released all claims. Exxon spent $300 million on voluntary settlements prior to any judgments being entered against it.

The State of Alaska and the United States brought actions against Exxon for the injury to the environment. Those cases were resolved by entry of a consent decree on October 8, 1991, under the terms of which Exxon agreed to pay at least $900 million to restore damaged natural resources.[10] Hundreds of private civil actions were filed in federal and state court.[11] Numerous issues have been resolved on appeal regarding various aspects of the complex litigation arising out of the disaster.[12]

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[10] *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 774 (9th Cir. 1994).

[11] *Id.* at 774

[12] *See Baker v. Exxon Corp.*, 239 F.3d 985 (9th Cir. 2001) (explaining that a defendant may require settling plaintiffs to assign their right to share in any punitive damage award as a condition of settlement); *In re Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000) (holding that cede-back agreements are enforceable and should not be revealed to a jury); *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Service Co.*, 206 F.3d 900 (9th Cir. 2000) (holding that the defendants were not prejudiced by a bailiff's inappropriate ex parte contact with a juror and that a district court's findings about alleged threats to one juror by other jurors were not clearly erroneous); *Payne v. Exxon Corp.*, 121 F.3d 503 (9th Cir. 1997) (concluding that the district court had the authority to dismiss the plaintiff's maritime negligence claim against the second defendant even though the first defendant had made discovery requests of the second defendant); *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166 (9th Cir. 1997) (vacating declaratory judgment on certain issues from the spill for improperly preempting the state court); *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997) (holding that the Alaska natives failed to prove special injury to communal life warranting recovery of non-economic damages for public nuisance); *Allen v. Exxon Corp.*, 102 F.3d 429 (9th Cir. 1996) (holding that the district court did not abuse its discretion in dismissing cases with prejudice as a discovery sanction); *Adkins v. Trans-Alaska Pipeline Liability Fund*, 101 F.3d 86 (9th Cir. 1996) (stating that the Fund rule limiting the time to request reconsideration and barring the submission of new documents did not violate due process and that the Fund properly denied claims that were too causally or geographically remote); *Youell v. Exxon Corp.*, 74 F.3d 373 (2d Cir. 1996) (explaining that a federal court is required to hear the case of whether global corporate excess insurance covered the loss from the spill despite parallel state court proceedings because it concerns a novel issue of federal admiralty law); *Exxon Shipping Co. v.*

U.S. Dept. of Interior, 34 F.3d 774 (9th Cir. 1994) (explaining that the federal housekeeping statute permitting an agency head to regulate employee conduct and have custody of certain records does not create a privilege or shield an employee from subpoena); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994) (holding that the United States and the State of Alaska as public trustees under the CWA and CERCLA could recover all lost use damages caused by the spill and that private claims for lost recreational use were barred under res judicata); *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773 (9th Cir. 1994) (holding that the pipeline company's notice of removal more than a year after it became aware of the nature of the plaintiffs' claims was untimely); *Benefiel v. Exxon Corp.*, 959 F.2d 805 (9th Cir. 1992) (affirming the dismissal for failure to state a claim of consumers who sought damages for the increased prices they had to pay for gas because of the spill); *SeaRiver Maritime Financial Holdings, Inc. v. Slater*, 35 F. Supp. 2d 756 (D. Alaska 1998) (stating that the dispute over whether the *Exxon Valdez* had been unconstitutionally barred from Prince William Sound was barred by the consent decree which provided that the parties were settling all claims); *Seariver Maritime Financial Holdings, Inc. v. Pena*, 952 F. Supp. 9 (D.D.C.1997) (holding that forum non conveniens counseled transfer to Alaska of the case challenging a section of the Oil Pollution Act which prohibited the oil tanker from traveling in the Prince William Sound); *Seariver Maritime Financial Holdings, Inc. v. Pena*, 952 F. Supp. 455 (S.D.Tex.1996) (dismissing complaint without prejudice for improper venue); *In re Exxon Valdez*, 142 F.R.D. 380 (D.D.C.1992) (granting plaintiffs' request for an order enforcing a non party subpoena of American Petroleum Institute's documents); *In re Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991) (denying pipeline company's motion for judgment on the pleadings); *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769 (Alaska 1999) (concluding that the Oil Pollution Act assigned to a native corporation federal claims for spill related harm to federal lands and that the superior court erred by precluding the jury from considering these claims); *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757 (Alaska 1999) (reversing summary judgment against municipalities seeking to recover diverted services damages from their response to the oil spill because their claims were authorized by state statute); *State v. Hazelwood*, 946 P.2d 875 (Alaska 1997) (stating that the mens rea requirement for the negligent discharge of oil could be satisfied by the civil negligence standard without violating the defendant's due process rights under the Alaska constitution); *State v. Hazelwood*, 866 P.2d 827 (Alaska 1993) (explaining that the doctrine of inevitable discovery applies to statements immunized because they involved the report of an oil spill); *Hazelwood v. State*, 962 P.2d 196 (Alaska App.1998) (affirming Hazelwood's conviction for the negligent

This case involves the action for compensatory and punitive damages by entities affected by the spill. The District Court certified a Commercial Fishing Class, a Native Class, and a Landowner Class for compensatory damages. The district court also certified a mandatory punitive damages class, so the award would not be duplicated in other litigation and would include all punitive damages the jury thought appropriate. For purposes of this litigation, Exxon stipulated that its negligence caused the oil spill. The district court, which did a masterful job of managing this very complex case, tried the case to the jury in three phases. In the first phase, the jury found that Hazelwood and Exxon had been reckless, in order to determine liability for punitive damages. The second phase assessed the amount of compensatory damages attributable to the spill to commercial fishermen and Alaska Natives. The third phase established the amount of punitive damages. A fourth phase, which settled before trial, was to determine the compensatory damages of plaintiffs whose damages were not determined in Phase II, including landowners and participants in other commercial fisheries.

The jury awarded $287 million in compensatory damages, from which the court deducted released claims, settlements, and payments by the Trans-Alaska Pipeline Liability Fund to find net compensatory damages of $19,590,257. The jury also awarded, in what was then the largest punitive damages award in American history, $5 billion in punitive damages against Exxon, as well as $5,000 in punitive damages against Hazelwood.

After extensive post-trial motion litigation, the district court entered judgment for the plaintiffs against Hazelwood and Exxon. Exxon and Hazelwood timely appealed. Plaintiffs cross appealed.

Analysis

To assure that we respond to all the points raised in the

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discharge of oil because the erroneous admission of evidence was harmless beyond a reasonable doubt).

very lengthy briefs, we treat the issues in the order that the appellants and cross appellants raise them.

I. Punitive Damages Permissibility.

Exxon argues that punitive damages ought to have been barred as a matter of law because as a matter of policy they are inappropriate in the circumstances, and because other principles of law bar them.

A. Policy.

Exxon argues that as a matter of due process, no punitive damages can be awarded in this case because the criminal and civil sanctions, cleanup expenses and other consequences of the spill have already so thoroughly punished and deterred any similar conduct in the future that no public purpose is served by the award. Exxon was sanctioned with a fine and restitution award of $125 million for environmental crimes. The prosecutors and the district court, in approving the plea agreement and sentence, emphasized its sufficiency. Exxon also spent $2.1 billion cleaning up the spill, a massive deterrent to repeating the conduct that led to it. The expenses associated with the spill hurt Exxon's profits, even though the punitive damages award has not yet been paid pending resolution of this appeal.

As plaintiffs correctly point out, a prior criminal sanction does not generally, as a matter of law, bar punitive damages.[13] Exxon's argument has some force as logic and policy. But it has no force, in the absence of precedent, to establish that the law, or the Constitution, bars punitive damages in these circumstances. Because we have not been made aware of a principle of law pursuant to which we should strike a punitive damages award on the ground that the conduct had already been sufficiently punished and deterred, we reject the argument.

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[13] *Restatement (Second) of Torts* § 908, cmt. a (1979) (explaining that punitive damages in a civil case are not to be granted or not granted based on a prior criminal conviction).

B. Punitive Damages in Maritime Law.

Exxon argues that punitive damages are not traditionally allowable in admiralty law. The argument is mistaken. Sometimes punitive damages are allowable, sometimes they are not.[14]

Exxon also argues that our decision in *Glynn v. Roy Al Boat Management Corp.* requires reversal of the punitive damages award.[15] That case is plainly distinguishable and carries no such implication. *Glynn* was not a maritime tort case such as the one at bar. *Glynn* was about maintenance and cure, which "is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery."[16] We held there that punitive damages were unavailable in maintenance and cure cases, for three reasons: (1) under *Vaughan v. Atkinson,*[17] attorneys' fees were available to deter the same kind of misconduct for which punitive damages may be used; (2) maintenance and cure is "pseudo-contractual" and punitive damages are traditionally unavailable for breach of contract; and (3) under *Miles v. Apex Marine Corp.,*[18] we were not free to expand seamen's remedies at will.[19] *Glynn* concerns an entirely different cause of action and none of the reasons for the *Glynn* rule apply here. It would thus be inappropriate for us to apply the *Glynn* rule to a general maritime tort case such as this one.

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[14] *See, e.g., The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) (explaining that "if this were a suit against the original wrong-doers," punishment by exemplary damages might be appropriate); *South Port Marine, LLC v. Gulf Oil Limited Partnership*, 234 F.3d 58, 64-65 (1st Cir. 2000) (explaining that general admiralty and maritime law "has traditionally provided for the general availability of punitive damages for reckless conduct" but holding that punitive damages are not available under the Oil Pollution Act); *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421, 1423 (11th Cir. 1997) (" [T]he general maritime law does not allow for the recovery of punitive damages except on a showing of willful and wanton misconduct."); *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995) ("Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others."); *Churchill v. F/V Fjord*, 892 F.2d 763, 772 (9th Cir. 1988) ("Punitive damages are available under the general maritime law."); *Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985) (holding that the dock owners were vicariously liable for punitive damages); Thomas J. Schoenbaum, *Admiralty and Maritime Law*, Practitioner's Edition § 4-14 (1987) ("Punitive damages are available under the general maritime law if the conduct causing the injury is willful, wanton, grossly negligent, or unconscionable so as to evince a callous disregard for the rights of others.").

[15] 57 F.3d 1495 (9th Cir. 1995); *see also Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1503 (5th Cir. 1995) (en banc) (holding that because the Jones Act limitations did not provide for punitive damages in the wrongful death and personal injury area, the plaintiff could not get punitive damages under general maritime law); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1349 (9th Cir. 1989) ("We hold that where an action under DOSHA is joined with a Jones Act action, neither statutory scheme may be supplemented by the general maritime law or by state law" to allow an award of punitive damages).

C. Res Judicata.

Exxon argues that the punitive damages award must be vacated as a matter of law because it is barred by res judicata. The State of Alaska and the United States sued Exxon and related defendants under a provision of the Clean Water Act. The Act, as it stood at the time of the spill,[20] entitled federal and state representatives to "act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources,"[21] as well as establishing civil penalties.[22] Claims were allowed against the owner or operator of a vessel from which oil was illegally discharged.[23] Recovery of penalties and costs was limited to a monetary ceiling unless the spill resulted from "willful negligence or willful misconduct," in which case the ceiling on costs was removed and the owner or operator may be liable "for the full amount."[24]

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[16] *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1962).

[17] 369 U.S. 527 (1962).

[18] 498 U.S. 19 (1990).

[19] *Glynn,* 57 F.3d at 1505.

[20] *See* 33 U.S.C. § 1321 (1994) historical and statutory notes ("applicable to incidents occurring after Aug. 18, 1990, see section 1020 of Pub.L. 101-380, set out as an effective date note under section 2701 of this title.").

[21] 33 U.S.C. § 1321(f)(5) (1990).

The consent decree pursuant to which the case was settled states that the $900 million settlement is "compensatory and remedial," and none of the amounts are described as punitive. Though the government signatories released all government claims, the consent decree provides explicitly that "nothing in this agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement."

Exxon's argument is essentially that the governments released plaintiffs' private claims, even though plaintiffs did not consent to any such release, because the governments were acting as *parens patriae* for the private claimants, and because punitive damages plaintiffs act as "private attorneys general," a prohibited exercise when the actual public attorneys general have already discharged the claims.

The authority on which Exxon relies, *Alaska Sport Fishing Ass'n v. Exxon Corp.*, though, is distinguishable.[25] The sport fishermen there did not claim any damages to any property they owned or economic interests, just to the *ferae naturae*, the natural resource of fish in the wild.[26] The sport fishermen's claims made were on behalf of the general public as to the lost use of un-owned natural resources, and we held that the state acted as *parens patriae* to protect its sovereign interest in these natural resources, so the plaintiffs were in privity with the state and were barred by the consent decree.[27]

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[22] 33 U.S.C. § 1321(b)(6)(B).

[23] 33 U.S.C. § 1321(b)(6)(A)-(B) (1990); 33 U.S.C. § 1321(f)(1) (1990).

[24] 33 U.S.C. § 1321(f)(1) (1990).

[25] 34 F.3d 769 (9th Cir. 1994).

[26] *Id.* at 770; *see also Alliance Against IFQ's v. Brown*, 84 F.3d 343, 344 (9th Cir. 1996) (citing *Pierson v. Post*, 3 Caines 175, 2 Am. Dec. 264 (N.Y.1805)).

By contrast, here the plaintiffs sued to vindicate harm to their private land and their ability to fish commercially and fish for subsistence. The consent decree was expressly not "intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement." The consent decree did not affect claims regarding private land. It also did not affect the individual claims of commercial and subsistence fishermen involving lost income and lower harvests, which are distinguishable from the rights of recreational fishermen. Commercial and subsistence fishermen are "favorites of admiralty" and their rights are frequently given special protection.[28] The Tenth Circuit has similarly decided such an issue.[29]

As for the "private attorneys general" metaphor, it is just that, a metaphor, and "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[30] The metaphor is faulty here. The consent decree in the case at bar explicitly covered payments that are "compensatory and remedial in nature," not punitive, so there can be no serious claim that the actual attorneys general already obtained the punishment that the plaintiffs obtained in the case at bar.

The parties must have intended to preserve private claims by their language expressly excluding them from the settlement. The *Alaska Sport Fishing* case does compel the conclusion that Exxon cannot be punished in this case for harming the environment and the general public. That is why we mentioned at the outset that this is not a case about befouling the environment. The punitive damages in this case are for harming the economic interests of commercial fishermen, the availability of fish to native subsistence fishermen, and private land. As such, the harm and the punishment is distinct from the harm to the environment and natural resources that we held in *Alaska Sport Fishing* had already been vindicated.

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[27] *Id.* at 773.

[28] *Cf. Carbone v. Ursich*, 209 F.2d 178, 182 (9th Cir. 1953).

[29] *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (holding that a consent decree between Colorado and a polluting corporation had a res judicata effect on all claims brought by the state but not on the private damage claims an individual might bring that differed from the claims in the consent decree).

[30] *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84, 94, 155 N.E. 58 (1926).

D. Statutory preemption of common law.

Exxon argues that the common law punitive damages remedy has been preempted by the comprehensive scheme for oil spill remedies in the Clean Water Act. Plaintiffs argue that Exxon waived this argument, and that even if Exxon did not waive it, far from preempting additional remedies, the statutory scheme expressly preserves them.

First, we consider waiver. Plaintiffs correctly point out that before the case went to trial on punitive damages, Exxon's statutory preemption argument focused only on the Trans-Alaska Pipeline Authorization Act,[31] not the Clean Water Act.[32] Exxon does not maintain on appeal its argument based on the Trans-Alaska Pipeline Authorization Act, so we do not consider that Act.

After the $5 billion verdict came back in the punitive damages case on October 23, 1995, Exxon tendered for filing a motion for judgment on punitive damages, along with a motion to lift a stay then in effect. Exxon argued that the verdict should be vacated as a matter of law, because common law punitive damages were preempted *both* by the Trans-Alaska Pipeline Authorization Act *and* by the Clean Water Act. Plaintiffs erroneously argued that the stay should not be lifted on the ground that the motion argued nothing new and merely reiterated the punitive damages argument previously ruled upon. The district court denied the motion to lift the stay and to file the motion.

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[31] 43 U.S.C. §§ 1651-56.

[32] 33 U.S.C. §§ 1251-1387.

We conclude that the issue should not be treated as waived. Exxon clearly and consistently argued statutory preemption as one of its theories for why punitive damages were barred as a matter of law, and argued based on the Clean Water Act prior to entry of judgment. Because the issue is massive in its significance to the parties and is purely one of law, which requires no further development in district court, it would be inappropriate to treat it as waived in the ambiguous circumstances of this case.[33]

Exxon further argues that because the Clean Water Act does not provide for punitive damages and does provide a comprehensive remedial scheme, punitive damages should be deemed preempted. Before and after the *Exxon Valdez* oil spill, the Clean Water Act's section on "Oil and hazardous substance liability" provided a carefully calibrated set of civil penalties for oil spills, generally with ceilings on penalties, even if the spills were grossly negligent or willful.[34]

Exxon's argument is that this carefully graduated and limited set of liabilities by implication precludes such unlimited and non-compensatory liability as the $5 billion punitive damages award in this case. In support of this inference, Exxon points to the Supreme Court decisions in *Miles v. Apex Marine Corp.*[35] and in *Middlesex County Sewerage Authority*

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[33] *United States v. Northrop Corp.*, 59 F.3d 953, 957 n. 2 (9th Cir. 1995).

[34] *See* 33 U.S.C. § 1321(b)(6)(B) (1990). Exxon also points to 33 U.S.C. § 1319, which provides for fines and civil penalties for violations of effluent standards and permits. Civil penalties cannot be assessed under both § 1321 and § 1319 for the same discharge. 33 U.S.C. § 1321(b)(6)(E) (1990). Because § 1321 directly treats oil spills from vessels, that is the section with which we concern ourselves.

[35] 498 U.S. 19 (1990).

v. National Sea Clammers Ass'n,[36] as well as to two circuit court cases.

Miles does not offer substantial support for Exxon's argument. It holds that loss of society and loss of future income are not compensable in a seaman's wrongful death case.[37] The reasoning is based on the long and technical history of wrongful death actions, and the traditional restrictions of wrongful death remedies in Lord Campbell's Act.[38] True, the Congressional limitations were held to prevent an inference of broader remedies in the general maritime law, but the tort was the specialized and traditionally limited one of wrongful death.

Sea Clammers raises a serious question. In *Sea Clammers,* plaintiffs claimed that the EPA and Army Corps of Engineers had permitted discharge of sewage into New York Harbor and the Hudson beyond what the statutes allowed, and that the permittees had violated their permits.[39] The Court held that the Clean Water Act and the Marine Protection, Research, and Sanctuaries Act provided a carefully structured set of citizens' remedies,[40] but not the private action for monetary and injunctive relief sought in the case, so Congress must not have meant to provide for this additional remedy.[41] A common law nuisance remedy was precluded.[42]

Though the question is not without doubt, we conclude that the better reading of the Clean Water Act is that it does not preclude a private remedy for punitive damages. The Clean Water Act section on oil and hazardous substance liability states:

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[36] 453 U.S. 1 (1981).

[37] *See Miles,* 498 U.S. at 37.

[38] *See id.* at 32.

[39] *See Sea Clammers,* 453 U.S. at 12.

[40] 33 U.S.C. §§ 1401-45.

[41] *See id.* at 14, 21-22.

[42] *See id.* at 21-22.

> Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.[43]

In section 1365, the Clean Water Act expressly provides that it does *not* preempt common law rights to other relief:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation *or to seek any other relief....*"[44]

The section 1365 savings clause was held in *Sea Clammers* *not* to preserve the claims plaintiffs made, but there the claims were for violations of the Act in which the savings clause was found, and the Court explained that "[i]t is doubtful that the phrase 'any statute' includes the very statute in which this statement was contained."[45] By contrast, the action in the case at bar is entirely at common law and not for violation of the statute in which the savings clause is found.

The nuisance action, more analogous to the claims in the case at bar, was also held in *Sea Clammers* to be preempted by the Clean Water Act, following *Milwaukee v. Illinois.*[46] *Milwaukee* held that a federal district court could not impose and enforce more stringent effluent limitations than those established by the administrative agency charged with enforcement of the Clean Water Act, so for purposes of a claim seeking that relief, the Clean Water Act preempted the common law remedy.[47] That is, the administrative agency decided to subordinate to some degree the interest in protecting shellfish and bottomfish to the interest in allowing a city to dispose of its sewage, and the district court was not allowed to change that balance and allow bottomfish protection to trump safe disposal of sewage. In the case at bar, Exxon does not argue that the plaintiffs seek any remedies that might conflict with the decision of an administrative agency charged with enforcement responsibility.

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[43] 33 U.S.C. 1321(*o*)(1) (1990).

[44] 33 U.S.C. § 1365(e) (emphasis added).

[45] *Sea Clammers,* 453 U.S. at 15-16.

[46] 451 U.S. 304 (1981).

The issue is close, particularly because the Clean Water Act effective at the time of the *Exxon Valdez* spill provides for civil penalties for oil spills and limits them to $50,000, or "where the United States can show that such discharge was the result of willful discharge or willful misconduct," $250,000.[48] One reading of this limit is that Congress decided that the most a willful oil polluter should be liable for is $250,000. But that is not the only sensible reading. This penalty is for damage to public resources, enforceable by the United States, and the monetary limit does not necessarily conflict with greater punitive amounts for private interests harmed. After all, if the government could take all the money a defendant had, the private plaintiffs would be left out in the cold with uncollectable judgments.

Where a private remedy does not interfere with administrative judgments (as it would have in *Milwaukee*) and does not conflict with the statutory scheme (as it would have in *Sea Clammers*), a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy. It is reasonable to infer that had Congress meant to limit the remedies for private damage to private interests, it would have said so. The absence of any private right of action in the Act for damage from oil pollution may more reasonably be construed as leaving private claims alone than as implicitly destroying them.

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[47] *See id.* at 320.

[48] 33 U.S.C. § 1321(b)(6)(B) (1990).

Exxon also cites First and Second Circuit decisions, *Conner v. Aerovox*[49] and *In re Oswego Barge Corp.*,[50] for the proposition that the Clean Water Act preempts common law remedies such as those upon which the plaintiffs relied. Both cases are distinguishable.

Conner holds that fishermen cannot recover for pollution on a nuisance theory, under *Sea Clammers* and *Milwaukee.*[51] Exxon does not argue that the plaintiffs' recovery in the case at bar is on a common law nuisance theory. The reason this distinction makes a difference is that, as the Supreme Court explained in *Milwaukee*, a nuisance theory would enable a federal district judge to substitute a different balancing of interests from the one made by the agency to which Congress assigned the job in the NPDES permit system.[52]

Oswego Barge is distinguishable for a different reason. There the common law remedies sought were by the government, not by private parties.[53] The government itself wanted a broader range of remedies and more damages than were permitted by the Clean Water Act.[54] The Second Circuit read the Clean Water Act as we do, and concluded that its remedies section "preempted *the Government's* non-FWCPA remedies against a discharging vessel for cleanup costs."[55] It does not speak at all to private remedies for private harms, just to whether the government can seek remedies unfettered by the limitations on the government's own remedies promulgated in the Clean Water Act.[56]

We conclude that the Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights. Again, what saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment.

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[49] 730 F.2d 835 (1st Cir. 1984).

[50] 664 F.2d 327 (2d Cir. 1981).

[51] *Conner*, 730 F.2d at 842.

[52] *Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981).

[53] *Oswego Barge*, 664 F.2d at 331.

[54] *See id.* at 331.

[55] *Id.* at 344 (emphasis added).

[56] *See id.* at 331.

II. Jury Instructions.

A. Standard of Proof.

Exxon requested that the judge instruct the jury that to find malicious or reckless action, it must be satisfied "that plaintiffs have shown by clear and convincing evidence that the spill was the proximate result of malicious or reckless conduct and that the Exxon defendants are legally responsible for that conduct." The judge declined to instruct on a "clear and convincing" standard. The jury was instructed that the plaintiffs had the burden of proving "by a preponderance of evidence" that the conduct manifested reckless or callous disregard for the rights of others, and was a legal cause of the grounding of the *Exxon Valdez*.

Exxon argues for a clear and convincing standard on various policy grounds, such as that it would be more consistent with the traditional purpose of admiralty law of limiting liability, and the greater harm caused by an erroneous award than erroneous denial of an award because punitive damages are a windfall rather than compensation to plaintiffs.

The standard of proof generally applied in federal civil cases is preponderance of evidence.[57] Congress has in special instances, such as habeas corpus and deportation, required proof by clear and convincing evidence,[58] but it has not so legislated for maritime cases.

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[57] *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 387 (1983) ("In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.").

[58] *See* 19 U.S.C. § 1592(e)(2) (Court of International Trade); 28 U.S.C. § 2244(b)(2)(B)(ii) (habeas petition); *see also Santosky v. Kramer,* 455 U.S. 745 (1982) (applying a clear and convincing standard in a proceeding to terminate parental rights); *Addington v. Texas,* 441 U.S. 418 (1979)

The Supreme Court has noted that "clear and convincing" standards in state law are "an important check against unwarranted imposition of punitive damages."[59] But when specifically faced with the question whether a preponderance of evidence standard denied due process of law to defendants, it held that the looser standard was permissible.[60] In *Haslip,* the Court stated in dictum that "[t]here is much to be said in favor of a State's requiring" a higher standard of proof, but held that Alabama's much lower standard, that the jury be "reasonably satisfied from the evidence," was constitutionally permissible.[61]

While the common law of admiralty could require a higher standard of proof for punitive damages than the Constitution requires, we have been presented with no authority for creating an exception to the general federal standard, and the arguments for doing so are not so compelling as to persuade us, in the absence of precedent, that the district court abused its discretion by instructing on the preponderance of evidence standard.

B. Vicarious Liability.

Exxon argues that the district court erroneously instructed the jury that it could impose punitive damages on Exxon even if all the recklessness was by its employee Captain Hazelwood rather than by Exxon itself. The district court instructed

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(using a clear and convincing standard in an involuntary commitment proceeding); *Woodby v. INS,* 385 U.S. 276, 285-286 n. 18 (1966) (requiring a clear and convincing standard in a deportation hearing and stating "[t]his standard, or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like.") (citing 9 Wigmore, Evidence § 2498 (3d ed.1940)).

[59] *Honda Motor Co. v. Oberg,* 512 U.S. 415, 433 (1994).

[60] *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 23 n. 11 (1991).

[61] *See id.* ("We are not persuaded, however, that the Due Process Clause requires [a clear and convincing standard].").

the jury twice on vicarious liability.

Phase I of the trial established that Exxon was "reckless" and that its recklessness was "a legal cause of the grounding of the Exxon Valdez." Had the jury not so found, the district court would not have allowed the jury to return a punitive damages verdict against Exxon.

Exxon argues that the Phase I instructions 33, 34 and 36 were incorrect. Instruction 33 said that a "corporation is not responsible for the reckless acts of all of its employees," but is for "those employees who are employed in a managerial capacity while acting in the scope of their employment." Instruction 34 defined a "managerial capacity" employee as one who "supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business." Instruction 36 said that acts contrary to the corporation's policies "are not attributable to the employer" provided that "adequate measures were taken to establish and enforce the policies or directions," but that "[m]erely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions."

Phase III of the trial set the amount of punitive damages. The jury had a second chance in Phase III to deny punitive damages altogether despite its prior verdict that Exxon was reckless. Exxon does not directly challenge any of the Phase III instructions, but argues that they failed to correct the claimed error in the Phase I instructions, which allowed vicarious liability for punitive damages. The court stated in Phase III instruction 30 that if "corporate policy makers did not actually participate in or ratify the wrongful conduct," or if it "was contrary to company policies," then the jury "may consider" these facts "in mitigation or reduction of any award of punitive damages."

Exxon cites a line of authority beginning with a War of

1812 decision by Justice Story, *The Amiable Nancy.*[62] The Amiable Nancy was a neutral Haitian vessel carrying corn in the Carribean.[63] The Scourge was an American privateer commissioned to act as a private armed vessel in the war.[64] The captain of the Scourge sent his lieutenant and a crew merely to check the Amiable Nancy's papers, but, as midnight approached, the armed Americans boarded the Haitian vessel, and stole money, clothing, poultry, and other goods.[65] The Court held that "the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals."[66] And, the Court said, "if this were a suit against the original wrong-doers," proper punishment by exemplary damages might be appropriate.[67] But the Court held that the owners of the privateer could not be held liable for "vindictive" (that is punitive) damages, because "[t]hey are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree."[68]

The Amiable Nancy, on its face, has no application to the case at bar. It is based in significant part on the fact that allowing punitive damages against privateers who engaged in improper conduct would defeat the government's War of 1812 policy to commission privateers.[69] But *The Amiable Nancy* rule has been interpreted more broadly in a number of decisions as a widely applicable shield against vicarious liability for punitive damages. In 1893, the Supreme Court held in *Lake Shore & Michigan Southern Railway Co. v. Prentice* that a national corporation could not be held liable for punitive damages because of the abusive conduct of a conductor toward a passenger.[70] It explained that *The Amiable Nancy* rule was a general common law rule prohibiting vicarious liability for punitive damages for an owner "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree."[71] Because there was no evidence that the corporation had any notice that the conductor was unsuitable in any way, or that the corporation "participated in, approved, or ratified" the conductor's misconduct, the judgment had to be reversed.[72]

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[62] 16 U.S. (3 Wheat.) 546, 4 L.Ed. 456 (1818).

[63] *See id.* at 547.

[64] *See id.* at 547, 550.

[65] *See id.* at 547-48, 551.

[66] *Id.* at 558

[67] *Id.*

[68] *Id.* at 559-60.

[69] *Id.*

Exxon is not in the position of the owners in *The Amiable Nancy* or *Lake Shore* of "having neither directed ... nor countenanced ... nor ... participated in the slightest degree" in the wrong.[73] Here the jury found that the corporation, not just the employee, was reckless. The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies. Thus the liability is not that of an owner shielded by *The Amiable Nancy* "nor participated in the slightest degree" rule.[74]

In 1905, we addressed *The Amiable Nancy* in *Pacific Packing & Navigation Co. v. Fielding.*[75] During the Nome gold rush, the captain of a steamship bringing people back to

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[70] 147 U.S. 101, 117 (1893).

[71] *Id.* at 108 (quoting *The Amiable Nancy,* 16 U.S. (3 Wheat.) 546, 559 (1818)).

[72] *Id.* at 117.

[73] *The Amiable Nancy,* 16 U.S. (3 Wheat.) 546, 559 (1818).

[74] *Id.; cf. Kolstad v. American Dental Assoc.,* 527 U.S. 526 (1999) (explaining that, in a punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII).

[75] 136 F. 577 (9th Cir. 1905).

Seattle at the end of the mining season imprisoned his purser, after the purser became deranged as they sailed through the Bering Sea.[76] We held that under *The Amiable Nancy*, the captain of a ship could not be treated as though he wielded "the whole executive power of the corporation" like a president, despite his sole command of the ship while at sea, so the owner of the vessel could not be vicariously liable for punitive damages merely and entirely on the basis of the captain's malice.[77]

We next considered this issue eighty years later in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*[78] A grossly negligent dock foreman for North Pacific caused a fireman's death and Protectus Alpha's ship and cargo to be destroyed.[79] We expressed approval of the Restatement (Second) of Torts § 909 position, which stated that punitive damages can be awarded against a principal for an agent's torts, not only where they are authorized, ratified or approved and not only where the agent was unfit and the principal was reckless in employing him, but also where he was "employed in a managerial capacity and was acting in the scope of employment."[80] We affirmed a punitive damages judgment because the foreman was a managerial employee acting within the scope of his employment and had discretion in what he did.[81]

The district court in the case at bar instructed the jury precisely in accord with *Protectus Alpha*. To say that the court abused its discretion in so doing requires that we hold that

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[76] *See id.*

[77] *See id.* at 579-80.

[78] 767 F.2d 1379 (9th Cir. 1985).

[79] *See id.* at 1384

[80] *Id.* at 1386 (quoting *Restatement 2d of Torts* § 909 (1979)).

[81] *See id.* at 1387.

Protectus Alpha is no longer the law.[82] That we cannot do. One of the amicus curiae urges that we do so, on the ground that *Protectus Alpha* was inconsistent with *Pacific Packing*.

We held *en banc* in *United States v. Hardesty* that if there is an irreconcilable conflict between two cases from this circuit, a panel's only choice is to call for rehearing en banc.[83] We do not conclude that the conflict between *Pacific Packing* and *Protectus Alpha* is "irreconcilable," though the question is close.[84] One three judge panel may reconsider the decision of a prior panel only when "an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point."[85]

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[82] *See Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1013 (9th Cir. 1999), *cert. denied*, 529 U.S. 1021 (2000) (noting that we review a district court's formulation of civil jury instructions for an abuse of discretion).

[83] 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) ("Unless an alternative method is provided by rule of this court, '[a] panel faced with such a[n] [intra-circuit] conflict *must* call for en banc review, which the court will normally grant.'") (internal citations omitted).

[84] *Protectus Alpha* was specifically rejected by the Fifth Circuit, and accepted only in part by the First Circuit. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995); *Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (en banc). The Sixth Circuit followed *The Amiable Nancy*, *Lake Shore*, and this circuit's opinion in *Pacific Packing* to hold that "punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969). Arguably *Protectus Alpha*, in relevant part, could have been dictum. Although it was not mentioned in the panel opinion, there was an express company policy that required the foreman to do exactly what he did, and the company expressly ratified what the foreman had done. *See Protectus Alpha Nav. v. Pacific Grain Growers*, 585 F. Supp. 1062, 1068 (1984). The district judge held the company liable for punitive damages on that basis, not on the basis that the foreman was a managerial employee. *See id.* at 1069. With this finding of fact, which was not challenged on appeal, there was no need to reach the question of whether the company would be vicariously liable for a managerial employee's conduct in the absence of a corporate policy authorizing and ratifying his conduct. But our decision in *Protectus Alpha* did not rely on that finding. We must leave whatever challenge might be made to *Protectus Alpha* to our court if it rehears this case en banc or to a higher court. We cannot hold that the district court abused its discretion by following our decision in *Protectus Alpha*.

Subsequent to *Protectus Alpha,* the Supreme Court held in *Pacific Mutual Life Insurance Co. v. Haslip* that a punitive damages award against a corporation based purely on *respondeat superior,* with no wrongful conduct whatsoever on the part of the corporation, did not violate the corporation's due process rights.[86] The constitutional issue resolved there is not the same as the maritime law at issue here, but it is close. For one thing, *Lake Shore* held that *The Amiable Nancy* was common law, not just maritime law, so what goes for an insurance company in *Haslip* goes for an oil company in this case.[87] For another, the considerations bearing on the constitutional question in *Haslip* are hard to distinguish from the common law issues here. The only substantial distinction that is apparent is that if Congress disagrees with our resolution of the common law question, it can easily bring the law into accord with its view. Thus, *Haslip* lends further support to the conclusion reached in *Protectus Alpha.*

Exxon argues that even if *Protectus Alpha* is good law, it can be reconciled with *The Amiable Nancy* only by confining it to acts done on shore. The reckless dock foreman in *Protectus Alpha* acted on the dock, the reckless crew and subordinate officer in *The Amiable Nancy* on the sea. But *Protectus Alpha* did not explain its conclusion with reasoning supporting this distinction. We conclude that we are bound by *Protectus Alpha.*

III. Sufficiency of the Evidence.

A. Hazelwood.

Exxon argues that there was insufficient evidence for the jury to award punitive damages against Hazelwood or against itself for Hazelwood's conduct. Its theory is that the evidence, which it concedes established negligence, can establish no more. As Exxon portrays it, Hazelwood left the vessel in the hands of an experienced mate, with a clear instruction to turn right at the Busby Island light, and the mate unaccountably failed to carry out this simple instruction.

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[85] *United States v. Gay,* 967 F.2d 322, 327 (9th Cir. 1992) (quoting *United States v. Lancellotti,* 761 F.2d 1363, 1366 (9th Cir. 1985)).

[86] 499 U.S. 1, 15 (1991).

[87] *Lake Shore & Michigan Southern Railway Co. v. Prentice,* 147 U.S. 101, 108 (1893).

A jury could have interpreted the evidence as Exxon suggests, but it plainly did not. A far more damning account was well supported by testimony, exhibits, and reasonable inferences from them. The jury reasonably could have concluded that Hazelwood took command of the ship so drunk that a non-alcoholic would have passed out, made it harder to avoid the reef by taking the course east of the ice, made it harder to maneuver between the ice and the reef by putting the ship on an autopilot program that sped the vessel up, then left the ship in the hands of an overtired third mate just two minutes before the critical maneuver, barely enough time to calculate what to do and conduct the maneuver. Hazelwood's instructions were vague, and turning a supertanker right at the light is not like turning a car right at the light on dry pavement, more like turning right on glare ice. In so doing, Hazelwood violated numerous legal regulations as well as common sense in caring for his vessel.

We review a jury's verdict for substantial evidence, which "is such reasonable evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence."[88] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions ... [and] all justifiable inferences are to be drawn in [the prevailing party's] favor."[89] The jury reasonably could have concluded that Hazelwood knew he was being extremely careless and testified falsely about his knowledge, or that he did not realize how dangerous his acts were because he had impaired his own judgment by taking the bridge drunk.[90]

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[88] *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc); *see also Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000).

[89] *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)).

Exxon also argues that even operating a boat drunk and high on marijuana is not enough for punitive damages under our decision in *Churchill v. F/V Fjord,*[91] but that is not a correct reading of *Churchill. Churchill* held that despite the impaired condition of a youth operating a skiff, the district court's finding that the skiff's owner did not act willfully, recklessly, maliciously or with gross negligence was not clearly erroneous.[92] It is one thing to uphold a factual finding on appeal as we did in *Churchill,* quite another to set it aside, which Exxon requests here. A trial determination has a great deal of force, whichever way it goes.

B. Exxon.

Exxon argues that the evidence was insufficient to establish a predicate for punitive damages based on its own actions. It is true that if the jury granted punitive damages on the basis of the vicarious liability instructions discussed above, Exxon's own recklessness would not be essential to the outcome. But the instructions allowed the jury to award them based on Exxon's own conduct, so the jury may well have granted them based only on Exxon's own recklessness. We therefore consider whether there was sufficient evidence to establish it.

There was, as Exxon argues, an alternative interpretation the jury could have made of the evidence. It could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk. But of course, we review a jury's verdict for substantial evidence, not for whether the evidence could have supported a different verdict.[93]

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[90] *See Koirala v. Thai Airways Intl., Ltd.,* 126 F.3d 1205, 1211 (9th Cir. 1997) (explaining that a factfinder could infer from failure to perform fundamental duty of safe navigation that flight crew *consciously* disregarded that duty).

[91] 892 F.2d 763 (9th Cir. 1988).

[92] *Id.* at 772.

There was substantial evidence to support the jury verdict. The jury could infer from the evidence that Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound.

Exxon had published policies that an employee with alcohol dependency would not be terminated for seeking rehabilitation. Its policies also provided that no crew member could attempt to perform any duties on one of its vessels within four hours of consuming any alcohol. Both sides attempt to make something of this. Plaintiffs stress that Exxon did not strictly enforce the four hour rule despite knowing that Hazelwood and others performed duties on its vessels within four hours of consuming alcohol, and Exxon contends it reasonably did not fire Hazelwood just because it knew he had an alcohol problem and participated in a rehabilitation program.

Both arguments are of little significance in the factual context of this case. Arguably knowing that a non-alcoholic had commanded a vessel three hours after consuming a few ounces of wine at dinner could not support punitive damages. As Exxon says, "if plaintiffs mean that sailors on shore leave occasionally visit bars, their discovery is as startling as Captain Renault's discovery that gambling was going on in Rick's Cafe." But knowing that an alcoholic has resumed drinking is far more serious. The jury could conclude from the evidence that Hazelwood's alcoholism required him to abstain totally, so that he could not have wine with dinner, let alone enough whiskey at waterfront bars to make most people unconscious. Arguably, it would have been improper and perhaps actionable to fire or transfer Hazelwood just for being an alcoholic who had sought treatment, but knowing that he had violated his treatment regimen by subsequently resuming drinking is far more serious, and he could have been fired, or at the very least transferred to less dangerous duty, for violating Exxon's policies.

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[93] *Lambert,* 180 F.3d at 1012.

The parties also dispute whether Exxon's tolerance of overtired employees who worked after exceeding the maximum permitted hours could support the verdict. Because of the evidence regarding Captain Hazelwood's drinking and Exxon's top executives' knowledge of it, we need not consider whether Cousin's fatigue and Exxon's knowledge of the routine use of fatigued crew could support the verdict.

IV. Amount of the Punitive Damages Award.

The jury awarded $5 billion in punitive damages against Exxon (as well as $5,000 in punitive damages against Captain Hazelwood). At the time, it was the largest punitive damages award in American history, so far as the litigants were able to determine. Exxon challenges the $5 billion award as excessive.

Ordinarily appellate courts must defer to juries.[94] If a reasonable mind could reach the result the jury reached on the evidence before them, that is ordinarily the end of it.[95] If there were no constitutional issue here, that might be the end of this discussion. This was a very bad oil spill. Captain Hazelwood's conduct, interpreting the evidence most strongly against him, was extremely reckless considering the difficulty and potential risk of his task, and Exxon was reckless to allow him to perform this task despite its knowledge that he was drinking again. The punitive damages amount, $5 billion, is about one year's net profits for the entire world-wide operations of Exxon, and the jury may well have decided that for such egregious conduct the company responsible ought to have a year without profit.

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[94] *See, e.g., Morgan v. Woessner,* 997 F.2d 1244, 1257 (9th Cir. 1993).

[95] *Three Boys Music Corp. v. Bolton,* 212 F.3d 477, 482 (9th Cir. 2000); *Lambert v. Ackerley,* 180 F.3d 997, 1012 (9th Cir. 1999) (en banc).

But a unique body of law governs punitive damages. In particular, under the Supreme Court's decision in *Honda Motor Co. v. Oberg,* a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards.[96] In *Oberg,* the Oregon Constitution prohibited judicial reduction of punitive damages awards "unless the court can affirmatively say that there is no evidence to support the verdict."[97] The Court held that the state constitutional denial of judicial review of the size of the award violated the due process clause of the Fourteenth Amendment.[98] Review limited to a "no substantial evidence" test "provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts."[99] The Court, explaining the importance of appellate review of punitive damages awards, noted that "more than half of those [punitive damages awards] appealed resulted in reductions or reversals of the punitive damages," and that this understated the importance of review, because so many awards are reduced by the trial court or settled for less pending appeal.[100]

Before *Oberg,* we would not disturb punitive damage awards unless it appeared that the jury was influenced by passion or prejudice.[101] However, as we explained in *Ace v.*

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[96] 512 U.S. 415, 432 (1994).

[97] *Id.* at 418.

[98] *Id.* at 432.

[99] *Id.* at 429.

[100] *Id.* at 433, n. 11.

[101] *See, e.g., Harmsen v. Smith,* 693 F.2d 932, 947 (9th Cir. 1982); *Glovatorium Inc. v. NCR Corp.,* 684 F.2d 658, 663 (9th Cir. 1982) (citing *Moore v. Greene,* 431 F.2d 584, 593-94 (9th Cir. 1970)). *But see, e.g.,*

Aetna Life Insurance Co., under *Oberg,* we must consider whether a punitive damages award passes "muster under federal due process analysis" in addition to reviewing whether the evidence is sufficient as a matter of law to support the award.[102] The test of whether a punitive damages award survives review cannot be merely whether there is any evidence to support it, under *Oberg.*

Two critical Supreme Court opinions, decided after the district court's decision in this case, have expanded the way courts review constitutional challenges to large punitive damage awards. In 1996, the Court decided *BMW of North America, Inc. v. Gore* and articulated, for the first time, factors that courts must consider when conducting a substantive review of a jury's punitive damages award.[103] In *BMW,* a jury awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages for the defendant's fraudulent conduct. The Court held that the amount of the punitive damage award was unconstitutional because the defendant lacked fair notice that such a severe award would be imposed.[104] In concluding the award violated the Due Process Clause, the Court established three "guideposts" for courts to use in determining whether a punitive damage award is grossly excessive: (1) the reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties in comparable cases.[105]

Boyle v. Lorimar Productions., Inc., 13 F.3d 1357, 1360 (9th Cir. 1994) (approving, under *Haslip,* California's passion and prejudice standard because the jury was also instructed to apply other criteria, including reprehensibility and ratio of punitive damages to compensatory damages).

[102] 139 F.3d 1241, 1248 (9th Cir. 1998); *see also Barnes v. Logan,* 122 F.3d 820, 823-24 (9th Cir. 1997) (considering first if the punitive damages award was in manifest disregard of the law, then considering whether the award violated due process).

[103] *See* 517 U.S. 559 (1996).

[104] *See id.* at 574, 585-86.

[105] *See id.* at 575-83.

The Court reaffirmed the importance of the *BMW* guideposts several months ago in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[106] Following a large punitive damages jury verdict, the defendant in that case challenged the amount of the award in the district court. Relying on *BMW*, the district court considered and rejected the argument that the award was grossly excessive.[107] On appeal, we reviewed the district court's determination for an abuse of discretion and affirmed. The Supreme Court reversed.

Cooper Industries examined the *BMW* factors to determine whether trial courts or appellate courts are in a better position to rule on the constitutionality of punitive damages awards, and ultimately concluded that "considerations of institutional competence" weigh in favor of independent appellate review.[108] Specifically, the Court held that "courts of appeal should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."[109] Because the Court's consideration of the *BMW* factors revealed "a series of questionable conclusions by the District Court," the Court remanded the case for us to conduct a thorough review of the district court's application of *BMW*.[110] *Cooper Industries* said "unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury."[111] Thus, reduction of a punitive damages award does not implicate the Seventh Amendment. The Court in *BMW* and in *Cooper Industries* set out criteria for judicial review of jury awards for punitive damages.

In *BMW*, the Supreme Court held that a punitive damage award violated the Due Process Clause of the Fourteenth Amendment because it was so grossly excessive that the defendant lacked fair notice that it would be imposed.[112] Dr. Gore's car was damaged in transit, and BMW repainted it but did not tell Dr. Gore about the repainting when it sold him the car.[113] The jury found that to be fraudulent, and awarded $4,000 in compensatory damages for reduced value of the car and $4 million in punitive damages.[114] The Alabama Supreme Court cut the award to $2 million, but the Court held that it was still so high as to deny BMW due process of law for lack of notice, because the award exceeded the amounts justified under three "guideposts."[115] The *BMW* guideposts are: (1) the degree of reprehensibility of the person's conduct; (2) the disparity between the harm or potential harm suffered by the victim and his punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.[116] We apply these three guideposts to evaluate whether "a defendant lacked 'fair notice' of the *severity* of a punitive damages award,"[117] and to stabilize the law by assuring the uniform treatment of similarly situated persons.[118]

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[106] 532 U.S. 424, 121 S. Ct. 1678.

[107] *See id.* at 1681-82.

[108] *Id.* at 1687-89.

[109] *Id.* at 1685-86.

[110] *Id.* at 1688.

[111] *Id.* at 1687-89.

In this case, the district court has not reviewed the award under the standards announced in *BMW* and *Cooper Industries*. This is because neither case had been decided at the time the jury returned its verdict, and, equally important, Exxon raised no direct constitutional challenges to the amount of the award until after the judgment. We therefore have no constitutional analysis by the district court over which to exercise any de novo review.[119] Because we believe the district court should, in the first instance, apply the appropriate standards, we remand for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW*. We think on these facts, this is the better approach, and we provide the following analysis to aid their consideration.

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[112] *Id.* at 574, 585-86.

[113] *Id.* at 562-63.

[114] *Id.* at 565.

[115] *Id.* at 567, 574-75

[116] *Id.* at 574-575.

[117] *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997); *see also Pavon v. Swift Trans. Co.*, 192 F.3d 902, 909-10 (9th Cir. 1999); *Ace v. Aetna Life Insurance Co.*, 139 F.3d 1241, 1248 (9th Cir. 1998).

[118] *Cooper Indus., Inc. v. Leatherman Tool*, 532 U.S. 424, 121 S. Ct. 1678, 1685 (2001) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (Breyer, J., concurring)).

A. Reprehensibility.

Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[120] The Supreme Court explained that "[p]erhaps the most important indicum of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[121] "[E]xemplary damages should reflect the enormity of [the defendant's] offense,"[122] and "punitive damages may not be grossly out of proportion to the severity of the offense."[123]

Degree of reprehensibility did not justify a $2 million punitive damages award in the BMW case for two reasons. First, the harm inflicted on Dr. Gore was "purely economic."[124] BMW's recklessness was toward a person's economic interest in getting a car that had never been damaged, not toward his health or safety. The court drew an analogy to criminal cases, noting that for purposes of reprehensibility, "'nonviolent crimes are less serious than crimes marked by violence.'"[125] Second, though fraudulent, BMW's conduct did not include active "trickery or deceit," just silence where there should have been disclosure.[126] Likewise in the case at bar, there was no violence, no intentional spilling of oil (as in a "midnight dumping" case), and no executive trickery to hide or facilitate the spill. Although the huge oil spill obviously caused harm beyond the "purely economic," the punitive damages award was expressly limited by the instructions to exclude environmental harm, as it had to be to avoid the res judicata bar discussed in Section I(C). The district court instructed the jury that in determining punitive damages "you should not consider any damage to natural resources or to the environment generally."[127] It explained that "[a]ny liability for punitive damages relating to these harms has been fully resolved in proceedings involving the Exxon defendants and the Natural Resource Trustees."[128] No party has challenged this instruction on appeal. The $5 billion punishment in this case was for injury to private economic interests-claims of commercial fishermen that they made less money from fishing on account of the spill, claims of land owners that their shores were polluted with spilled oil, and claims of Alaska

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[119] *Cf. id.* at 1685-86.

[120] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

[121] *BMW*, 517 U.S. at 575.

[122] *Id.* (citing *Day v. Woodworth,* 13 How. 363, 371 (1852)).

[123] *Id.* (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453 (1993)).

[124] *Id.* at 576.

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[125] *Id.* at 575-76 (quoting *Solem v. Helm,* 463 U.S. 277, 292-93 (1983)).

[126] *Id.* at 576, 579; *see also TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993) (affirming an award of $10 million in punitive damages in a title dispute case involving trickery); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 6-7 (1991) (affirming a punitive damage award of not less than $840,000 million in a breach of contract case involving fraud); *Neibel v. Trans World Assurance Co.,* 108 F.3d 1123, 1132 (9th Cir. 1997) (holding that punitive damages award was not excessive given that the defendants received warnings that the scheme was a scam and the fraud lured the plaintiffs to their financial ruin); *Hopkins v. Dow Corning Corp.,* 33 F.3d 1116, 1127-28 (9th Cir. 1994) (affirming a $6.5 million punitive damages award because Dow exposed thousands of women to painful and debilitating disease, gained financially from its conduct, and knew of the possible defects but concealed the information for years).

[127] Phase III Instruction 29.

[128] *Id.*

Natives that their subsistence fishing was impaired by the spill.

Plaintiffs correctly argue that Exxon's conduct was reprehensible because it knew of the risk of an oil spill in the transportation of huge quantities of oil through the icy waters of Prince William Sound. And it knew Hazelwood was an alcoholic who was drinking. But this goes more to justify punitive damages than to justify punitive damages at so high a level.

Also, the $5 billion punitive damages award at issue was against Exxon, which had some direct responsibility because it did not fire or transfer Hazelwood after learning that he was drinking and taking command despite his alcohol treatment, as well as vicarious responsibility. However, the difference between the $5,000 awarded as punitive damages against the man who directly caused the oil spill, and the $5 billion awarded as punitive damages against his employer gives rise to concern about jury evaluation of their relative reprehensibility.[129]

Some factors reduce reprehensibility here compared to some other punitive damages cases. Exxon spent millions of dollars to compensate many people after the oil spill, thereby mitigating the harm to them and the reprehensibility of its conduct. Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.

Also, as bad as the oil spill was, Exxon did not spill the oil on purpose, and did not kill anyone. By contrast, in *Protectus*

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[129] *Cf. Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) ("Punitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically leave the jury with wide discretion in choosing amounts and since evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses.").

Alpha, a man was foreseeably killed by a deliberate act.[130] And in *Hilao v. Estate of Marcos,* a $1.2. billion punitive damages award, the defendant intentionally caused thousands of people to be tortured and killed.[131]

B. Ratio.

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff."[132] This analysis is based upon the "principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages."[133] The harm to be considered includes both the actual harm to the victim and the harm that was likely to occur.[134]

The "reasonable relationship" ratio is intrinsically somewhat indeterminate. The numerator is "the harm likely to result from the defendant's conduct."[135] The denominator is the amount of punitive damages. Because the numerator is ordinarily arguable, applying a mathematical bright line as though that were an objective measure of how high the punitive damages can go would give a false suggestion of precision. That is one reason why the Supreme Court has emphasized that it is not possible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[136] Nevertheless, a "general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus."[137] Part of why the Court held that the punitive damages were excessive in *BMW* was a "breathtaking 500 to 1" ratio between the harm to the plaintiff himself and the award.[138]

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[130] *Protectus Alpha,* 767 F.2d at 1381-1382.

[131] 103 F.3d 767, 771 (9th Cir. 1996).

[132] *BMW,* 517 U.S. at 580.

[133] *Id.*

[134] *See id.* at 581 ("*TXO,* following dicta in *Haslip,* refined this analysis by confirming that the proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'") (quoting *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993)).

[135] *BMW,* 517 U.S. at 581 (quoting *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993)). Harm "likely" to occur is, of course, less than harm that is possible but unlikely to occur. *Cf. Leatherman,* 121 S. Ct. at 1688-89.

Although it is difficult to determine the value of the harm from the oil spill in the case at bar,[139] the jury awarded $287 million in compensatory damages, and the ratio of $5 billion punitive damages to $287 million in compensatory damages is 17.42 to 1. The district court determined that "total harm could range from $288.7 million to $418.7 million,"[140] which produces a ratio between 12 to 1 and 17 to 1. This ratio greatly exceeds the 4 to 1 ratio that the Supreme Court called "close to the line" in *Pacific Mutual Life Ins. Co. v. Haslip.*[141]

The amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment. "[T]he general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions," such as this one.[142]

The cleanup expenses Exxon paid should be considered as part of the deterrent already imposed. Depending on the circumstances, a firm might reasonably, were there no punishment, be deterred, in some cases but not all, by its actual expenses. For example, a person painting his trim may not carefully mask window glass, because it is cheaper and easier to scrape the paint off the glass than to mask it carefully. But if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him "only" $10,005 and he was not otherwise punished.

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[136] *BMW,* 517 U.S. at 576.

[137] *See BMW,* 517 U.S. at 582-83; *see also Boyle v. Lorimar Prods., Inc.,* 13 F.3d 1357, 1361 (9th Cir. 1994).

[138] *See id.* at 583.

[139] *Cf. Leatherman,* 121 S. Ct. at 1688.

[140] Order No. 267, at 13.

[141] 499 U.S. 1, 23 (1991).

[142] *Cf. In re Exxon Valdez,* 229 F.3d 790, 795 (9th Cir. 2000); *see also Baker v. Exxon,* 239 F.3d 985, 988 (9th Cir. 2001).

Exxon's casualty losses for the vessel and cargo (approximately $46 million),[143] the costs of clean up (approximately $2.1 billion), the fine and restitution (approximately $125 million), settlement with the government entities (approximately $900 million), settlements with private parties (approximately $300 million), and the net compensatory damages (approximately $19.6 million) totaled over $3.4 billion. Whether cost of cleanup and compensatory damages, damage to the vessel, and lost oil deters bad future acts depends on whether it greatly exceeds the expense of avoiding such accidents, not whether the amounts are compensatory or punitive. A company hauling a cargo worth around $25.7 million has a large incentive to avoid a $3.4 billion expense for the trip. This case is like the ink on the rug example, not the paint on the window example. Just the expense, without any punishment, is too large for a prudent transporter to take much of a chance, given the low cost of making sure alcoholics do not command their oil tankers. Because the costs and settlements in this case are so large, a lesser amount is necessary to deter future acts.

Ratio analysis as required by *BMW* helps avoid overdeterrence. Justice Breyer's concurrence in *BMW* notes that "[s]maller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would over-deter by leading potential defendants to spend more to prevent the activity that causes the economic harm, say, through employee training, than the cost of the harm itself."[144] It is hard to deter bad conduct without also deterring some good conduct that risks being misunderstood as bad, or that will look bad in retrospect. Every large company knows that it cannot exercise absolute control over all its employees, so if there is too much risk in performing some activity, the entire activity may be avoided as a preferable alternative to bearing potentially infinite costs of avoiding the harm, and society would lose the benefit of the productive activity. As bad as the oil spill is, fuel for the United States at moderate expense has great social value and that value as well as the value of avoiding horrendous oil spills can be reconciled by ratio analysis.

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[143] Salvage of a vessel can be very difficult and expensive. *See, e.g., Hendricks v. Gordon Gill,* 737 F. Supp. 1099, 1101 (D. Alaska 1989).

[144] *BMW,* 517 U.S. at 593.

C. Comparable penalties.

The third *BMW* "indicium of excessiveness" is the penalties, civil or criminal, "that could be imposed for comparable misconduct."[145] The purpose of this particular indicium is to "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[146] One reason the Court held that the $2 million punitive damages award was so excessive as to deny BMW due process of law, even though the corporation could easily pay it, was that the statutory sanctions were much lower than the punitive damages award.[147]

This case is unusually rich in comparables. Both the state and federal governments pursued sanctions and obtained judicial approval for the amounts. Thus, we know the state and federal legislative and executive judgments, both in general and as applied to this case, about what sanctions were appropriate.

Criminal fines are particularly informative because punitive damages are quasi-criminal.[148] The parties agree that 18 U.S.C. § 3571 is the federal measure for fines in this case. It provides for up to a $500,000 fine for a felony, or for a misdemeanor resulting in death, or $200,000 for a class A misdemeanor not resulting in death.[149] If $200,000 is the relevant legislative comparable judgment, then the punitive damages were twenty-five thousand times the legislative judgment, an excessiveness problem like *BMW.* Plaintiffs argue that we should use subsection (d) instead. That subsection provides an alternative fine where a "person derives pecuniary gain from the offense," or the offense "results in pecuniary loss" to another person, "not more than the greater of twice the gross gain or twice the gross loss."[150] The district court calculated damages to others as $386.7 million to $516.7 million. Doubling the highest number suggests an exposure to a criminal fine of $1.03 billion. The plaintiffs would double various additional figures, most importantly the $2.1 billion Exxon spent cleaning up the spill, but that would not be included in the § 3571(d) fine, because it is damage to Exxon itself, and the fine doubles only "loss to a person other than the defendant."[151]

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[145] *Id.* at 582.

[146] *Id.* (internal citations omitted).

[147] *Id.* at 583.

[148] *Leatherman,* 121 S. Ct. at 1683.

Ceilings on civil liability are also instructive. Congress provided in the Trans-Alaska Pipeline Act that "if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel ... shall be strictly liable ... for all damages, including clean-up costs, sustained by any person or entity, public, or private, including residents of Canada, as the result of discharges of oil from such vessel."[152] However, "[s]trict liability for all claims arising out of any one incident shall not exceed $100,000,000."[153] That $100 million sanction is only 1/50 of the punitive damages award.

In addition to the legislative judgment, we have an actual penal evaluation made in this case by the attorneys general of the United States and the State of Alaska. Exxon and the United States entered a plea agreement for $150 million, which was subsequently reduced to a $25 million fine plus $100 million in restitution. This plea agreement was approved by the district court. At Exxon's sentencing hearing, the U.S. Attorney explained that "[a]s a result [of the money Exxon agreed to pay under the Consent Decree], the total amount of the penalties, compensatory payments, and other voluntary expenditures will exceed 3.5 billion dollars" and that it was "hard to imagine a more adequate deterrence for negligence, [sic] but unintentional conduct." The Alaska Attorney General expressed similar views, indicating that the $150 million fine was "a number which the State can hold up to whether [sic] polluters that this is the fine which you face, 150 million dollars, and that certainly should be sufficient, the State believes to give pause to those who do not show the proper regard for the Alaska environment." In approving the consent decree, the district judge indicated that "it contain[ed] an appropriate amount of punishment."

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[149] 18 U.S.C. § 3571(c).

[150] 18 U.S.C. § 3571(d).

[151] *Id.*

[152] 43 U.S.C. § 1653(c)(1).

[153] 43 U.S.C. § 1653(c)(3).

The district judge subsequently explained why the $150 million was not, after all, the appropriate amount of punishment, when he denied the motion for new trial on punitive damages, by noting that "the criminal payment was made before the harm to plaintiffs was quantified." While not a limit, the fine is nevertheless a significant datum, because the massiveness of the spill was apparent immediately, and the $150 million represents an adversarial judgment by the executive officers of the state and federal governments who had the public responsibility for seeking the appropriate level of punishment.

Because of the importance of the *Exxon Valdez* oil spill, Congress revised federal law to assure that such spills would be adequately deterred and punished in the future.[154] Obviously Exxon could not have had notice of an Act passed after the spill. Nevertheless, the Oil Pollution Act has value as a legislative judgment, made in the course of legislative evaluation of this particular oil spill, of what amount of punishment serves the public interest in deterring and punishing, but not overdeterring, the conduct that caused the spill.[155] Congress sought to deter pollution, but not so aggressively as to deter transporting oil. Under the Act, the owner of vessels from which oil is discharged on account of "gross negligence or willful misconduct" is subject to a civil penalty of "not more than $3,000 per barrel of oil ... discharged."[156] The *Exxon Valdez* spilled 11 million gallons, which is 261,905 barrels.[157] Thus, Congress's retrospective judgment made as it considered this oil spill was that the maximum permissible civil penalty for a grossly negligent spill as big as the *Exxon Valdez* ought to be no more than $786 million.

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[154] 33 U.S.C. § 1321(b)(7).

D. Summary.

The $5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW*[158] and *Cooper Industries.*[159] It must be reduced. Because these Supreme Court decisions came down after the district court ruled, it could not apply them. We therefore vacate the award and remand so that the district court can set a lower amount in light of the *BMW* and *Cooper Industries* standards.

V. Juror misconduct.

Exxon argues that the jury improperly considered material somehow obtained outside the evidence, which showed that Hazelwood had either been convicted of driving under the influence or had his driver's license revoked. About a year after the trial and following extensive motion practice, the district court held an evidentiary hearing in which ten of the jurors and the husband of the eleventh were questioned under oath to find out whether jurors had been exposed to any extrinsic evidence.

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[155] *Id.; see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law,* vol. 2 418 (1987).

[156] 33 U.S.C. § 1321(b)(7)(D).

[157] 33 U.S.C. § 1321(a)(13) ("'barrel' means 42 United States gallons at 60 degrees Fahrenheit.").

[158] 517 U.S. 559 (1996).

[159] 532 U.S. 424, 121 S. Ct. 1678.

Most of the jurors said they had no information about Hazelwood's driving record in the evidence, a few thought they had learned about it or inferred it from the evidence such as Hazelwood's personnel record, and a few knew about it but were uncertain when or where they had learned about it. Based upon an affidavit describing an examination of all the transcripts and exhibits, the district court found that there was no evidence of Hazelwood's conviction or license revocation, so the jurors who testified to the contrary were confused about where they had learned it. The court therefore made a finding of fact that "the jurors were not exposed to extraneous information about Captain Hazelwood."

> "Where extraneous information is imparted, as when papers bearing on the facts get into the jury room without having been admitted as exhibits, or when a juror looks things up in a dictionary or directory, the burden is generally on the party opposing a new trial to demonstrate the absence of prejudice, and a new trial is ordinarily granted if there is a reasonable possibility that the material could have affected the verdict."[160]

Before we apply the standard for what to do when extraneous information was imparted, it has to have been imparted. The district court found that it was not. The district court's findings of fact are reviewed for clear error.[161] Exxon argues that the district court "inexplicably" so found because some jurors had testified to the contrary and some of the judge's questions were not well phrased. The argument is weightless. There is nothing inexplicable about a person having trouble recalling accurately whether he learned something during a trial or deliberations, or during a subsequent year of intensive media publicity about the trial. The questions were well within the district court's discretion and appear to us to have been carefully designed to determine the truth. There is no basis for the argument that the district court's finding of no extraneous information was clearly erroneous.

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[160] *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000).

[161] *Id.* at 911 n. 19; *Diamond v. City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000).

VI. Compensatory Awards.

Exxon argues that the jury verdict "contained indefensible awards" of compensatory damages of $22 million for chum salmon fishermen and of $30 million for setnetter fishermen. Exxon argues that it should have been granted judgment as a matter of law to correct these "errors" by the jury.

We review a jury verdict of compensatory damages for substantial evidence,[162] and "will not disturb an award of damages unless it is clearly unsupported by the evidence."[163] We afford "substantial deference to a jury's finding of the appropriate amount of damages,"[164] and we "*must* uphold the jury's findings unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork."[165]

Exxon's argument is that when we apply the theories offered by its expert witnesses to the data on fish catches in different years, it is not possible to arrive at the numbers the jury did. These numbers and theories depended on several unknown factors, such as whether the price of certain kinds of fish went down because buyers feared oil contamination or because farmed salmon became a significant competitor of wild salmon, and how much fish would have been caught over the course of several years had there not been an oil spill.

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[162] *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000); *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc).

[163] *Stinnett v. Damson Oil Corp.*, 813 F.2d 1394, 1398 (9th Cir. 1987).

[164] *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1435 (9th Cir. 1996).

[165] *Id.* (emphasis added).

Exxon argues that a jury may not reject all the expert testimony and "pick out of the air a number," citing for that proposition our decisions in *Rebel Oil Co. v. Atlantic Richfield Co.,*[166] *Claar v. Burlington Northern Railroad Co.,*[167] and the District of Columbia Circuit's decision in *Lewis v. Washington Metropolitan Area Transit Authority.*[168]

Exxon's citations are not at all in point, and it is puzzling that the brief uses them for the proposition for which they are cited. *Rebel Oil* is an appeal from a summary judgment, and has nothing to do with whether a jury has to follow an expert.[169] Likewise *Claar.*[170] *Lewis* at least has the relevance that it involves an appellate challenge to a jury verdict,[171] but it is also not in point. The question was whether a woman's wrist and knee injuries were caused by a bus accident, and it was controlled by District of Columbia law requiring expert testimony to support causation, which the plaintiff had failed to present.[172] No such principle of law has been cited to us in this case.

Nor is Exxon's argument on the facts so compelling as to exclude the possibility that a reasonable jury could go any other way. While Exxon presents a plausible argument against the soundness of the damages awards, the complexity and uncertainty of these damages questions left room for reasonable jurors to take many paths. Reasonable jurors need not accept the views of one side's expert or the other's, but may make their own reasonable judgment on the evidence, accepting part, all, or none of any witness's testimony.

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[166] 51 F.3d 1421 (9th Cir. 1995).

[167] 29 F.3d 499 (9th Cir. 1994).

[168] 19 F.3d 677 (D.C.Cir. 1994).

[169] *Rebel Oil,* 51 F.3d at 1429-30.

[170] *Claar,* 29 F.3d at 500.

[171] *Lewis,* 19 F.3d at 678.

[172] *Id.* at 679, 680-82.

VII. Hazelwood's separate appeal.

Hazelwood's separate appeal challenges two evidentiary rulings.

A. Blood Test Results.

Exxon and Hazelwood moved *in limine* to exclude evidence of a .061% blood alcohol level in samples taken eleven hours after the *Exxon Valdez* ran aground on Bligh Reef. Expert testimony was offered to show that if he still had that much alcohol in his blood eleven hours later, he must have been deeply under the influence when he abandoned the bridge to the third mate.

The district court, despite noting "remarkable mishandlings" of the blood samples, denied the motion *in limine.*[173] Its reasons were that any change in the blood from bad storage would have been observed and noted by the laboratory technicians, and that the evidence on chain of custody regarding sealed tubes with Hazelwood's name and social security number on them was good enough so that reasonable jurors could conclude that the tubes contained Hazelwood's blood. Hazelwood argues on appeal that because of improper storage and because of a discrepancy between the color of the stoppers in the evidence log and the lab notes, the evidence should not have been admitted.

We review evidentiary rulings for abuse of discretion.[174] The authentication of evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[175] The district court properly exercised its discretion according to the correct standard, which is whether "a reasonable juror could find" that the tested specimens were Hazelwood's.[176]

Hazelwood argues that authentication was inadequate as a matter of law, under *Iran v. INS*.[177] *Iran* is not in point. It merely rejects the contention made by the Immigration and Naturalization Service that no authentication of documents at all was necessary to have them admitted at deportation hearings.[178] In this case, there was authentication.[179] Though the challenge to authenticity was plausible, the challenge was not so compelling as to render admission an abuse of discretion. If a witness offers testimony from which a reasonable juror could find in favor of authenticity, the trial court may properly admit the evidence to allow the jury to decide what probative force it has.[180]

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[173] *See* Order No. 215, at 2-3.

[174] *Defenders of Wildlife v. Bernal,* 204 F.3d 920, 927 (9th Cir. 2000).

[175] *United States v. Harrington,* 923 F.2d 1371, 1374 (9th Cir. 1991).

[176] *See id.*

B. Individual Disability Report.

Hazelwood and Exxon sought an *in limine* order to exclude a physician's report from 1985 that diagnosed him as having "dysthemia" and "alcohol abuse-episodic." Hazelwood argues on appeal that admission of the report violated his state physician-patient privilege and federal regulations relating to alcohol treatment.

The report was made on an Exxon form called an Individual Disability Report that Hazelwood provided. It is a doctor's excuse that the company requires when an employee misses more than five days of work because of claimed illness. The doctor sent the form to the company, rather than maintaining it in his confidential files.

The Alaska Rules of Evidence protect against disclosure of "confidential communications made for the purpose of diagnosis or treatment."[181] A doctor's excuse sent to the patient's employer is not shielded by this rule.[182] Even if the form and the testimony relating to it were covered by the federal confidentiality rule, admission of this record was within the court's discretion,[183] and was harmless in any event because of the overwhelming evidence from other sources establishing the matter at issue, that Hazelwood had the alcohol problem the record tended to prove.

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[177] 656 F.2d 469 (9th Cir. 1981).

[178] *See id.* at 472.

[179] *Cf. United States v. Blackwood*, 878 F.2d 1200, 1202 (9th Cir. 1989) (finding *Iran* inapplicable where witness with personal knowledge provided extrinsic evidence to establish authenticity).

[180] *Id.; Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1155 (5th Cir. 1981) (stating that claims of "alteration, contamination or adulteration" of blood samples that serve as the basis of blood tests to determine intoxication go to the "weight and not the admissibility of the evidence.").

VIII. Plaintiffs' cross appeal.

Plaintiffs cross appeal. They argue that the district court erroneously granted summary judgment against the claimants who suffered purely economic injury on account of the oil spill. And they argue that if the punitive damages award were reversed, then certain rulings on evidence and instructions were erroneous and should be corrected for retrial.

A. Economic injury.

The district court granted summary judgment against all claimants who suffered only economic injury on account of the oil spill, unaccompanied by any physical injury to their property or person. It relied on the United States Supreme Court's decision in *Robins Dry Dock & Repair Co. v. Flint,*[184] a case commonly read to hold that economic recovery is unavailable in admiralty cases absent physical harm, and our decision in *Union Oil Co. v. Oppen,*[185] which recognized a commercial fisherman's exception to the *Robins Dry Dock* rule. Based on the understanding that state law may not conflict with federal maritime law, the district court held that *Robins Dry Dock* preempted Alaska's strict liability statute for hazardous substances. In light of subsequent Supreme Court decisions, we are compelled to reverse the district court's ruling in part.

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[181] AK R. Evid. 504(b).

[182] AK R. Evid. 504(a)(4).

[183] 42 U.S.C. § 290dd-2(b)(2)(C).

[184] 275 U.S. 303 (1927).

[185] 501 F.2d 558 (9th Cir. 1974).

Whether the dismissed claimants may recover depends on two inquiries: whether state law can control despite *Robins Dry Dock,* and whether Alaska law does indeed allow for recovery. The first question has been recently addressed by the United States Supreme Court. In *American Dredging Co. v. Miller*[186] and *Yamaha Motor Corp. v. Calhoun,*[187] the Supreme Court reaffirmed the three-prong test articulated almost a century ago in *Southern Pacific Co. v. Jensen,*[188] as the proper analysis for determining whether federal admiralty law preempts contrary state law. Interpreting the "saving to suitors clause" of the 1789 Judiciary Act, the Supreme Court held that, notwithstanding federal admiralty law, a state may "adopt such remedies ... as it sees fit" so long as the state remedy does not (1) "contravene[ ] the essential purpose expressed by an act of Congress;" (2) "work[ ] material prejudice to the characteristic features of the general maritime law"; or (3) "interfere[ ] with the proper harmony and uniformity of that law in its international and interstate relations."[189] Whether contrary state law can control despite *Robins* thus depends on whether the denial of recovery for pure economic injury is the "essential purpose" of an act of Congress, a "characteristic feature" of admiralty, or a doctrine whose uniform application is necessary to maintain the "proper harmony" of maritime law.[190] Like the First Circuit, we think it is none of these.[191]

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[186] 510 U.S. 443 (1994).

[187] 516 U.S. 199 (1966).

[188] 244 U.S. 205 (1917).

[189] *American Dredging,* 510 U.S. at 447; *see also Yamaha,* 516 U.S. at 211.

[190] *See American Dredging,* 510 U.S. at 447.

[191] *See Ballard,* 32 F.3d 623. The conclusion that contrary state law is not preempted by *Robins* has also been reached in the context of maritime oil spills by the Alaska Supreme Court and several district courts. *See Kodiak Island Borough v. Exxon,* 991 P.2d 757 (1999); *Complaint of*

The first question is easily disposed of: no act of Congress directly governs our case.[192] The second prong of the *Jensen* test requires preemption where a state remedy "works material prejudice to [a] characteristic featur[e] of the general maritime law." In *American Dredging*, the Court held that the "characteristic feature" language of *Jensen* refers only to a federal rule that either "originated in admiralty" or "has exclusive application there."[193] Where a federal rule "is and has long been a doctrine of general application," a state's refusal to follow that rule does not "work 'material prejudice to [a] characteristic featur[e] of the general maritime law.'"[194]

As the First Circuit has held, the *Robins Dry Dock* rule denying purely economic losses neither "originated in admiralty" nor "had 'exclusive' application in admiralty."[195] Justice Holmes' opinion in *Robins Dry Dock* presents the rule as a truism for which "no authority need be cited," and cites four cases that have applied the rule, only two of which are in admiralty.[196] It is a traditional rule of tort law.[197] Commentators trace the *Robins Dry Dock* rule to a non-admiralty case decided in 1875.[198] And courts, including our own, have repeatedly denied liability for purely economic harm in a variety of land-based contexts. As the Fifth Circuit noted in *M/V Testbank*, "[*Robins Dry Dock*] broke no new ground but instead applied a principle, then settled both in the United States and England, which refused recovery for negligent interfer-

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Nautilus Motor Tanker Co., Ltd., 900 F. Supp. 697 (D.N.J.1995); *Slaven v. BP America, Inc.*, 786 F. Supp. 853 (C.D. Cal. 1992).

[192] *See, e.g., Ballard*, 32 F.3d at 627 (no act of Congress governed 1989 spill); *In re Nautilus*, 900 F. Supp. at 702 (no act of Congress governed 1990 spill).

[193] 510 U.S. at 450.

[194] *Id.*

[195] *Ballard*, 32 F.3d at 627-28.

[196] 275 U.S. at 309.

[197] *Ballard*, 32 F.3d at 628.

[198] *See Id.*

ence with 'contractual rights.'"[199] Thus, a state's decision to depart from *Robins Dry Dock* does not materially prejudice a rule that "originated in" or is "exclusive to" general maritime law, and cannot be preempted on this ground.

State law allowing for recovery of purely economic damage can be preempted, therefore, only if it "interferes with the proper harmony and uniformity" of maritime law.[200] The Supreme Court has adopted a balancing test that weighs state and federal interests on a case-by-case basis.[201]

In undertaking this balancing test, we first look to the state interest in providing remedies for damages caused by oil spills. The Alaska Supreme Court has expressly recognized the state's "strong interest in regulating oil pollution and in providing remedies for damages caused by oil spills."[202] The United States Supreme Court has similarly recognized that regulating oil pollution and providing for recovery of economic damages is within the state's police powers, and is not preempted by federal law.[203] Because it is undisputed that "general maritime law may be changed, modified, or affected by state legislation,"[204] where "the state law is aimed at a matter of great and legitimate state concern, a court must act with great caution," before declaring the state remedy "potentially so disruptive as to be unconstitutional."[205]

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[199] *State of Louisiana v. M/V Testbank,* 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc).

[200] *Jensen,* 244 U.S. at 216.

[201] *Yamaha,* 516 U.S. at 210-15; *Ballard,* 32 F.3d at 628 (citing *Kossick v. United Fruit Co.,* 365 U.S. 731 (1961)); *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 442-48 (1960).

[202] *Kodiak,* 991 P.2d at 768 (finding *Robins Dry Dock* does not preempt state law remedies).

[203] *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 328-29 (1973) (describing oil spills as "an insidious form of pollution of vast concern to every coastal city or port and to all estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent"); *see also Huron,* 362 U.S. at 442 (describing state air pollution laws as a classic example of police power allowing states to regulate maritime activities concurrently with the federal government).

[204] *Jensen,* 244 U.S. at 216.

Accordingly, we must balance a state's "great and legitimate" interest in protecting its citizens from oil spill-related injury against the federal interest in barring recovery for pure economic harm. The federal interest in maintaining a uniform rule of recovery in admiralty is "more subtle but also not without importance."[206] It aims to contain costs potentially imposed on maritime commerce by a regime of liability, or a diversity of regimes, that are not so difficult to administer as to prevent the efficient and predictable resolution of maritime disputes.

Two federal laws establish the absence of a federal policy against awards for purely economic harm, the Oil Pollution Act ("OPA")[207] and the Trans-Alaska Pipeline Authorization Act ("TAPAA").[208] The First Circuit concluded that OPA "almost certainly provides for recovery of purely economic damages in oil spill cases" even where the claimant does not have a proprietary interest in the damaged property or natural resources.[209] The same has been said of TAPAA.[210] Both OPA and TAPAA, moreover, expressly provide that they do not preempt state imposition of additional liability requirements.[211] These statutes offer "compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce."[212]

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[205] *Ballard,* 32 F.3d at 630.

[206] *Id.* at 629.

[207] Oil Pollution Act of 1990, 33 U.S.C §§ 2701-2718 (1990).

[208] Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1656 (1994).

[209] *Ballard,* 32 F.3d at 630-31

[210] *Slaven v. BP America, Inc.,* 786 F. Supp. 853, 857-59 (C.D.Cal.1992) (TAPAA repealed *Robins Dry Dock,* at least in part)

[211] *See* 33 U.S.C. § 2718(a)(1990); 43 U.S.C. § 1653(c)(3) & (9) (1994).

In light of these considerations, the balance tips in favor of the state: "Alaska's strong interest in protecting its waters and providing remedies for damages resulting from oil spills outweighs the diminished federal interest in achieving interstate harmony through the uniform application of *Robins.*"[213]

Whether the dismissed claimants can recover depends, therefore, on whether economic recovery is indeed available under Alaska law. The Alaska Supreme Court has recently addressed this issue under Alaska's strict liability statute for hazardous substances, Alaska Stat. § 46.03.822.[214]

This expansion of liability to purely economic harm does not establish liability for all the claims plaintiffs advance. As we held in *Benefiel v. Exxon Corp.*[215] the requirement of proximate cause bars remote and speculative claims. There we held that Californians who claimed that their gasoline cost more as a result of the Exxon Valdez oil spill were barred from recovery because of "the remote and derivative damages" they claimed and lack of proximate cause as a matter of law.[216]

We remand so that the district court can determine whether tenderboat operators and crews, and seafood processors, dealers, wholesalers, and processor employees can establish allowable damages. Summary judgment was appropriately granted against "area businesses," "commercial fishermen outside the closed areas," the aquaculture association, and persons claiming "stigma" damages. Even without *Robins Dry Dock*, these groups' damages were too remote.

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[212] *Ballard,* 32 F.3d at 630-31.

[213] *Kodiak,* 991 P.2d at 769.

[214] *See id.* at 759-65; *Federal Deposit Ins. Corp. v. Laidlaw Transit, Inc.*, 21 P.3d 344 (Alaska 2001).

[215] 959 F.2d 805, 808 (9th Cir. 1992).

[216] *Benefiel,* 959 F.2d at 808 ("[w]hile proximate or legal causation normally presents an issue for the trier of fact to resolve, both California and federal law recognize that where causation cannot reasonably be established under the facts alleged by a plaintiff, the question of proximate cause is one for the courts.").

B. Conditional Cross-Appeals.

Plaintiffs argue that if the judgment is reversed in any respect, we should also reverse certain evidentiary and instructions determinations made by the trial court. We decline to do so.

First, plaintiffs say that the trial court erred in excluding some evidence of Hazelwood's drinking, drunkenness, and leaving the bridge during the early 1980's, before he went to a hospital for alcohol treatment. The district court excluded the evidence because much other evidence, closer in time and more relevant, of substantially the same conduct came in. The excluded evidence was of lesser relevance because it was remote in time, was likely to cause confusion, and would waste time as there would be a trial within the trial about whether the highly disputed allegations were true. This was within the district court's discretion.[217]

Plaintiffs also argue that the district court erred by excluding evidence of Hazelwood's two criminal convictions for driving while under the influence of alcohol. The district court excluded them for various reasons, among which were that the risk of unfair prejudice outweighed the relevance, particularly because Exxon did not know about them, because Hazelwood's misconduct with his own car on his own time had limited value in proving what he did on company time with the company's oil tanker, and because the offer of proof suggested use of character to prove conduct.[218] Though plaintiffs make a good argument for admitting the evidence, we cannot say that the district court abused its discretion in keeping it out. Nor, considering the evidence of alcohol abuse that came in, is there any significant possibility that the outcome was affected by the exclusion.[219]

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[217] Fed. R. Evid. 403; *Defenders of Wildlife v. Bernal,* 204 F.3d 920, 927 (9th Cir. 2000).

[218] Fed. R. Evid. 403; Fed. R. Evid. 404.

The same applies to the other challenged rulings, which excluded evidence that Hazelwood had five to seven drinks on an airplane flight a few days after the oil spill, and limited an expert witness's reliance on the excluded material. The district court's exclusion of evidence relating to whether a punitive damages award of the magnitude of this one was "material" to Exxon's financial condition was within its discretion for the reason the court gave, that "materiality" was a subjective accounting judgment not helpful to the jury.[220] The district court also did not abuse its discretion in refusing to admit evidence of Exxon's insurance coverage.

Likewise plaintiffs' disputes about the formulation of jury instructions go to exercises of discretion, and the district court has broad discretion in the formulation of instructions.[221] It was not abused.

Conclusion

The judgment is affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. Each party to bear its own costs.

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[219] *Bernal,* 204 F.3d at 927-28.

[220] *Cf. id.* at 927; *see also* Fed. R. Evid. 403.

[221] *Beachy v. Boise Cascade Corp.,* 191 F.3d 1010, 1013 (9th Cir. 1999), *cert. denied,* 529 U.S. 1021 (2000).

APPENDIX C

United States District Court, D. Alaska.
In re the EXXON VALDEZ
This Order Relates to All Cases
No. A89-0095-CV (HRH).

Jan. 28, 2004.

ORDER No. 364

Second Renewed Motion for Reduction of Punitive Damages Award

HOLLAND, District Judge.

Preface

On December 6, 2002, the court granted Exxon Mobil Corporation's (D-1) and Exxon Shipping Company's (D-2), hereinafter referred to as "Exxon", renewed motion for reduction or remittitur and reduced a jury verdict awarding plaintiffs $5 billion in punitive damages to $4 billion.[1] The court concluded that application of the *BMW* guideposts supported the $5 billion award but, based on plaintiffs' alternative suggestion, reduced the award to $4 billion because the Ninth Circuit in earlier proceedings hereinafter described in detail had mandated that the award be reduced on remand. After final judgment was entered on the $4 billion award,[2] both Exxon and plaintiffs timely appealed.[3]

On April 7, 2003, before any briefing on the appeals in this case, the Supreme Court decided *State Farm Mutual Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 123 S. Ct.

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[1] Order No. 358, Clerk's Docket No. 7564. Order No. 358 was published as *In re Exxon Valdez,* 236 F. Supp. 2d 1043 (D. Alaska 2002).

[2] Order No. 359 (granting Motion for Rule 54(b) Determination) (Jan. 27, 2003), Clerk's Docket No. 7589; Judgment, Clerk's Docket No. 7566.

[3] Clerk's Docket Nos. 7605 and 7609A.

1513 (2003).[4] In *State Farm,* the United States Supreme Court revisited the due process issue as to punitive damages in the context of an insurance bad faith case. On August 18, 2003, the Ninth Circuit Court of Appeals vacated the $4 billion punitive damages judgment and remanded the case to this court to reconsider the punitive damages award in light of *State Farm.*[5] Upon remand, this court called for supplemental briefing from the parties to aid in its reconsideration.[6] Exxon submitted its supplemental briefing in the form of a second renewed motion for reduction or remittitur of punitive damages.[7] This motion is opposed by plaintiffs.[8] Oral argument on the second renewed motion for reduction or remittitur of punitive damages was heard on December 3, 2003.

After considering the parties' briefing and hearing oral argument, the court has determined it most practical, for purposes of reevaluating the punitive damages award, to vacate Order No. 358 in its entirety.[9] *State Farm* adds no new, free-standing factor to the constitutional analysis of punitive damages that the court might "tie onto" its previous order. It is the court's view that *State Farm,* while bringing the *BMW* guideposts into sharper focus, does not change the analysis.[10]

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[4] *State Farm* will also be published as 538 U.S. 408, 123 S .Ct. 1513.

[5] *See* Order, Clerk's Docket No. 7737.

[6] Order re Further Proceedings on Punitive Damages Award (Aug. 26, 2003), Clerk's Docket No. 7714.

[7] Clerk's Docket No. 7753.

[8] Clerk's Docket No. 7767.

[9] Vacating Order No. 358 impliedly leaves Exxon's Renewed Motion for Reduction of Punitive Damages Award, Clerk's Docket No. 7487, unresolved. In light of Exxon's Second Renewed Motion for the Reduction of Punitive Damages, the motion at Clerk's Docket No. 7487 is denied as moot.

[10] By so stating, the court does not mean that it has adopted plaintiffs' suggestion that *State Farm* breaks no new ground and is limited to the facts of that case. There is new guidance from the Supreme Court; however, there is still no "bright-line" rule as to what is or is not unconstitutional as regards punitive damages. *State Farm,* 123 S. Ct. at 1524. The three *BMW* guideposts still apply.

In fact, there are aspects of the due process evaluation of punitive damages awards which have not changed at all as a result of *State Farm*. As a consequence, although the court is vacating Order No. 358, where the court perceives no need or necessity of further exposition of the facts or its view of the law, the court will simply replicate what it has previously said in Order No. 358.

Facts

Terrible things have happened in Alaska on Good Friday. On Good Friday, March 27, 1964, the strongest earthquake ever recorded in North America literally relocated the seabed of most of Prince William Sound and the Kenai Peninsula. On Good Friday, March 24, 1989, the oil tanker *Exxon Valdez* was run aground on Bligh Reef in Prince William Sound, Alaska.

On March 24, 1989, Exxon's co-defendant, Joseph Hazelwood, was in command of the *Exxon Valdez*. He was assisted by a third mate and a helmsman. Captain Hazelwood was a skilled mariner, but he was an alcoholic. Worse yet, he was a relapsed alcoholic; and, before departing Valdez, Alaska, on March 23, 1989, he had, more probably than not, consumed sufficient alcohol to incapacitate a non-alcoholic. As the *Exxon Valdez* exited Valdez Arm, Captain Hazelwood assumed command of the vessel from a harbor pilot and made arrangements to divert the vessel from the normal shipping lanes in order to avoid considerable ice which had calved off Columbia Glacier. That diversion from the standard shipping lanes took the vessel directly toward Bligh Reef. The captain gave the third mate explicit, accurate orders which, if carried out by the third mate, would have returned the vessel to the shipping lanes without danger of grounding on Bligh Reef. The third mate, who had completed the requirements for a captain's license, was, more probably than not, overworked and excessively tired at the time in question. He neglected to commence a turn of the vessel at the point where, and the time when, he had been directed to do so. At that critical time, Captain Hazelwood had left the bridge to attend to paperwork.

When the third mate realized that he had proceeded too far in the direction of Bligh Reef, he commenced a turn, but it was too late.

Like so many great tragedies, this one occurred when three or more unfortunate acts and/or omissions took place in close proximity to one another, and but for any one of them, the grounding would likely not have occurred. Joe Hazelwood was under the influence of alcohol. Instead of staying on the bridge to verify that his orders were carried out, he tended to paperwork below. The third mate, being overworked and tired, neglected to carry out the orders which he had been given. The grounding might still have been avoided but for several other converging circumstances: the captain had put the vessel on an automated system for increasing its speed prior to completing the maneuver around the ice in the shipping lane; and the third mate, upon realizing his oversight, did not turn the vessel as sharply as he might have.

It has never been established that there was any design, mechanical, or other fault in the *Exxon Valdez*. It responded to its human masters as intended and expected. Thus it is entirely clear why the *Exxon Valdez* grounded on Bligh Reef: the cause was pure and simple human frailty.

Defendant Exxon Shipping owned the *Exxon Valdez*. Exxon employed Captain Hazelwood, and kept him employed knowing that he had an alcohol problem. The captain had supposedly been rehabilitated, but Exxon knew better before March 24, 1989. Hazelwood had sought treatment for alcohol abuse in 1985 but had "fallen off the wagon" by the spring of 1986. Exxon knew that Hazelwood had relapsed and that he was drinking while on board ship. Exxon officials heard multiple reports of Hazelwood's relapse, and Hazelwood was being watched by other Exxon officers. Yet, Exxon continued to allow Hazelwood to command a supertanker carrying a hazardous cargo. Because Exxon did nothing despite its knowledge that Hazelwood was once again drinking, Captain Hazelwood was *the* person in charge of a vessel as long as three football fields and carrying 53 million gallons of crude oil. Exxon officials knew that it was dangerous to have a captain with an alcohol problem commanding a supertanker. Exxon officials also knew that oil and fisheries could not mix with one another. Exxon officials knew that carrying huge volumes of crude oil through Prince William Sound was a dangerous business, yet they knowingly permitted a relapsed alcoholic to direct the operation of the *Exxon Valdez* through Prince William Sound.

Captain Hazelwood came to the bridge immediately after the grounding. He timely reported to the United States Coast Guard:

> *Exxon Valdez* [calling Valdez Traffic Control]. We should be on your radar there. We've fetched up hard aground north of Goose Island off Bligh Reef and evidently leaking some oil and we're gonna be here for a while....[11]

Despite the fact that he was aware of oil boiling up through the seawater on both sides of the vessel, Captain Hazelwood attempted to extract the vessel from the reef.[12] Had he succeeded in backing the vessel off the reef or driving it across the reef, the *Exxon Valdez* would probably have foundered, risking the loss of the entire cargo and the lives of those aboard. However, the vessel was really hard aground. It could wiggle but not be moved off Bligh Reef.

The best available estimate of the crude oil lost from the *Exxon Valdez* into Prince William Sound is about 11 million gallons.[13] In the days following the grounding, about 42 million gallons of crude oil were lightered off the *Exxon Valdez* by other tankers. This process was very dangerous. The lightering process was necessarily taking place in a pool of crude oil. A spark from static electricity or other mechanical or electrical sources might have set fire to the crude oil.

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[11] Plaintiffs' Exhibit 92A, Excerpts of Record, Vol. II-Trial Exhibits, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[12] Transcript of Trial Testimony of Joseph J. Hazelwood at 439, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[13] Throughout these proceedings, plaintiff W. Findlay Abbott has contended that far more than 11 million gallons of crude oil were actually spilled from the *Exxon Valdez* into Prince William Sound. The court has repeatedly rejected these contentions for lack of any substantial evidence to support Mr. Abbott's contentions. For example, his *qui tam* action,

The crude oil lost from the *Exxon Valdez* spread far and wide around Prince William Sound, mostly in a westerly direction. Counter-currents which pass through the sound in a westerly direction (the primary North Pacific currents flow from west to east) took the crude oil past numerous islands, spreading to the coast of the Kenai Peninsula, Cook Inlet, and Kodiak Island. As the oil spread, it disrupted the lives and livelihoods of those in its path, including the 32,677 punitive damages class members. Commercial fisheries throughout this area were totally disrupted, with entire fisheries being closed for the 1989 season. As a result, commercial fishermen not only suffered economic losses but also the emotional distress that comes from having one's means of making a living destroyed. A high percentage of commercial fishermen suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder, or a combination of all three.[14] Subsistence fishing by residents of Prince William Sound and Lower Cook Inlet villages was also disrupted. The disruption to subsistence fishing deeply affected Native Alaskans, for whom subsistence fishing is not merely a way to feed their families but an important part of their culture. Research indicated that Native Alaskans also experienced great emotional

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United States ex rel. Abbott v. Exxon Corp., No. A96-0041-CV, was dismissed by this court and that dismissal was affirmed by the Ninth Circuit Court of Appeals, 182 F.3d 930 (Table) (1999 WL 313320) (9th Cir. 1999). There is no reliable evidence in the record that a larger spill was covered up by Exxon.

[14] J. Steven Picou and Duane A. Gill, "The *Exxon Valdez* Disaster as Localized Environmental Catastrophe: Dissimilarities to Risk Society Theory" in *Risk in the Modern Age: Social Theory, Science and Environmental Decisionmaking*, Maurie J. Cohen, ed. (2000) at 160-62, pertinent part attached as Exhibit 6 to Declaration of David W. Oesting, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

distress following the spill.[15] Shore-based businesses dependent upon the fishing industry were also disrupted as were the resources of cities such as Cordova.

In keeping with its legal obligations, Exxon undertook a massive cleanup effort.[16] Approximately $2.1 billion was ultimately spent in efforts to remove the spilled crude oil from the waters and beaches of Prince William Sound, Lower Cook Inlet, and Kodiak Island. Also in accordance with its legal obligations attendant to spilling crude oil,[17] Exxon undertook a voluntary claims program, ultimately paying out $303 million, principally to fishermen whose livelihood was disrupted for the year 1989 and ensuing years up to 1994.

Proceedings

Litigation over the grounding was soon commenced. The civil suits came first, but developed slowly because of their number and complexity. Both the United States Government and the State of Alaska sued Exxon for environmental damage. That litigation was expeditiously settled by means of consent decrees under which Exxon agreed to pay to the governments, for environmental damage, $900 million over a period of ten years.[18] The decrees contain an "opener" provision, allowing the governments to make additional claims of up to $100 million for environmental damage not known when the settlements were reached.[19]

Captain Hazelwood was prosecuted by the State of Alaska for operating a watercraft while intoxicated, reckless endangerment, negligent discharge of oil, and three felony counts of criminal mischief. That litigation became involved in legal complexities which led to multiple appeals. Some nine years after the grounding, a single misdemeanor conviction for negligent discharge of oil was affirmed on appeal.[20]

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[15] *Id.* at 160-61.

[16] *See* 33 U.S.C. § 1321, which imposes a duty upon an owner or operator of a vessel that spills oil to clean up its discharge.

[17] AS 46.03.822.

[18] *United States v. Exxon Corp.*, No. A91-0082-CV (Clerk's Docket No. 46 at 7-8), and *Alaska v. Exxon Corp.*, No. A91-0083-CV (Clerk's Docket No. 26 at 7-8).

[19] *See* Consent Decree and Agreement at 18-19, Clerk's Docket No. 46 in *United States v. Exxon Corp.*, No. A91-0082-CV, and Clerk's Docket No. 26 in *Alaska v. Exxon Corp.*, No. A91-0083-CV.

Exxon was prosecuted by the federal government for various environmental crimes: violating the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); violating the Refuse Act, 33 U.S.C. §§ 407 and 411; violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); violating the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and violating the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon Corporation pled guilty to one count of violating the Migratory Bird Treaty Act. Exxon Shipping pled guilty to one count each of violating the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. They were jointly fined $25 million and were ordered to pay restitution in the amount of $100 million.[21]

The civil cases (involving thousands of plaintiffs) were ultimately (but with a few exceptions) consolidated into this case. Municipal claims and some Native corporation claims were tried in state court.[22] In the consolidated cases, there was never any dispute as to Exxon's liability for compensatory damages. Only the amount of the plaintiffs' economic losses was controverted. As a consequence of procedural orders in this case and the excellent, cooperative approach taken by counsel for all parties, an effective and efficient trial protocol for the plaintiffs' claims was developed. As the time for trial grew near, this court became convinced of the necessity of creating a single, punitive damages claims class. On April 14, 1994, the court granted conditional final approval of a mandatory punitive damages class, consisting of all persons or entities who possess or have asserted claims for punitive damages against Exxon and/or Exxon Shipping which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill.[23]

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[20] *State v. Hazelwood,* 946 P.2d 875 (Alaska 1997); *State v. Hazelwood,* 866 P.2d 827 (Alaska 1993); and *Hazelwood v. State,* 962 P.2d 196 (Alaska Ct. App.1998).

[21] *See* Judgments at Clerk's Docket Nos. 235 and 236 in *United States v. Exxon Corp.,* No. A90-0015-CR.

[22] More or less simultaneously with the trial in this case, a state court civil trial involving several Native corporations was conducted. The jury awarded the corporations almost $6 million in damages. *Chenega Corp. v. Exxon Corp.,* 991 P.2d 769, 774 (Alaska 1999). The trial court offset pretrial settlements and payments against the jury award. *Id.* at 775. Because the pretrial payments exceeded the jury award, final judgments were entered by which the corporations "took nothing" from Exxon. *Id.* Recently, a straggling case involving six Alaska communities was tried in state court to a defense verdict. The cities were unsuccessful in their efforts to recover from Exxon for alleged additional expenses incurred by them as a consequence of the oil spill.

By agreement with the parties, trial as regards Exxon's and Captain Hazelwood's liability for punitive damages was commenced on May 2, 1994. In this Phase I of the trial, the jury found Exxon and Captain Hazelwood to be liable for punitive damages.

Phase II of the trial dealt with compensatory damages for plaintiffs' economic losses. In Phase IIA, the jury returned a verdict in favor of the fishermen in the amount of $287 million. Phase IIB, a separate aspect of the compensatory claims having to do with the Native economic claims, was settled without trial for $22.6 million.

Phase III of the trial focused upon the amount of punitive damages which should be imposed upon the defendants. As a predicate or base for the punitive damages trial, the parties entered into a stipulation regarding impacts from the oil spill which was read to the jury at the beginning of Phase III.[24] The stipulation outlined the actual damages that had been resolved in Phase IIB of the trial and the actual damages that were to be resolved in Phase IV of the trial and in Alaska state court proceedings. The damage estimates outlined in the stipulation exceeded $350 million. The jury was, of course, also aware that it had awarded $287 million in damages in Phase IIA of the trial. The evidence presented during Phase III focused on Exxon's and Hazelwood's conduct as it related to the oil spill. While evidence of extra-territorial conduct was admitted,[25] it had a nexus to the grounding of the *Exxon Valdez* and the resulting oil spill.

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[23] Order No. 204 (granting conditional final approval and certifying mandatory punitive damages class) at 2, Clerk's Docket No. 4856.

[24] *See* Clerk's Docket No. 5634.

In consultation with counsel, unusually detailed punitive damages instructions were developed for purposes of this case. The jury was instructed that punitive damages are awarded for the purposes of punishment and deterrence,[26] and that the fact that it had found the defendants' conduct reckless did not require it to award punitive damages.[27] The jury was specifically instructed to use reason in setting the amount of punitive damages and that any award of punitive damages should bear a reasonable relationship to the harm caused the members of the plaintiff class by the defendants' misconduct.[28] The jury was instructed that punitive damages are not

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[25] For example, evidence of Hazelwood drinking in parts of the country other than Valdez, Alaska, was admitted.

[26] *See* Jury Instruction No. 22:

> The purposes for which punitive damages are awarded are:
>
> (1) to punish a wrongdoer for extraordinary misconduct; and
>
> (2) to warn defendants and others and deter them from doing the same.

Clerk's Docket No. 5890.

[27] *See* Jury Instruction No. 20, which in pertinent part, reads: "The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them." Clerk's Docket No. 5890.

[28] *See* Jury Instruction No. 25, which in pertinent part reads:

> the amount of punitive damages may not be determined arbitrarily. You must use reason in setting the amount....[A]ny punitive damages award must have a rational basis in the evidence in the case. A punitive damages award may not be larger than an amount that bears a reasonable relationship to the harm caused to

intended to provide compensation for plaintiffs' losses and that they should assume that the plaintiffs had been fully compensated for the damages that they had suffered as a result of the oil spill.[29] Factors that the jury was told it could consider in setting an amount of punitive damages included the reprehensibility of the defendants' conduct,[30] the amount of actual and potential harm suffered by the members of the plaintiff class as a result of the defendants' conduct, and the financial condition of the defendants.[31] As to the reprehensibility factor, the jury was instructed that in determining the reprehensibility of the defendants' conduct it could consider "the nature of the conduct, the duration of the conduct, and

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> members of the plaintiff class by a defendant's misconduct.... Also, the award may not be larger than what is reasonably necessary to achieve society's goals of punishment and deterrence.

Clerk's Docket No. 5890.

[29] *See* Jury Instruction No. 26, which reads:

> An award of punitive damages is not intended to provide compensation for any loss suffered by any plaintiff. In determining whether to make an award of punitive damages you should assume that all plaintiffs have been or will be fully compensated for all damages they may have suffered as a result of the oil spill. You may not make an award of punitive damages for the purpose of compensating any plaintiff.

Clerk's Docket No. 5890.

[30] The jury was instructed, however, that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible...." *See* Jury Instruction No. 30, Clerk's Docket No. 5890.

[31] *See* Jury Instruction No. 27, which reads in pertinent part:

> In determining the amount of punitive damages to award, if any, you may consider, among other factors:
>
> (a) the degree of reprehensibility of the defendants' conduct,
>
> (b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and
>
> (c) the financial condition of the defendants.

Clerk's Docket No. 5890.

defendant's awareness that the conduct was occurring."[32] As to the defendants' wealth, the jury was instructed to consider the defendants' financial condition only in terms of what level of award would be necessary to achieve punishment and deterrence.[33]

The jury was instructed that it should not count any damage to natural resources or the environment in general when assessing the harm suffered by members of the plaintiff class.[34] The jury was also instructed that it could consider as mitigating factors the existence of criminal fines or civil awards against the defendants for the same conduct and the extent to which the defendants had taken steps to remedy the consequences of the oil spill[35] and to prevent another oil

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[32] Jury Instruction No. 30, Clerk's Docket No. 5890.

[33] *See* Jury Instruction No. 32, which reads:

> In considering whether an award of punitive damages is appropriate in this case and, if so, in what amount, you may consider the financial condition of a defendant. This does not necessarily mean that you should punish one defendant more than another defendant simply because of their relative financial conditions. If you find that a defendant's financial condition affects the level of award necessary to punish the defendant and to deter future wrongful conduct by that defendant and others, you may take the defendant's financial condition into account for that purpose.

Clerk's Docket No. 5890.

[34] *See* Jury Instruction No. 29, which reads in pertinent part: "In determining the harm caused by the oil spill, you should not consider any damage to natural resources or to the environment generally [.]" Clerk's Docket No. 5890.

[35] *See* Jury Instruction No. 36, which reads in pertinent part:

> In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you may consider whether a defendant has paid other criminal fines or civil penalties. You may also consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures. You may also consider the extent to which a defendant has been subjected to condemnation or reproval by society as a result of other means,

spill.[36]

The Phase III trial was relatively short, lasting only five days, but the jury deliberated for approximately twenty-two days before returning a verdict. The jury awarded a breath-taking $5 billion in punitive damages against the Exxon defendants, and $5,000 against Captain Hazelwood.

There was to be a Phase IV of the civil litigation. The Phase IV claims embodied all of the compensatory damage claims remaining in federal court and not included in Phase II. As to these claims, a settlement was reached in the amount of $13.4 million.

Exxon moved for a reduction or remittitur of punitive damages.[37] That motion was denied.[38] The court applied the *Hammond* factors to reach its conclusion that the $5 billion punitive damages award was not so grossly excessive as to violate Exxon's due process rights.[39] After lengthy other

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> such as loss of standing in the community, public vilification, loss of reputation, and similar matters.

Clerk's Docket No. 5890.

[36] *See* Jury Instruction No. 35, which reads in pertinent part, that "[i]n considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you should consider steps taken by a defendant to prevent recurrence of the conduct in question-in this case, another oil spill." Clerk's Docket No. 5890.

[37] Clerk's Docket No. 5970.

[38] Clerk's Docket No. 6234.

[39] The Supreme Court, in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), indicated that the Hammond factors were useful in assessing the reasonableness of a punitive damages award. The Hammond factors are as follows:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also

proceedings not relevant now, final judgment was entered including the award of $5 billion in punitive damages.[40]

Appeal and Remands

Exxon appealed as to liability for and the amount of punitive damages. Exxon sought and obtained a stay of execution on the judgment for punitive damages by posting a *supersedeas* bond in the amount of $6,750,000,000.[41] On appeal, Exxon contended first that punitive damages should have been barred as a matter of law. For reasons given, the court of appeals rejected this contention, concluding that:

> the Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights.... [W]hat saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment.

In re Exxon Valdez, 270 F.3d at 1231.

Exxon's second contention was that the plaintiffs' burden of proof should be to produce clear and convincing evidence of liability for punitive damages. The court of appeals held that this court did not abuse its discretion by employing the preponderance of evidence standard. *Id.* at 1232-33. Similarly, this court was affirmed as regards its instructions to the jury concerning Exxon's vicarious liability for the conduct of its

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sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Haslip*, 499 U.S. at 21-22.

[40] Judgment as to Phases I and III was entered September 16, 1994. Clerk's Docket No. 5891. That judgment was vacated. Clerk's Docket No. 6055. A final judgment was entered September 24, 1996, Clerk's Docket No. 6911, and an amended judgment was entered January 30, 1997, Clerk's Docket No. 6966.

[41] Clerk's Docket No. 6914.

employees. *Id.* at 1235. Exxon did not challenge the substance of the court's instructions as to the determination of punitive damages; for, with prescient skill, counsel for plaintiffs and Exxon had proposed instructions which appropriately informed the jury as to what have become the "guideposts" for fixing punitive damages: the reprehensibility of defendant's conduct, the relationship of punitive damages to actual and potential harm, and comparison to other penalties.

Captain Hazelwood and Exxon both challenged the sufficiency of the evidence to support an award of punitive damages against them. The Ninth Circuit Court concluded that there was substantial evidence to support a jury verdict of liability for punitive damages as to both Captain Hazelwood and Exxon. *Id.* at 1237-38.

Finally, with liability concluded, the court of appeals turned to Exxon's challenge to the amount of the punitive damages award against it. In addition to passing muster under the sufficiency of the evidence test, punitive damages awards must be subjected to a due process analysis which flows from the decision of the United States Supreme Court in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). In *BMW,* the Supreme Court held that a $2 million punitive damages award[42] based upon $4,000 in compensatory damages for pure economic loss was unconstitutional because the defendant lacked fair notice of so severe a punitive award. *Id.* at 574-75. The importance of the *BMW* guideposts in determining the outer constitutional limits of punitive damages was reinforced in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001).

Based upon *BMW,* the Ninth Circuit Court of Appeals in this case reiterated the three guideposts established by the Supreme Court for use in determining whether punitive damages are so grossly excessive as to constitute a violation of due process. The guideposts are:

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[42] The jury awarded Dr. Gore $4 million in punitive damages, which the Alabama Supreme Court reduced to $2 million.

> (1) the reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties in comparable cases.

In re Exxon Valdez, 270 F.3d at 1240. The court of appeals recognized that this court did not have the benefit of *BMW* and *Cooper Industries* when it decided Exxon's original motion to reduce the punitive damages award and remanded the case "for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW*." *Id.* at 1241. However, the court of appeals also provided its analysis of the *BMW* factors to aid the court in its consideration of the constitutional question. *Id.* In the end, the court of appeals unequivocally told this court that "[t]he $5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW* and *Cooper Industries*" and "[i]t must be reduced." *Id.* at 1246 (citations omitted).

On remand, Exxon filed a renewed motion for reduction or remittitur of the punitive damages award,[43] which plaintiffs opposed.[44] After consideration of the briefing and hearing oral argument on the renewed motion, the court, on December 6, 2002, issued Order No. 358, which granted Exxon's renewed motion and reduced the punitive damages award to $4 billion.[45] In applying the *BMW* guideposts, the court found Exxon's conduct highly reprehensible, a ratio of 9.85-to-1 based on actual and potential harm of over $507 million, and comparable civil and criminal penalties of which Exxon was on notice in excess of $5 billion. The court concluded that application of the *BMW* guideposts supported the $5 billion punitive damages award but reduced the award to $4 billion because the Ninth Circuit had mandated that the award be reduced.

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[43] Clerk's Docket No. 7487.

[44] Clerk's Docket No. 7501.

[45] Clerk's Docket No. 7564.

Judgment on the $4 billion punitive damages award was entered on December 10, 2002.[46] Plaintiffs moved for an order directing entry of a final judgment on Order No. 358 or, in the alternative, an order authorizing an interlocutory appeal.[47] On January 27, 2003, the court granted the plaintiffs' motion.[48] Both Exxon and plaintiffs timely noticed appeals to the Ninth Circuit Court of Appeals. Exxon sought and obtained a stay of execution on the judgment by posting a *supersedeas* bond in the amount of $4.805,000,000.[49]

On April 7, 2003, the Supreme Court decided *State Farm*, 538 U.S. 408, 123 S. Ct. 1513, which addressed the question of whether a $145 million punitive damages award, compared to compensatory damages of $1 million, in an insurance bad faith case was grossly excessive and violated due process. The Court held that the $145 million punitive damages award did not comport with due process and remanded the case to the Utah Supreme Court with the suggestion that, under the circumstances of the case, a punitive damages award at or near the amount of compensatory damages would comport with due process. *Id.* at 1526.

On August 18, 2003, prior to briefing on either appeal, the Ninth Circuit Court of Appeals vacated the $4 billion punitive damages judgment and again remanded the case to this court, this time to reconsider the punitive damages award in light of *State Farm*.[50] In remanding, the court of appeals simply vacated the court's amended judgment which found plaintiffs entitled to $4 billion in punitive damages against Exxon. The court of appeals did not comment on the merits of Order No. 358, neither suggesting nor implying that the court should revise Order No. 358, although the court of appeals plainly intended that this court reconsider Order No. 358 in light of *State Farm*. In remanding, the court of appeals also did not disturb its earlier holding that the $5 billion punitive damages award was too high to pass constitutional muster.

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[46] Clerk's Docket No. 7566.

[47] Clerk's Docket No. 7569.

[48] Order No. 359 (granting Motion for Rule 54(b) Determination) (Jan. 27, 2003), Clerk's Docket No. 7589.

[49] Clerk's Docket No. 7622.

[50] *See* Order, Clerk's Docket No. 7737.

On remand, this court called for supplemental briefing from the parties to aid in its reconsideration of the punitive damages award in light of *State Farm*.[51] Exxon submitted its supplemental briefing in the form of a second renewed motion for reduction or remittitur of punitive damages.[52] This motion is opposed by plaintiffs.[53] Oral argument on the second renewed motion for reduction or remittitur of punitive damages was heard on December 3, 2003. Having considered the parties' arguments, both written and oral, the court turns, for a third time, to the question of whether the $5 billion punitive damages award against Exxon offends the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Discussion

Legal Background

It has long been understood "that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 (1993) (quoting *Seaboard Air Line Ry v. Seegers*, 207 U.S. 73, 78 (1907)). It was not, however, until recent years that the Supreme Court considered applying this general principle of constitutional law to punitive damages awards.

In *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989), the Supreme Court suggested that the Due Process Clause could place substantive limits on punitive damages awards but left the question of whether it did to another day because the parties had not raised the issue below. *Id.*

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[51] Order re Further Proceedings on Punitive Damages Award (Aug. 26, 2003), Clerk's Docket No. 7714.

[52] Clerk's Docket No. 7753.

[53] Clerk's Docket No. 7767.

That day came two terms later in *Haslip,* 499 U.S. 1. *Haslip* involved the misappropriation of insurance premiums by Pacific Mutual's agent. After their insurance lapsed because of non-payment of premiums, Haslip and others brought a fraud claim against the agent and also sought to hold Pacific Mutual liable on a *respondeat superior* theory. A jury awarded Haslip $200,000 in compensatory damages and $840,000 in punitive damages.[54] *Id.* at 6-7 and n. 2. Pacific Mutual challenged Haslip's punitive damages award arguing that it violated both substantive and procedural due process.

The Supreme Court rejected Pacific Mutual's argument that its substantive due process rights were violated by the imposition of liability based upon the *respondeat superior* doctrine. The Court also determined that the common-law method of determining punitive damages is not "so inherently unfair as to deny due process and be *per se* unconstitutional." *Id.* at 17. However, the Court emphasized that a punitive damages award that was the result of unlimited jury or judicial discretion could violate the Due Process Clause. *Id.* at 18.

The Court in *Haslip* refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable...." *Id.* Rather, the Court stated that punitive damages awards should be evaluated based upon "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury...." *Id.* The Court then concluded that the punitive damages award against Pacific Mutual did not violate the Due Process Clause because: (1) the jury had been adequately instructed and was not given unlimited discretion in setting the amount of punitive damages; (2) the trial court was required to do a post-trial review of the punitive damage award for excessiveness; and (3) the Alabama Supreme Court also conducted a post-verdict review of punitive damages awards, using the *Hammond* factors. *Id.* at 191-22.

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[54] The other three plaintiffs were awarded much smaller amounts of damages ($15,290; $12,400; and $10,288).

The Court observed that Haslip's punitive damages award was more than four times her compensatory damages and much greater than any fine that could have been imposed for insurance fraud under Alabama law but found that the award, although perhaps "close to the line", *id.* at 23, did "not cross the line into the area of constitutional impropriety." *Id.* at 24.

Two terms later, in *TXO,* 509 U.S. 443, the Court again took up the issue of the constitutionality of a punitive damages award, this time a $10 million punitive damages award in a slander of title case that was 526 times the compensatory damages award. The parties urged the Supreme Court to formulate a "test" for evaluating whether a punitive damages award violated due process. The Court refused to do so, instead returning to what it had said in *Haslip:*

> "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus."

Id. at 458 (quoting *Haslip,* 499 U.S. at 18).

In evaluating the reasonableness of the $10 million punitive damages award against TXO, the Court concluded that it was appropriate not only to consider the actual harm that a defendant's conduct caused a plaintiff but also the potential harm that may have resulted from the defendant's conduct. *Id.* at 460. TXO's pattern of behavior could have resulted in damages ranging from $5 million to $8.3 million. *Id.* at 461. Considering the "potential" harm, the Court found that "the dramatic disparity between the actual damages and the punitive award [was not] controlling...." *Id.* at 462.

TXO also challenged the punitive damages award on the grounds that the jury had not been adequately instructed. The Court noted that the jury had been instructed that it could consider the wealth of TXO "in recognition of the fact that effective deterrence of wrongful conduct 'may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.'" *Id.* at 463 (quoting the punitive damages jury instruction). The jury was also instructed that one of the purposes of punitive damages was to provide additional compensation to the injured parties.

The Court agreed with TXO that reference to TXO's wealth may have increased the risk of the jury being influenced by prejudice against a large non-resident defendant but noted that it had found in *Haslip* that the wealth of the defendant could be considered when assessing punitive damages. The Court also stated that it did not understand the reference in the instructions about "additional compensation" . However, because the issue of inadequate instructions had not been raised below, the Court did not consider what effect these jury instructions might have had on the punitive damages award.

The Supreme Court next considered the constitutionality of a punitive damages award in *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994). Oberg was severely injured in an accident involving a three-wheeled all-terrain vehicle that was manufactured and sold by Honda. The jury awarded Oberg $735,512.31 in compensatory damages and $5 million in punitive damages. Honda appealed, arguing that the punitive damages award violated due process, in large part, because Oregon courts had no power to reduce a punitive damages award if they found that the amount of the award was grossly excessive. The Court held "that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment."[55] *Id.* at 432.

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[55] On remand, the Oregon Supreme Court, after engaging in a due process analysis, upheld the $5 million punitive damages award. *Oberg v. Honda Motor Co.,* 320 Or. 544, 888 P.2d 8 (1995).

Then came *BMW,* 517 U.S. 559, in which the Court provided lower courts with a more definite means for analyzing the reasonableness of a punitive damages award. In *BMW,* Dr. Gore purchased a new BMW from a Birmingham, Alabama, dealer. Pursuant to a national BMW policy, the dealer did not disclose to Dr. Gore that the car had been repainted because the cost of this "repair" was less than three percent of the car's suggested retail value.

At trial, BMW admitted that its national policy since 1983 was to not disclose repairs to new cars if the repairs cost less than three percent of the car's suggested retail price. Dr. Gore presented evidence that since 1983 BMW had sold 983 "repaired" cars as new, including fourteen in Alabama. Dr. Gore also presented evidence that the value of a repainted car was ten percent less than a car that had not been repainted.

The jury awarded Dr. Gore $4,000 in compensatory damages and $4 million in punitive damages (apparently based on 1000 cars x $4000 in actual damages per car). BMW moved to set aside the punitive damages award, but the trial court denied the motion. On appeal to the Alabama Supreme Court, the punitive damages award was reduced to $2 million.

In reviewing the $2 million punitive damages award, the United States Supreme Court stated that "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW,* 517 U.S. at 568. The Court observed that there could be no doubt that Alabama had a legitimate interest in protecting its citizens from deceptive trade practices. *Id.* at 568-69. However, it was conceded that Dr. Gore was endeavoring to achieve national punishment and deterrence. For reasons explained, the Supreme Court held that Alabama's interests, not those of the entire nation, were the proper scope of deterrence and punishment. *Id.* at 573-74.

The Court then announced the three guideposts that lower courts are to use to determine whether a punitive damages award is grossly excessive and applied them to the punitive damages award against BMW. The Court held that the $2 million punitive damages award against BMW violated due process and remanded the case to the Alabama Supreme Court.[56] *Id.* at 585-86.

After *BMW,* the Supreme Court did not consider a punitive damages/due process case until its 2001 decision in *Cooper Industries,* 532 U.S. 424, in which the issue was "whether the Court of Appeals applied the wrong standard of review in considering the constitutionality of the punitive damages award." *Id.* at 426. The Ninth Circuit Court of Appeals had applied an abuse of discretion standard; the Supreme Court reversed, holding that the constitutionality of punitive damages required *de novo* review and remanded the case to the appellate court to apply the appropriate standard. *Id.* at 431. Although the constitutional issue was not before the Court, it nonetheless applied the *BMW* guideposts and found several potential problems with a punitive damages award of $4.5 million versus a compensatory damages award of $50,000 for violations of the Lanham Act based on Cooper Industries passing off its product as Leatherman's.[57]

For the next several years, lower courts grappled with applying the *BMW* guideposts to punitive damages awards with no additional guidance from the Supreme Court. Then, last term, the Court handed down its decision in *State Farm,* 538 U.S. 408. *State Farm* arose out of a serious traffic accident in 1981, in which, one person (Ospital) was killed and one (Slusher) was permanently disabled. The accident occurred when Curtis Campbell was attempting to pass six vans. Early investigation into the accident indicated that Campbell's unsafe pass was the cause of the accident. A wrongful death and tort action was brought against Campbell. Campbell insisted that he was not at fault and his insurer, State Farm, decided to contest liability and declined offers to settle the claims against Campbell for policy limits ($25,000 per person, $50,000 total).

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[56] On remand, the punitive damages award was reduced to $50,000. *See BMW of North America, Inc. v. Gore,* 701 So.2d 507 (Ala.1997).

[57] On remand, the Ninth Circuit Court of Appeals reduced the punitive damages award to $500,000. *See Leatherman Tool Group, Inc. v. Cooper Industries, Inc.,* 285 F.3d 1146 (9th Cir. 2002).

The case went to trial and ended with a judgment against Campbell for $185,849, which was in excess of the amount offered in settlement. State Farm refused to cover the excess or to assist Campbell in an appeal. Campbell hired his own counsel to appeal and during the appeal reached a settlement with the plaintiffs in the tort case by which they agreed not to seek satisfaction of the judgment against Campbell if Campbell would pursue a bad faith action against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal. State Farm then paid the entire judgment, including the excess. Nonetheless, Campbell and his wife filed suit against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress.

The trial court granted summary judgment to State Farm but was reversed on appeal. On remand, the case was bifurcated for trial. In the first phase of the trial the jury determined that State Farm's decision to not settle was unreasonable. Phase two of the trial addressed, among other issues, compensatory and punitive damages. During phase two, the Campbells were allowed to introduce evidence of "'a national scheme [by State Farm] to meet corporate fiscal goals by capping payouts on claims company wide.'" *Id.* at 1518 (quoting *Campbell v. State Farm Mutual Auto. Ins. Co.,* 65 P.3d 1134, 1143 (Utah 2001)). This evidence concerned State Farm's business practices for over 20 years in numerous states. Many of the practices had no connection to third-party automobile claims, which was the type of claim underlying the complaint against the Campbells. In addition, some of the out-of-state conduct was legal where it occurred. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. The trial court reduced the compensatory damages to $1 million and the punitive damages to $25 million.

On appeal, the Supreme Court of Utah applied the *BMW* guideposts and reinstated the $145 million punitive damages award (but left compensatory damages at $1 million). State Farm successfully petitioned for certiorari.

The United States Supreme Court began its analysis, as it had in *BMW,* with a discussion of how the two aims of punitive damages, deterrence and retribution, fit into the concept that grossly excessive or arbitrary punitive damages awards offend due process. The Court observed that "it is well established that there are procedural and substantive constitutional limitations" on punitive damages awards. *State Farm,* 123 S. Ct. at 1519. The Court further observed that although punitive damages serve the same purpose as criminal penalties, defendants in civil cases are not afforded the same protections as criminal defendants. The Court stated that "[t]his increases our concerns over the imprecise manner in which punitive damages systems are administered." *Id.* at 1520. The Court discussed the need to properly instruct juries concerning punitive damages. *Id.* The Court continued by remarking that "[o]ur concerns are heightened when the decisionmaker is presented ... with evidence that has little bearing as to the amount of punitive damages that should be awarded." *Id.*

The Court then turned its attention to the application of the *BMW* guideposts, observing that "this case is neither close nor difficult." *Id.* at 1521. The Court held that the $145 million punitive damages award violated due process and remanded the case to the Utah Supreme Court, stating:

> An application of the [*BMW*] guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages.

Id. at 1526.

The Question Presented

The question presented by the instant motion is the same question that was presented in *Haslip, TXO, BMW,* and *State Farm:* does the punitive damages award constitute "grossly excessive or arbitrary punishment [ ] on [Exxon]" in violation of the Due Process Clause of the Fourteenth Amendment? *State Farm,* 123 S. Ct. at 1520 (citing *Cooper Industries,* 532 U.S. at 433, and *BMW,* 517 U.S. at 562). The question is not whether the jury "got it right" as to the necessary and/or appropriate level of punishment and/or deterrence *per se.* Discussions of whether the award sufficiently "got" Exxon's attention or whether the costs of the cleanup of the oil spill were a sufficient deterrence have little place in the constitutional analysis. We engage in a judicial (as opposed to lay judgment) review of the fundamental fairness of the punitive damages award. We consider whether Exxon was fairly on "notice not only of the conduct that will subject [it] to punishment, but also of the severity of the penalty...." *BMW,* 517 U.S. at 574. That analysis is a forward-looking inquiry from Exxon's point of view *prior* to the grounding of the *Exxon Valdez.* The Supreme Court has not said this expressly, but the forward-looking nature of the inquiry is necessarily implicit in the concept of fair notice to Exxon, *i.e.,* what Exxon should reasonably have perceived as the likely consequences of its conduct. It is because of this aspect of the inquiry that we are to look at not only actual harm but also potential harm which a defendant's reckless conduct could foreseeably have caused. *TXO,* 509 U.S. at 460.

The fair notice inquiry requires that the court first look at the quality of Exxon's conduct. Any reasonable person will understand that the more heinous his conduct, the more severe the punishment will be. Next, we look at the harm which a reasonable person would anticipate likely to flow from his conduct. This includes potential harm because a reasonable person analyzing the consequences of his conduct would naturally look to not only what is sure to happen but also to what could possibly happen. Finally, we look at other sanctions that can be imposed because the *maxima* in these regards are the very kind of thing that a reasonable person would think about if he were evaluating the possible consequences of his conduct.

In sum, the question before us is whether, under the circumstances of this case, an award of $5 billion in punitive damages is grossly excessive and therefore violates due process. To answer that question, the court's inquiry is two-fold: (1) the court must identify the state interests that the $5 billion punitive damages award was designed to serve, and (2) the court must apply the *BMW* guideposts in light of *State Farm.*

Punishable Interests

In *BMW,* the Court instructed that "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW,* 517 U.S. at 568. Without saying so expressly, *State Farm* suggests that this is still the first step in the due process evaluation of a punitive damages award. *State Farm,* 123 S. Ct. at 1519-20. In both *BMW* and *State Farm,* the plaintiffs were endeavoring to achieve national punishment and deterrence. In *BMW,* for reasons explained, the Supreme Court held that Alabama's interests, not those of the entire nation, were the proper scope of deterrence and punishment. *BMW,* 517 U.S. at 573-74. In *State Farm,* the Court reiterated that punitive damages are not to be used to punish and deter a defendant for conduct that happened in another jurisdiction, particularly if the conduct is legal in the jurisdiction in which it occurred. *State Farm,* 123 S. Ct. at 1522-23.

Most of the courts considering the constitutionality of punitive damages awards have ignored this first step in the analysis. In *In re Exxon Valdez,* the Ninth Circuit Court did not expressly discuss the scope of interests which plaintiffs seek to vindicate.[58] That it would not have done so probably flows directly from the circumstances of this case. The plaintiffs' claims for punitive damages expressly excluded consideration of harm to the environment. These claims were pursued and vindicated by consent decrees in favor of the State of Alaska and the United States Government in other proceedings. Here, the plaintiffs' focus has always been upon what happened in Prince William Sound, Lower Cook Inlet, and the environs of Kodiak Island. While brought under both state and federal law, the focus of plaintiffs' complaints have always had to do with harm to Alaska fisheries, Alaska businesses, Alaska property (both real and personal), and, to the extent that potential claims have been involved, they too have Alaskan roots. No one has contended that Exxon should be deterred or that it should be punished for conduct not having a direct nexus with the grounding of the *Exxon Valdez* on Bligh Reef in Prince William Sound.

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[58] Both the Tenth and Eleventh Circuits have expressly stated that *BMW* requires a two-step analysis: (1) define the scope of the legitimate state interests the punitive award is intended to further and (2) apply the three *BMW* guideposts. *Smith v. Ingersoll-Rand Co.,* 214 F.3d 1235,

Before moving on, and as a part of the first phase of the constitutional analysis, further comment about the court's instructions on punitive damages may be in order. The Supreme Court's punitive damages jurisprudence has consistently emphasized the role of adequate jury instructions in ensuring punitive damage awards that comport with due process. As discussed above, in *State Farm,* the Supreme Court reiterated its concern about quasi-criminal awards being made without the protections applicable to criminal cases and without adequate instructions that properly limit the jury's discretion. *State Farm,* 123 S. Ct. at 1520.

Here, given the jurisprudential changes which took place between the time this court first evaluated the $5 billion punitive damages award and the Ninth Circuit Court's review of the same, there could have been an absence of appropriate instructions to the jury or inadequate instructions as to how

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1252-53 (10th Cir. 2000); *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999). The Ninth Circuit did the same in a case that was decided after *In re Exxon Valdez. See White v. Ford Motor Co.*, 312 F.3d 998, 1013 (9th Cir. 2002).

punitive damages should be determined by the jury.[59] As discussed above, Exxon had its opportunity for input to those instructions, its opportunity to challenge those instructions, and we all have the results of that inquiry before us at the present time. The court's substantive jury instructions as to the determination of punitive damages were unchallenged. Nevertheless, given the nature of the present inquiry, it strikes the court as important to know and be mindful in understanding the second phase of the constitutional analysis (the guideposts) that the trial jury in this case was working with the very same concepts embodied within the *BMW* guideposts as set out above. The jury was instructed on the purpose of punitive damages: punishment and deterrence. The jury was admonished not to be arbitrary: punitive damages must have a rational basis in the record and bear a reasonable relationship to harm done or likely to result from the defendant's conduct. The jury was also instructed on the subjects of reprehensible conduct and consideration of mitigation (as by voluntary payments) and some comparison to other available sanctions.

Without proper instructions, jury verdicts are patently suspect. Here, we know that the trial jury, in making an award of $5 billion for punitive damages, was seeking to vindicate-through punishment and deterrence-the appropriate, Alaska-oriented plaintiff interests, and not other interests such as environmental concerns which had been separately dealt with and which the jury was expressly told not to consider. In short, this is not a situation where the jury awarded $5 billion in punitive damages based upon one script, with this court second-guessing the jury's work using a different script.

Finally, this court was concerned before trial about the risk of multiple punitive damages awards based upon the same incident. Even when punitive damages awards are limited to matters in which there is a proper Alaska interest, they could be arbitrarily cumulative and in sum grossly excessive. Here, Exxon was exposed to a multiplicity of claims, most but not all of which were pending in this court. But for the creation of a mandatory punitive damages class, Exxon was exposed to the risk of multiple punitive damages awards flowing from the same incident.[60] Where multiple suits for punitive damages have been brought in a single jurisdiction, it strikes this court that there is a very real risk that two punitive damages awards in different courts, but based upon the same incident, could result in a doubling up on deterrence and punishment. How this concern should be managed under *BMW* and *State Farm* is not clear. What is clear is that the risk does not exist in this case. Because of the mandatory punitive damages class, the court can say with confidence that Exxon has not been exposed to grossly excessive deterrence or punishment because of multiple suits for punitive damages based upon the same harm or course of conduct. It follows that the whole of what is constitutionally foreseeable for purposes of due process is fairly put to the *BMW* test of whether $5 billion in punitive damages was or was not grossly excessive.

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[59] Both now and when this case was tried, Ninth Circuit pattern jury instructions on punitive damages are not adequate to meet the concern expressed in *State Farm*.

In consideration of the foregoing, this court concludes that the plaintiffs in making their claims, this court in instructing the jury, and the jury in awarding punitive damages, were all focused upon the appropriate, relevant Alaska interests for which deterrence and punishment through punitive damages is permissible.

Application of BMW Guideposts

Reprehensibility. In *BMW,* the Court stated that "*[p]erhaps* the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW,* 517 U.S. at 575 (emphasis added). In *State Farm,* the Court unequivocally stated that the reprehensibility of the defendant's conduct *is* "'[t]he most important indicium of the reasonableness of a punitive damages award....'" *State Farm,* 123 S. Ct. at 1521 (quoting *BMW,* 517 U.S. at 575). In determining whether a defendant's conduct is reprehensible, the court considers whether:

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[60] Indeed, claims against Exxon were being tried at virtually the same time in both the United States District Court for the District of Alaska and the Superior Court for the State of Alaska.

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

In *BMW,* BMW's conduct was found to be not very reprehensible. Dr. Gore suffered only economic harm; BMW did not show indifference to the health and safety of others; BMW's conduct was not criminal; and although BMW suppressed a material fact, there were no deliberate false statements made. Dr. Gore argued that BMW's conduct was highly reprehensible because it was part of a nationwide pattern of conduct, thereby making BMW a recidivist. *BMW,* 517 U.S. at 577-79. The Court recognized that a recidivist is usually punished more severely than a first offender, but noted that in some states, BMW's conduct would not have violated state disclosure laws and that BMW had a good faith belief that its conduct would not be considered fraudulent.

In *State Farm,* the Court again found the defendant's conduct not very reprehensible, once extra-territorial (non-Utah) factors were set aside. State Farm had altered company records to make Campbell look less culpable, disregarded the overwhelming evidence of liability and almost certainty of an excess judgment at trial, and first assured the Campbells that their personal assets were safe but after judgment told them to put a for-sale sign on their house. The

Campbells, like Dr. Gore, argued that State Farm's conduct was reprehensible based on its nation-wide business practices. The Supreme Court reiterated that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *State Farm,* 123 S. Ct. at 1522. The Court also emphasized that a defendant should not be punished for out-of-state conduct that is unrelated to the harm suffered by the plaintiffs. *Id.* at 1523. In short, the Court concluded that "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period." *Id.* at 1524.

The reprehensibility of a party's conduct, like truth and beauty, is subjective. One's view of the quality of an actor's conduct is the result of complex value judgments. The evaluation of a victim will vary considerably from that of a person not affected by an incident. Courts employ disinterested, unaffected lay jurors in the first instance to appraise the reprehensibility of a defendant's conduct. Here, the jury heard about what Exxon knew, and what its officers did and what they failed to do. Knowing what Exxon knew and did through its officers, the jury concluded that Exxon's conduct was highly reprehensible.

As part of the constitutional analysis, the court must also determine the reprehensibility of Exxon's conduct, and it does so by applying the factors set forth in *State Farm.* These factors are objective criteria which the court employs to evaluate the jury's subjective appraisal of the quality of a defendant's conduct. With due deference to the jury process, verdicts should not be upset unless the jury result is "grossly excessive" in light of the objective evaluation of a defendant's conduct and therefore, constitutionally impermissible. *BMW,* 517 U.S. at 574; *State Farm,* 123 S. Ct. at 1519-20.

In evaluating the reprehensibility of a defendant's conduct, the court may not consider extra-territorial conduct that has no nexus to the harm suffered by plaintiffs. *State Farm,* 123 S. Ct. at 1523. However, the Supreme Court stated in *State Farm* that even "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id.* at 1522. Here, the court views not only the actual grounding of the *Exxon Valdez* as relevant conduct but also Exxon's conduct in the years prior to the grounding that resulted in Exxon giving the keys to a supertanker to a relapsed alcoholic on the evening of March 23, 1989. Exxon's pre-grounding conduct by and large took place outside Alaska. Exxon could have removed Captain Hazelwood from his command on the *Exxon Valdez* based upon knowledge of his relapse into alcoholism. It chose not to do so with tragic consequences. The nexus between the out-of-state conduct of Exxon and the grounding and harm to plaintiffs is clear and convincing.

The court turns now to the *State Farm* reprehensibility factors.

Type of Harm. In determining reprehensibility, the court considers whether the defendant's conduct caused physical harm or only economic harm to the plaintiffs. In both *BMW* and *State Farm,* the defendants' conduct caused only economic harm. Conduct that results in physical harm is considered more reprehensible than conduct that results in only economic harm. *Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir. 2001).

Exxon's conduct did not cause only economic harm. The court of appeals has aptly observed on Exxon's earlier appeal that "The huge oil spill obviously caused harm beyond the 'purely economic'." *In re Exxon Valdez,* 270 F.3d at 1242. The social fabric of Prince William Sound and Lower Cook Inlet was torn apart. "[R]esearch on the community impacts of the *Exxon Valdez* Oil Spill clearly delineate a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress."[61] Communities affected by the spill "reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems, and occupation related problems."[62] Also, several studies found that a high percentage of affected fishermen suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder, or a combination of all three.[63] The spilling of 11 million gallons of crude oil into Prince William Sound and Lower Cook Inlet disrupted the lives (and livelihood) of thousands of claimants and their families for years.

The foregoing shows that the harm that the plaintiffs suffered as a result of Exxon's conduct was much more egregious than the pure economic harm suffered by Dr. Gore whose only harm was that his new car was worth slightly less, or the economic risk and attendant emotional distress to which the Campbells were subject for eighteen months. Moreover, Dr. Gore and the Campbells each chose to deal with their defendant. Here, Exxon unilaterally intruded into the lives of the plaintiffs with no transactional foundation.

Reckless disregard to the health and safety of others. Exxon's and Captain Hazelwood's conduct was determined by the jury to have been reckless and its verdict as to liability for punitive damages has already been affirmed. In evaluating the reprehensibility guidepost, the court of appeals observes that the spill "did not kill anyone." *In re Exxon Valdez,* 270 F.3d at 1242-43. That statement is true based upon the record of this case; but we are engaged in a due process inquiry evaluating what Exxon was fairly on notice of prior to the plaintiffs' losses. It is a well-known fact that drunk drivers kill people with alarming frequency.[64] Exxon's decision to leave Captain Hazelwood in command of the *Exxon Valdez* not only showed a reckless disregard for the health and safety of those who lived and worked on the Sound, but also recklessly put the captain himself, his crew, and all of his rescuers in harm's way. After its grounding, the *Exxon Valdez* was sitting in a pool of oil. Rescuers had to enter that pool of oil. Careless cigarette smoking, or an electrical failure on the grounded vessel, or so simple and predictable an occurrence as an electro-static discharge when hoses are being connected or disconnected to a vessel might have ignited the crude oil and incinerated everyone in the vicinity.[65]

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[61] J. Steven Picou, *et al., Community Recovery From the Exxon Valdez Oil Spill: Mitigating Chronic Social Impacts* at 6-7, attached as Exhibit 4 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[62] Duane A. Gill, *Environmental Disaster and Fishery Co-Management in a Natural Resource Community: Impact of the Exxon Valdez Oil Spill, in Folk Management in the World's Fisheries* 227 (Dyer & McGoodwin, eds., 1994), pertinent part attached as Exhibit 5 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[63] *See* Plaintiffs' Opposition at 24, n. 20, for a complete list of the relevant studies, Clerk's Docket No. 7501. Pertinent portions of the studies are attached as Exhibits 4 and 6 through 9 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

Finally, Captain Hazelwood, for whom Exxon is responsible, did not just ground the *Exxon Valdez.* Perhaps because of judgment impaired by alcohol, but in the face of knowledge that the vessel had been holed and was rapidly losing crude oil into Prince William Sound, he endeavored to maneuver the vessel. The record reflects that this was a dangerous undertaking, one which might have taken a vessel from a point of more or less stability into a posture where a great deal more oil might have been spilled. Indeed, the vessel might have foundered.

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[64] In 1988, an estimated 23,626 deaths were caused by alcohol-related motor vehicle crashes. *See Traffic Safety Facts 1999* at 32 *available at* http://www-nrd.nhtsa.dot.gov/pfd/nrd-30/NCSA/TSFAnn/TSF1999/pdf. In 1989, 22,404 alcohol-related fatalities were reported. *Id.*

[65] As an example, Captain William J. Deppe, who took over command of the Exxon Valdez after Captain Hazelwood was relieved of his duty, explained that:

> when we were pumping oil from the top like that, oxygen could come in through the openings ... and we would create an explosive atmosphere between the void space, the deck and the oil. By putting the tools and lines and equipment down there, we could get a spark, and if we had an explosive atmosphere, you could blow up the ship.

Transcript of Trial Testimony of William J. Deppe at 7206, lns. 15-20, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

Exxon's conduct showed great disregard for the health and safety of others (including Exxon employees) and appreciably aggravates Exxon's conduct.

Financially vulnerable targets. The plaintiffs, plus anyone else who lived and worked on Prince William Sound, were the foreseeable "victims" of Exxon's decision to leave a relapsed alcoholic at the helm of a supertanker carrying a toxic cargo. While the commercial fishermen may not have been financially vulnerable targets, the subsistence fishermen certainly were.[66] Although Exxon's claims program mitigated the impact that its conduct had on financially vulnerable targets, Exxon cannot escape the fact that it knew that it was allowing a relapsed alcoholic to operate a fully-loaded, crude oil tanker in and out of Prince William Sound, a body of water which Exxon knew to be highly valuable for its fishery resources, resources which Exxon knew, or should have known, were relied on by subsistence fishermen.

Repeated actions or an isolated incident. BMW and *State Farm* recognized that a recidivist may be punished more severely than a first-time offender. In the instant case, Exxon's conduct involved repeated actions, not an isolated incident. Granted, Captain Hazelwood only grounded one vessel in Alaska between the spring of 1986 and March of 1989 and there was only one spill of oil from the *Exxon Valdez* into Prince William Sound. But, as the court noted at the outset of its discussion of the reprehensibility guidepost, the relevant conduct here involves more than just the actual grounding. It involves the conduct that led up to the grounding of the *Exxon Valdez.* March 24, 1989, was not the first time that Exxon had permitted Captain Hazelwood to command a supertanker even though Exxon knew that he had "fallen off the wagon." For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood to sail into and out of Prince William Sound with a full load of crude oil.

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[66] A compensatory damages class of Alaska Natives was certified in March of 1994. *See* Order Certifying Commercial Fishing Class, Native Class, and Landowner Class (March 14, 1994), Clerk's Docket No. 4653. The Native class included Alaska Native subsistence fishermen who suffered losses because of the oil spill. An exact number of class members is not available. However, 717 Native subsistence fishermen opted out of the Alaska Natives class. *See* Order No. 307 (granting final approval of settlement between Native opt-out settlement class and Exxon) (Jan. 19, 1996), Clerk's Docket No. 6600.

Intentional malice, trickery, or deceit, or mere accident. The grounding of the *Exxon Valdez* and the consequential spilling of crude oil was not intentional. Captain Hazelwood's purpose just prior to the grounding was to avoid Bligh Reef, not park on it. The defendants' conduct did not involve trickery or deceit. There was no effort on the part of Exxon to hide or minimize what happened.[67] But the grounding was no mere accident.

It is undisputed that Exxon understood and well knew the risks attendant to transporting crude oil out of Valdez, Alaska, and through Prince William Sound. Moreover, Exxon knew that Captain Hazelwood was an alcoholic, it knew that he had resumed drinking, and it knew that Captain Hazelwood was drinking while on duty. Driving under the influence of alcohol is a crime anywhere in the country and in Alaska.[68] Exxon knew from the spring of 1986 that Captain Hazelwood was drinking and driving the crude oil tanker *Exxon Valdez* and did nothing about it until after the *Exxon Valdez* was grounded.

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[67] Hiding a 900-foot vessel capable of carrying more than 53 million gallons of crude oil-even in so large a body of water as Prince William Sound-would not have been possible. More to the point, however, Exxon not only made no effort to hide what happened but, rather, Captain Hazelwood reported the incident to the Coast Guard immediately. *See also supra* note 13 and accompanying text.

[68] AS 28.35.030(a) and (r)(3) as regards operating watercraft.

The court of appeals observed in this regard that Exxon's knowledge "goes more to justify punitive damages than to justify punitive damages at so high a level." *In re Exxon Valdez,* 270 F.3d at 1242. Certainly Exxon's knowledge that Captain Hazelwood was drinking and driving the *Exxon Valdez* is an important, perhaps the most important, reason why the jury found and the court of appeals affirmed Exxon's liability for punitive damages. But, Exxon's knowledge is also a fundamental component of fair notice. Fair notice is the foundation of due process under the Fourteenth Amendment. Respectfully, the extent of Exxon's knowledge should also be a consideration in the characterization of the quality of Exxon's conduct.

Here we are concerned about due process and what Exxon should reasonably have anticipated as punishment for wrongful conduct. There is a direct nexus between what Exxon should reasonably have expected as punishment and the extent of its knowledge of Captain Hazelwood's situation. It is one thing to knowingly employ a sober recovering alcoholic. It is quite another-a far more serious matter-to have knowingly and intentionally allowed Captain Hazelwood to continue as master of the *Exxon Valdez* despite his relapse. Some Exxon representatives contended that Captain Hazelwood was the most watched person in the fleet, and he may have been. Exxon officials nevertheless ignored the information that was at their disposal, leaving Captain Hazelwood to operate a huge tank vessel through Prince William Sound, a body of water known for its valuable fishing resources. This is not someone hauling dry cargo, the spilling of which would have minimal impact on the fisheries and other uses of Prince William Sound. Rather, this is an employer deliberately permitting a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic, crude oil. In the view of this court, the decision by Exxon to leave Captain

Hazelwood in command of the *Exxon Valdez* is *the* critical factor in evaluating the quality of Exxon's conduct and therefore the amount of punitive damages.

Exxon willfully[69] allowed Captain Hazelwood to continue to operate a supertanker filled with crude oil despite Exxon's knowledge that he was drinking again. It was this intentional decision by Exxon that led to the plaintiffs being harmed. Willfulness-ignoring reason-is a principal component of malice.[70] Exxon's management of Captain Hazelwood amounted to intentional malice toward the plaintiffs.

Conclusion as to Reprehensibility. Punitive damages "'should reflect the enormity of [the defendant's] offense....'" *In re Exxon Valdez,* 270 F.3d at 1241 (quoting *BMW,* 517 U.S. at 575). Exxon's conduct did not simply cause economic harm to the plaintiffs. Exxon's decision to leave Captain Hazelwood in command of the *Exxon Valdez* demonstrated reckless disregard for a broad range of legitimate Alaska concerns: the livelihood, health, and safety of the residents of Prince William Sound, the crew of the *Exxon Valdez,* and others. Exxon's conduct targeted some financially vulnerable individuals, namely subsistence fishermen. Plaintiffs' harm was not the result of an isolated incident but was the result of Exxon's repeated decisions, over a period of approximately three years, to allow Captain Hazelwood to remain in command despite Exxon's knowledge that he was drinking and driving again. Exxon's bad conduct as to Captain Hazelwood and his operation of the *Exxon Valdez* was intentionally malicious.

Comparing Exxon's conduct with what happened in *BMW* and *State Farm,* Exxon's conduct was many degrees of magnitude more egregious. For approximately three years, Exxon management, with knowledge that Captain Hazelwood had fallen off the wagon, willfully permitted him to operate a fully-loaded, crude oil tanker in and out of Prince William Sound-a body of water which Exxon knew to be highly valuable for its fisheries resources. Exxon's argument that its conduct in permitting a relapsed alcoholic to operate an oil tanker should be characterized as less reprehensible than what State Farm did to the Campbells suggests that Exxon, even today, has not come to grips with the opprobrium which society rightly attaches to drunk driving. While there are surely other situations that would be more reprehensible-such as knowingly allowing a relapsed alcoholic to operate a 747 aircraft loaded with passengers-this case is in an entirely different galaxy than selling repainted cars as new, passing off a product as that of a competitor's, or refusing for eighteen months to pay an excess judgment of $185, 849. Based on the foregoing, the court finds Exxon's conduct highly reprehensible.

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[69] Willful is defined as: "governed by will without yielding to reason or without regard to reason" or "done deliberately." *Webster's Third New International Dictionary* 2617 (1981).

[70] Malice is defined as: "intention or desire to harm another usu [ally] seriously through doing something unlawful or otherwise unjustified," "*willfulness in commission of a wrong,*" or "evil intention." *Id.* at 1367 (emphasis supplied).

Ratio. The ratio guidepost requires the court to compare "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award[.]" *State Farm,* 123 S. Ct. at 1520. The harm side of the ratio is made up of two components: actual harm to the victim and the harm that was likely to occur. *BMW,* 517 U.S. at 581. The trial jury in this case was expressly instructed to consider the magnitude of "actual" and "likely" harm.[71] Under this guidepost, the court may also consider whether the compensatory damages award contained a punitive component, whether the economic injuries were minor, and whether the plaintiffs suffered physical harm or trauma. *State Farm,* 123 S. Ct. at 1524-25.

The Supreme Court has repeatedly declined "to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* at 1524. However, the Court has also repeatedly noted that "traditional" multipliers for wrongful conduct have been in the range of double, treble, or quadruple damages and that a ratio of more than 4-to-1 might be "close to the line of constitutional impropriety." *Id.* (citing *Haslip,* 499 U.S. at 23-24). "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* (quoting *BMW,* 517 U.S. at 5821589). "A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *BMW,* 517 U.S. at 582. But, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm,* 123 S. Ct. at 1524. "The precise award in any case, of course, must be based upon facts and circumstances of the defendant's conduct and the harm to plaintiff." *Id.*

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[71] Jury Instruction No. 27, Clerk's Docket No. 5890.

In *BMW,* the actual and potential harm to Dr. Gore was limited to $4,000. Thus, the Court stated that the 500-to-1 ratio between punitive damages and the harm suffered by Dr. Gore "must surely 'raise a suspicious judicial eyebrow.'" *BMW,* 517 U.S. at 583 (quoting *TXO,* 509 U.S. at 481 (O'Connor, J., dissenting)). In *State Farm,* the Court began its application of the ratio guidepost with the presumption that a triple-digit ratio would not comport with due process, but plainly, the appropriate ratio is still "somewhat indeterminate." *In re Exxon Valdez,* 270 F.3d at 1243.

Not only is the ratio somewhat indeterminate, but "potential harm" is often not subject to precise calculation. *TXO,* 509 U.S. at 460. In *TXO,* the United States Supreme Court observed that "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* (emphasis in original). While neither *BMW* or *State Farm* involved potential harm, both cases acknowledged that potential harm is part of the ratio analysis. Clearly this court is not restricted to the jury's compensatory award in evaluating the ratio guidepost. Moreover, in another case flowing from the grounding of the *Exxon Valdez* (*Sea Hawk Seafoods, Inc. v. Exxon Corp.*, 246 F.3d 676 (Table) (2000 WL 1860726) (9th Cir. 2000)), the Ninth Circuit Court held that Western Alaska Fisheries, Inc., a seafood processor that did not file an independent lawsuit against Exxon, could nevertheless share in the class action punitive damages award on the same basis as other, eligible, seafood processors. The court of appeals stated that "[u]nder federal law, including federal maritime law, punitive damages are available to any person or entity that suffered actual injury arising from a defendant's violation of a federally protected right, independent of whether legal injury is established at trial." *Id.* at *2. If this be true, then it may also follow that claimants who were dismissed from this case and were not awarded any compensatory damages could also share in the punitive damages award if they suffered some actual injury that involved a federally protected right. In addition, there are plaintiffs whose claims, dismissed by this court, have been reinstated by the court of appeals and have not yet been settled. *See In re Exxon Valdez,* 270 F.3d at 1253.[72] These claimants have "potential" for adding to the harm side of the ratio.

As to actual harm-the compensatory damages associated with the grounding of the *Exxon Valdez*-the parties differ sharply. Exxon first contends that the actual harm number for purposes of ratio calculation can be no higher than $20.3 million, which is the amount of the two compensatory judgments ultimately entered against Exxon. Exxon contends that all other payments it made were pre-judgment payments or settlements, which the court of appeals has said do not count for purposes of calculating actual harm.[73] If pre-judgment payments or settlements do not reduce actual harm, Exxon contends that the actual harm number is $383 million.[74] The plaintiffs contend that the actual harm component of total compensatory damages is $513.1 million.[75] This number is based on actual judgments and recoveries obtained by distinct categories of plaintiffs from Exxon and the TAPL Fund.[76]

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[72] Specifically, the claims of tender boat operators and crews, cannery workers, and 34 seafood processors were reinstated. Some of these reinstated claims have been settled; some are still pending.

The court finds that the best indicators of actual, compensatory damages in this case are the following items:

(1) $287,000,000 Phase II jury verdict[77]

(2) $9,515,000 paid by Exxon to Native corporation owned seafood processing operations[78]

(3) $113,500,000 paid to other commercial fish processors[79]

(4) $6,000,000 paid to the Seattle Seven fish proces-

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[73] Exxon also argues that most of its pre-judgment payments could not reasonably be treated as compensation for actual harm caused by the oil spill because Exxon's prompt payment of claims protected the plaintiffs from economic loss that might have otherwise occurred. Whether Exxon's pre-judgment payments represent "actual" harm or harm that might otherwise have occurred is ultimately irrelevant since the court must consider both harms for purposes of calculating a ratio. *BMW,* 517 U.S. at 581.

[74] Exxon's Second Renewed Motion for Reduction or Remittitur of Punitive Damages Award at 24, Clerk's Docket No. 7753.

[75] Plaintiffs' Memorandum in Opposition to Exxon's Second Renewed Motion for Reduction or Remittitur of Punitive Damages Award at 21, Clerk's Docket No 7767.

[76] *See* chart summarizing judgments and recoveries at page 39 of Plaintiffs' Opposition, Clerk's Docket No. 7501.

[77] The precise amount the jury awarded was $286, 787, 739.22. *See* Minutes from the United States District Court (Aug. 11, 1994), Clerk's Docket No. 5716.

[78] Amended Stipulation Regarding Impacts for Phase III at 5, Part III, ¶ 5, Clerk's Docket No. 5634.

[79] *Id.* at ¶ 6.

sors[80]

(5) $4,000,000 paid to fish processors by TAPL Fund[81]

(6) $20,000,000 paid by Exxon to members of the Native class[82]

(7) $2,600,000 paid by Exxon to Native class members who opted out[83]

(8) $17,790,510 net paid to Native corporations by TAPL Fund (after reimbursement by corporations to the Fund; Native corporations reimbursed the Fund $7.4 million)[84]

(9) $3,254,576 paid by Exxon to Native corporations[85]

(10) $152,275 Tatitlek state court jury verdict[86]

(11) $592,500 in other settlements to Native corporations[87]

(12) $8,521,667 paid by Exxon to municipalities and

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[80] 1996 Settlement Agreement at 4, Part II, ¶ A, Exhibit 16 to Oesting Declaration which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[81] *See* Exhibit C to Declaration of John F. Daum, which is appended to Defendants' Reply, Clerk's Docket No. 7535.

[82] Amended Stipulation Regarding Impacts for Phase III at 2, Part I, ¶ 1, Clerk's Docket No. 5634.

[83] *See* Order No. 307 (Jan. 19, 1996), Clerk's Docket No. 6600.

[84] *See* Daum Declaration at 3, ¶ 6, which is appended to Notice of Filing Original Declaration, Clerk's Docket No. 7540, and Exhibit C to his declaration, which is attached to Defendants' Reply, Clerk's Docket No. 7535. *See also,* Oesting Declaration at 7, ¶ 13, and 10, ¶ 15, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[85] *See* Memorandum from W. Monte Taylor at 53 (Mar. 20, 1992), attached as Exhibit 19 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[86] Oesting Declaration at 9, ¶ 14, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[87] *See* Exhibits 21 and 22 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

villages[88]

(13) $974,000 in additional settlements to municipalities and villages[89]

(14) $724,000 state jury verdict for Kodiak Island Borough[90]

(15) $1,340,178 paid by TAPL Fund to municipalities and villages[91]

(16) $1,500,000 received by municipalities and villages as part of the State of Alaska's recovery against Alyeska[92]

(17) $13,400,000 Phase IV settlement[93]

(18) $4,071,694 paid by TAPL Fund to cannery workers, tenders, and seafood brokers[94]

(19) $11,964,793 paid by Exxon to cannery workers, tenders, and seafood brokers[95]

(20) $388,596 paid by Exxon to area businesses[96]

(21) $219,305 paid by TAPL Fund to area businesses[97]

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[88] *See* Taylor Memorandum at 53, attached as Exhibit 19 to Oesting Declaration, and Exhibit 24 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[89] *See* Exhibits 25, 26, and 27 attached to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[90] *See* Exhibit 28 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[91] *See* Oesting Declaration at 8, ¶ 13, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501. This number should probably be slightly lower as it likely includes interest.

[92] *See id.* at 11, ¶ 16.

[93] *See id.* at 12, ¶ 17.

[94] *See id.* at 13, ¶ 18. This number probably includes interest and so should be slightly lower.

[95] *See id.*

[96] *See* Exhibit 30 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

(22) $821,000 paid by Exxon to reinstated seafood processors[98]

(23) $3,067,646 paid by Exxon to reinstated cannery workers[99]

(24) $1,750,000 paid by Exxon to reinstated tenderboat operators and crew.[100]

These figures represent a total actual harm of $513,147,740.

Laying aside briefly the question of whether it is possible to place a number on the likely or potential harm flowing from the grounding of the *Exxon Valdez,* this court turns now to what it has found to be the most troubling aspect of the decision of the court of appeals in *In re Exxon Valdez.* Without citation of authority, and without explanation that has a nexus to the due process fair notice issue which underlies the question of whether or not punitive damages are grossly excessive, the court of appeals observed with respect to the ratio analysis that:

> The amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment.

In re Exxon Valdez, 270 F.3d at 1244.[101]

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[97] Oesting Declaration at 13, ¶ 19, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[98] Exxon's Second Renewed Motion for Reduction or Remittitur of Punitive Damages Award at 23 n. 27, Clerk's Docket No. 7753.

[99] *Id.*

[100] *Id.*

[101] Following the suggestion that the court should generally discount compensatory damages by the amount of voluntary payments or settlements, the court of appeals goes on (as a part of its discussion of the ratio) to speak of cleanup expenses, observing that they "should be considered as part of the deterrent already imposed." *In re Exxon Valdez,* 270 F.3d at 1244. But cleanup costs have to do with environmental damage, and the jury was precluded from considering that harm in making its award of punitive damages. In this case, environmental harm and deterrence of it

The briefing of the parties and the court's independent research suggest that authority on the issue under consideration is virtually nonexistent, and what sparse authority there is reaches a contrary conclusion. In *Kelley v. Michaels,* 59 F.3d 1050 (10th Cir. 1995), the court dealt with an actual damage award of $292,750 and a punitive damages award of $500,000. However, the net actual damages recovered by the plaintiff were only $2,750 because of an offset of $290,000 which was the result of a partial settlement of the plaintiff's claim. The Tenth Circuit employed the $292,750 compensatory award in calculating the ratio of harm to punitive damages. *Id.* at 1055. A similar result is to be found in *United Phosphorus, Ltd. v. Midland Fumigant, Inc.,* 205 F.3d 1219 (10th Cir. 2000), where the district court reduced a compensatory award made by a jury but did not reduce the punitive award. There, also, the Tenth Circuit rejected the argument that because the district court reduced the compensatory award to prevent a double recovery to the plaintiff, the punitive award should also be reduced. *Id.* at 1231 n. 6. Thus, in determining harm for *the second *BMW* guidepost (the ratio), the Tenth Circuit added back into the compensatory award those damages that had been subtracted out because of a double recovery. *Id.* at 1231.

As already noted, the court of appeals' reason for suggesting the subtraction of voluntary payments was because to do otherwise would deter settlements prior to judgment. This court does not understand how or why encouraging settlements should be a part of the due process analysis of a punitive damages award made in a case which went to trial. Moreover, this court believes that a contrary view is more logical. If a defendant knows that it will get credit in the computation of punitive damages for a partial settlement, voluntarily made before trial, it may be encouraged to go to trial; whereas, as a general proposition the specter of a large

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should stand apart from other harms and the punishment and deterrence of them.

punitive damages award is a very powerful factor in encouraging settlements of entire cases. Reducing the risk of going to trial on punitive damages by discounting them for voluntary payments does not encourage settlements; it encourages trials.

In this case, if the general rule announced by the circuit-that the harm factor should be reduced by voluntary payments-is held to be the law, then that general rule should not apply in this case. This position is not taken because of this court's view of how reducing harm for purposes of punitive damages evaluation might impact the settlement process, but because of the specific punitive damages instructions given the jury in this case.

Generally, punitive damages instructions are very open-ended as regards how juries should come up with a punitive damages number if liability for such damages is determined. For example, the Ninth Circuit Model Civil Jury Instruction for punitive damages provides as to the amount of punitive damages only that:

> If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.[102]

In instructing the jury in this case, and as set out fully in marginal notes above, the court, with much assistance from the parties, went far beyond the norm in endeavoring to give the jury guidance on how to determine punitive damages. In those instructions, the jury was specifically admonished to take account of mitigating factors. It was instructed that it could "consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures."[103]

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[102] Ninth Circuit Model Civil Jury Instruction No. 7.5.

In arguing this case to the jury, the plaintiffs sought punitive damages of more than $5 billion and less than $20 billion.[104] The jury plainly did not buy plaintiffs' top-dollar analysis of how punitive damages should be calculated in this case. The court presumes that the jurors followed and faithfully applied, to the best of their ability, the court's instructions. *See Leatherman,* 285 F.3d at 1150 ("we must presume the jury understood and followed the instructions"). Presumably the jury already considered whether and to what extent punitive damages should be mitigated based on voluntary payments by Exxon before judgment. Reducing actual harm for purposes of ratio analysis by the amount of voluntary payments unfairly skews the ratio in Exxon's favor, and in effect gives Exxon double credit for voluntary payments by reducing both punitive damages which were based on mitigation instructions and actual harm for purposes of the punitive damages/harm ratio analysis. In this case, the court concludes that it should not discount actual harm by voluntary payments made by Exxon.

Thus, the court finds that the actual harm Exxon's conduct caused plaintiffs was $513,147,740. The punitive damages award was $5 billion, which leads to a ratio of 9.74-to-1. This ratio, of course, does not include any consideration of potential harm, a consideration that is still appropriate after *State Farm.*

In this case, there was purely non-economic harm that cannot be quantified; there was harm which likely occurred but has not yet been valued; and there was potential harm-all flowing from the grounding of the *Exxon Valdez.*

Firstly, there are some 32,677 punitive damages claimants.[105] These claimants did not get deceived about the quality of the paint on a new car. As discussed in detail above, the most direct and palpable effect of Exxon's recklessness was upon the livelihood of Prince William Sound, Cook Inlet, and Kodiak area fishermen. However, the spilling of 11 million gallons of crude oil into Prince William Sound and Lower Cook Inlet also disrupted the lives of thousands of claimants and their families. The trauma was real although not physical. That harm cannot be quantified.

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[103] Jury Instruction No. 36, Clerk's Docket No. 5890.

[104] *See* Transcript of Proceedings, Trial by Jury-70th Day, at 7587, lns. 23-25 (Aug. 29, 1994), Clerk's Docket No. 5778.

Secondly, there are plaintiffs whose claims have been reinstated in *In re Exxon Valdez* and whose claims are not yet determined. Putting a number on these claims would be speculative, even though the harm is very likely to have occurred.

Thirdly, and in the area of potential harm, there is no way of calculating how much additional oil might have spilled into Prince William Sound and spread elsewhere had Captain Hazelwood's efforts to back the *Exxon Valdez* off Bligh Reef succeeded. Here, the risk of more extensive economic and non-economic losses to the plaintiffs is immense and incalculable. If more oil would have been spilled, it is very likely that the oil would have spread further so as to affect more fisheries and more fishermen than the thousands who are plaintiffs in this case. Had the entire cargo spilled, the risk to the *Exxon Valdez* crew and its rescuers would have also been enhanced. Exxon insists that *State Farm* precludes any consideration of potential harm to anyone besides the plaintiffs.

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[105] *See* Plaintiffs' Response to Court's Requests at Oral Argument at 4, Clerk's Docket No. 7553. This number includes claimants whose claims are based on recreational uses or commercial fishing activities in unoiled commercial fisheries. These claimants may be entitled to punitive damages under the Ninth Circuit's holding in Sea Hawk Foods, 246 F.3d 676 (Table) (2000 WL 1860726). But see Exxon's Memorandum with Respect to Plaintiffs' Response to Court's Questions, Clerk's Docket No. 7561.

Here, the court discusses potential harm, so use of the number of claimants potentially entitled to receive punitive damages seems most appropriate.

While it is the court's view that consideration of the risks to rescuers and crew does not run afoul of *State Farm* or other constitutional concepts, even if this potential harm is excluded, the additional harm to the plaintiffs had the entire cargo spilled would have been immense. For Exxon to suggest that spilling the entire tanker load of crude oil into Prince William Sound involved no more risk or no more potential loss to anyone than spilling a fifth of its cargo is ludicrous. It is true that having once closed fishing for a full season, the season cannot be closed again, but that says nothing about whether additional fisheries or fishing seasons could have also been lost.

Because there is no way to quantify the non-economic, potential, and yet-to-be-litigated economic harms discussed above, the appropriate approach is to accommodate the unknowns by allowing a higher ratio to pass constitutional muster. This is in keeping with Supreme Court precedent. In *BMW,* the Court observed that "[a] higher ratio may ... be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *BMW,* 517 U.S. at 582.

Besides unquantified harm, there are other factors that support a higher ratio in this case. In *State Farm,* the Court observed that a higher ratio may be appropriate when the defendant's conduct is highly reprehensible and the economic damages recovered by the plaintiffs are small. *State Farm,* 123 S. Ct. at 1524. Exxon insists that the economic damages in this case were "substantial" and thus a 1-to-1 ratio is all that is appropriate. In *State Farm,* the Court found the $1 million in compensatory damages awarded to the Campbells "substantial" and suggested that a lower ratio, in the realm of 1-to-1, would be appropriate in that case. In *State Farm,* there were two plaintiffs. Assuming that each plaintiff was entitled to an equal share of the damages, each plaintiff received $500,000 in compensatory damages, a substantial number under any circumstances. Here, there are 32,677 claimants. Using the $513,147,740 as the measure of damages and assuming that each plaintiff was entitled to an equal share (which the court is aware is not the case), the plaintiffs' average share of the total recovery is $15,704. That is a far cry from the half-million dollars each plaintiff in *State Farm* received. The court is unpersuaded that the damages in this case were "substantial" . Rather, this is a case in which the economic damages recovered by the average plaintiff was relatively small.

In *State Farm,* the Court indicated that where compensatory damages already contain a punitive component, a lower ratio may be appropriate. In *State Farm,* the compensatory damages awarded to the Campbells contained such a punitive component. *State Farm,* 123 S. Ct. at 1525. The same is not true here. The compensatory damages that the plaintiffs received were solely for economic losses and had no punitive component. Unlike the Campbells, who pursued an intentional infliction of emotional distress claim against State Farm, the plaintiffs here never pursued such claims against Exxon. Therefore, unlike the Campbells who were compensated for the emotional distress that State Farm caused, the plaintiffs here have never been compensated for the emotional distress (the disruption of their lives discussed earlier) that resulted from oil spill which was caused by Exxon's reckless behavior. Because the plaintiffs' compensatory damages did not already contain a punitive component, a higher, single-digit ratio is appropriate in this case.

The court of appeals suggests that the cleanup costs and the like paid by Exxon would go a long way toward effecting appropriate deterrence. *In re Exxon Valdez,* 270 F.3d at 1244. As discussed above, this court is of the view that we are far past the question of whether the cleanup costs incurred by Exxon was sufficient deterrence in and of itself. That was the dealt with in the environmental litigation as discussed above. However, the issue of over-deterrence is relevant to the constitutional analysis because over-deterrence may mean that a defendant did not have fair notice that its actions could subject it to the level of punishment and deterrence imposed.

Apparently taking a cue from Justice Breyer's concurrence in *BMW*,[106] the court of appeals discusses how entrepreneurs do their planning, suggesting that they are deterred by the prospect of cleanup costs and the like. The appeals court concludes by observing, "[a]s bad as the oil spill is, fuel for the United States at moderate expense has great social value and that value as well as the value of avoiding horrendous oil spills can be reconciled by ratio analysis." *Id.*

While the court of appeals' economic analysis makes sense in the abstract or academic world, its analysis reflects what well-informed, rational entrepreneurs would do. In the real world, Exxon and its officials and managers do not work this way. If they did, they would remove the Captain Hazelwoods from the bridge because leaving them there is what creates a risk of horrendous cleanup costs and other expenses. Thus, what it theoretically takes to deter a rational business person (cleanup costs, etc.), and what it takes to deter corporate officials given to reckless conduct are very different. Here, we are dealing with reckless corporate officials.

The following considerations cause this court to believe that a higher, single-digit ratio presents no identified risk of over-deterrence. Firstly, a huge number of claimants suffered harm that was not purely economic. The harm struck at their lifestyle, causing trauma but no proven physical injuries. The health and safety of the residents of the Sound, people working on the Sound, the *Exxon Valdez* crew, and their rescuers were put at risk.

Secondly, the court is aware of no evidence in the record of this case suggesting that Exxon is able to pass its cleanup and other costs associated with the *Exxon Valdez* spill on to the public. Thus there is no showing that the deterrent effect of Exxon's costs (or the punitive sanctions) threatened the socially valuable availability of moderately priced fuel.[107]

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[106] *BMW*, 517 U.S. at 593 (Breyer, J., concurring).

Thirdly, the discussion thus far has said nothing about the financial circumstances of the defendants. In *State Farm,* the Court stated that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm,* 123 S. Ct. at 1525. However, the Court also observed that it was neither unlawful nor inappropriate to consider the defendant's wealth. *Id.* Punitive damages are intended to punish and deter; they are not intended to be an economic death sentence. Here, after judgment was entered on the punitive damages award, Exxon's treasurer advised the court that "the full payment of the Judgment would not have a material impact on the corporation or its credit quality."[108] In fact, Exxon was able to protect itself from the risk of the plaintiffs executing on the $5 billion judgment by posting an irrevocable, syndicated standby letter of credit for over $6 billion.[109] There is absolutely no chance of a $5 billion punitive damages award amounting to an economic death sentence for Exxon. This is at least some evidence of the absence of over-deterrence. In any event, this is *not* a case where Exxon's size and wealth has been used by the plaintiffs as a surrogate for the "'failure of other factors, such as "reprehensibility."'" *State Farm,* 123 S. Ct. at 1525 (quoting *BMW,* 517 U.S. at 591 (Breyer, J., concurring)).

The foregoing discussion of deterrence says nothing about the coequal goal of punitive damages: punishment. The deterrence aspect of punitive damages is intended to be essentially forward-looking. The goal is to modify the future conduct of Exxon and others similarly situated. The punishment aspect of punitive damages awards is backward-looking. The law imposes sanctions for reckless conduct of the past. The concepts are therefore quite different and foster different societal goals.

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[107] As already observed, cleanup costs have to do with environmental damage; and in this case, environmental damages have been excluded from the punitive damages determination and this court's ratio analysis.

[108] Declaration of Edgar A. Robinson at 16, ¶ 30, pertinent portion attached as Exhibit 33 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[109] *See* Clerk's Docket No. 6914.

The harms visited upon the plaintiffs and punitive damages class members (both actual and potential harm) are, for reasons discussed above, not entirely economic, and Exxon's conduct was highly reprehensible. Thus, the applicable ratio of punitive damages to harm must be such as to accommodate not just the deterrence of reckless conduct in the future, but also punishment for the recklessness which gave rise to the harm.

"Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution [.]" *State Farm,* 123 S. Ct. at 1524. The court concludes that the dual purposes of punitive damages and the circumstances of this case justify a 9.74-to-1 punitive damages to actual harm ratio. The reprehensibility of Exxon's conduct, the low per-plaintiff average economic damages recovered, the actual and potential unquantified harm, and the lack of a punitive component in the compensatory damages all point to a higher ratio in this case. Considering all of the foregoing, the court is persuaded that a punitive damages award of $5 billion was "both reasonable and proportionate to the amount of harm to the plaintiff[s] and to the general damages recovered." *Id.* That award was not grossly excessive in comparison to the actual and potential harm occasioned by the grounding of the *Exxon Valdez.*

Comparable Penalties. In *BMW,* the Court announced that "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW,* 517 U.S. at 583. Although indicating that both civil and criminal penalties were appropriate for comparison, the *BMW* Court only looked to the comparable civil penalty, which was $10,000. The Court observed that the $2 million punitive damages award was "substantially greater" than the statutory fine of $10,000. *BMW*, 517 U.S. at 584.

In *State Farm*, the Court dropped any reference to criminal penalties, stating that "[t]he third guidepost in [*BMW*] is the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *State Farm*, 123 S. Ct. at 1526 (quoting *BMW*, 517 U.S. at 575). The *State Farm* Court acknowledged that in past cases it had looked to comparable criminal penalties that might be imposed. The Court then observed that

> [t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility.

Id. The Court emphasized that "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Id.* The Court then only looked at the comparable civil penalty to which State Farm could have been subject, which again was $10,000. The Court observed that the civil fine was "dwarfed by the $145 million punitive damages award." *Id.*

Thus, after *State Farm*, there has been some discussion as to whether comparable criminal penalties are still appropriate for consideration under the third guidepost. This court's role is to make a due process inquiry. The potential size of criminal sanctions not only tells us that Alaska (and Federal) authorities view oil spills as very serious, but the criminal (and civil) sanctions available are a useful double-check of what Exxon reasonably would have understood was the outside limit of punishment that it could incur by reckless conduct. The latter is the focus of the constitutional inquiry.

In criminal proceedings brought against them by the federal government, the Exxon defendants were charged with five separate counts. Count I charged a violation of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); Count II, a violation of the Refuse Act, 33 U.S.C. §§ 407 and 411; Count III, a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); Count IV, a violation of the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and Count V, a violation of the Dangerous Cargo Act, 46 U.S.C. § 3718(b).[110] Exxon Corporation pled guilty to Count III, and Exxon Shipping pled guilty to Counts I, II, and III, and both were fined.[111] That said, the point to be made here is that Exxon has admitted criminal responsibility for its conduct. It is plainly, therefore, not unreasonable to evaluate the constitutionality of a civil award of punitive damages in the light of what Exxon could have reasonably been on notice of had it considered the civil and criminal sanctions which could flow from the conduct in question. The actual criminal penalty imposed is not the proper criteria for the constitutional inquiry in which we are engaged. Our focus is the outer limit of potential sanctions that Exxon was charged with knowing prior to the grounding of the *Exxon Valdez*.

For each of the five criminal offenses brought against it, the Exxon defendants might have been fined "twice the gross [pecuniary] loss" occasioned by the oil spill. 18 U.S.C. § 3571(d). Laying aside harm likely caused by the oil spill which has not been quantified, and laying aside harm that might potentially have been occasioned by the spill had

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[110] *See United States v. Exxon Corp.*, No. A90-0015-CR.

[111] Pursuant to a joint plea agreement, Exxon was fined a net amount of $25 million and ordered to pay restitution in the amount of $100 million. *See* Judgments at Clerk's Docket Nos. 235 and 236 in Case No. A90-0015-CR. The net amount of the fine was affected by at least three considerations: (1) the plea agreement effected a settlement which avoided a difficult and expensive trial, (2) at the time of the disposition of the criminal case, this court did not have the benefit of the more robust development of actual damages which took place later in the civil proceedings, and (3) there were practical reasons why the court eschewed a larger fine in favor of a substantial restitution obligation. The court deemed it far preferable for Exxon to be sanctioned by means of a restitution obligation which would be employed for restoration of the environment than by a larger fine which would not be so employed.

Captain Hazelwood succeeded in backing the *Exxon Valdez* off Bligh Reef, the court has found the actual pecuniary loss for purposes of the constitutional analysis to be $513.1 million. That amount doubled, as provided by the statute, and multiplied by five offenses equals $5.1 billion.[112] Because Exxon is on notice of the provisions of the criminal laws of the United States, in particular 18 U.S.C. § 3571(d), it was, for constitutional due process purposes, on notice that criminal sanctions for spilling even a modest portion of the cargo of the *Exxon Valdez* could lead to truly horrendous criminal penalties. Perhaps more important because we are concerned about notice of what *could be,* Exxon is fairly chargeable with knowledge that reckless conduct on its part could result in the spill of the entire cargo of a tank vessel such as the *Exxon Valdez.* While the court is not prepared to say that spilling the entire cargo of the *Exxon Valdez* would cause additional damage in direct proportion to that actually observed, spilling five times as much oil as was spilled would surely result in a significant increase in Exxon's exposure for criminal and civil penalties. Surely Exxon knew that billions of dollars were at stake if it were to criminally spill a tanker-load of oil in Prince William Sound. Plainly those fines could exceed the jury's punitive damages award in this civil case.

Subsection 3551 of Title 18, United States Code, also provides for imprisonment.[113] While it is not possible to imprison a corporate defendant in a criminal case, provision for imprisonment is a recognized legislative signal of heightened seriousness of the offense, and therefore, for purposes of the constitutional analysis, justifies a punitive damages award

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[112] Exxon suggests that voluntary pre-judgment payments should be deducted when calculating a potential fine, just as those payments should be deducted when calculating the ratio under the second *BMW* factor. In this case, a reduction would be no more appropriate here than it was for purposes of calculating the ratio.

[113] Exxon personnel with the authority and responsibility for placing a relapsed alcoholic in control of a large tank vessel might be imprisoned for up to one year. 33 U.S.C. §§ 407 and 411.

"'much in excess of the fine that could be imposed[.]'" *BMW,* 517 U.S. at 583 (quoting *Haslip,* 499 U.S. at 23).

The Ninth Circuit Court of Appeals observed that "[c]eilings on civil liability are also instructive." *In re Exxon Valdez,* 270 F.3d at 1245. The court of appeals discussed the $100 million "cap" on liability for discharging oil from a vessel as provided by the Trans-Alaska Pipeline Act. 43 U.S.C. § 1653(c)(1) & (3). This limit upon liability is not in any sense a sanction, nor is it a limit on civil liability. It is, rather, an upper limit of *strict* liability for harms caused by non-negligent spilling of oil. Here, we deal with Exxon's reckless conduct and focus upon sanctions as to which the statutory limit of strict liability for non-negligent conduct is not instructive.

In *BMW,* the Court suggests that a more appropriate consideration is exposure to civil penalties for wrongful conduct. *BMW,* 517 U.S. at 584. Both state and federal law make provision for the imposition of civil penalties for spilling crude oil into Prince William Sound. Alaska Statutes, Section 46.03.758, imposes civil penalties ranging from $1 per gallon to $10 per gallon, depending on where the oil is spilled. The plaintiffs estimate that state civil penalties for spilling 11 million gallons of oil in Prince William Sound would amount to $63.8 million, or an average of $5.80 per gallon.[114] Federal civil penalties of $270,000 could also have been imposed for the spill. *See* 16 U.S.C. §§ 668(b), 1858(a); 33 U.S.C. §§ 1232(a)(1), 1319(g), 1514(b)(3), 1908(b); 43 U.S.C. § 1350(b); and 46 U.S.C. § 3718(a)(1). Again, the foregoing pre-supposes the actual spill, whereas Exxon was fairly on notice that reckless conduct could cause the loss of the entire cargo thereby putting it at risk for state civil penalties approaching five times the civil penalty which would attend the actual spill. Such a civil penalty could be in excess of $255 million.

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[114] Plaintiffs' Opposition at 70, Clerk's Docket No. 7501. Exxon could have received an offset equal to the amount of oil it removed from the environment as part of cleanup efforts. *See* AS 46.03.758(f).

The court is well satisfied that Exxon was fairly on notice that its officers could face imprisonment and the company could face in excess of $5 billion in criminal and civil penalties for recklessly spilling crude oil into Prince William Sound.

New Developments

Since the Supreme Court's decisions in *BMW* and *State Farm,* both state and federal lower courts, when faced with the constitutionality of a punitive damages award, dutifully cite the three *BMW* guideposts and apply them, with varying results. In general, a review of post-*BMW* and post-*State Farm* cases offers little guidance to the court in its evaluation of the punitive damages award in this case. However, because this court is bound by the precedent of the Ninth Circuit Court of Appeals, the court has found *Zhang v. American Gem Seafoods, Inc.,* 339 F.3d 1020 (9th Cir. 2003), the one published case in which the court of appeals has considered the constitutionality of a punitive damages award after *State Farm,* helpful to its analysis.

Zhang was an employment discrimination case in which one plaintiff was awarded $360,000 in compensatory damages and $2.6 million in punitive damages on his Section 1981 claim. *Id.* at 1027. The court of appeals applied the *BMW* guideposts as clarified by *State Farm* to determine whether the punitive damages award was grossly excessive.

As for reprehensibility, the court of appeals found a "substantial gulf" between the reprehensibility of the defendants' intentional racial and ethnic discrimination and the conduct at issue in *BMW, Cooper Industries,* and *State Farm. Zhang* at 1043. Similarly here, this court finds a vast gulf between the reprehensibility of Exxon's conduct in willfully allowing a relapsed alcoholic to continue to command a supertanker filled with toxic cargo and the conduct at issue in *BMW, Cooper Industries,* and *State Farm.*

As for the ratio guidepost, the court of appeals found a

7-to-1 ratio constitutionally acceptable, in large part because it was a single-digit ratio. The court of appeals observed that it was "aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." *Zhang,* 339 F.3d at 1044. Here, this court finds a single-digit ratio constitutionally acceptable-not grossly excessive.

Lastly, as to the comparable sanctions guidepost, the court of appeals noted that there was no comparable civil penalty but that Congress has imposed a $300,000 cap on punitive damages for Title VII discrimination claims. *Id.* at 1045. Although recognizing that $300,000 is less than the $2.6 million in punitive damages imposed, the court of appeals noted that it was not as great a discrepancy as there was in *BMW* and *State Farm. Id.* The court of appeals also stated that simply because one *BMW* factor raises constitutional concerns does not mean that the punitive damages award is constitutionally excessive. Here too, if we were to only look at comparable civil penalties, there could be constitutional concern. *Id.* But here, as in *Zhang,* the defendant (Exxon) engaged in highly reprehensible conduct. The latter is "'[t]he most important indicium of the reasonableness of a punitive damages award.'" *State Farm,* 123 S. Ct. at 1521 (quoting *BMW,* 517 U.S. at 575).

Conclusion

The Supreme Court instructed that punitive damages awards must be subjected to an "exacting" review to "ensure[ ] that an award of punitive damages is based upon an "'application of law, rather than a decisionmaker's caprice.'"" *State Farm,* 123 S. Ct. at 1520-21 (quoting *Cooper Industries,* 532 U.S. at 436) (quoting *BMW,* 517 U.S. at 587 (Breyer, J., concurring)). This court has engaged in an exacting review of the $5 billion punitive damages award not once or twice, but three times, with a more penetrating inquiry each time. This court again concludes that a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of fair notice-its right to due process. This conclusion is based on the court's findings that:

> (1) Exxon's conduct was highly reprehensible;
>
> (2) the ratio of punitive damages to actual harm inflicted on the plaintiffs is a permissible one, 9.74-to-1; and
>
> (3) the comparable criminal and civil penalties could have exceeded $5 billion.

However, the court of appeals did not just remand this case for application of *BMW, Cooper Industries,* and *State Farm.* It instructed this court to reduce the punitive damages award, and the court must do that. Determining the amount of an award that will be constitutionally acceptable "'is not an enviable task.'" *Leatherman,* 285 F.3d at 1152 (quoting *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.,* 181 F.3d 446, 468 (3d Cir. 1999)). As the Third Circuit Court of Appeals explained:

> We have searched vainly in the case law for a formula that would regularize this role, but have not found one.... [T]he Supreme Court has instructed as to the analysis but has provided nothing concrete as to the amount.

Inter Medical Supplies, 181 F.3d at 468. This observation remains as true today after *State Farm* as it was before *State Farm.*

Because the court's independent evaluation of the *BMW* guideposts as applied to the facts of this case have led it to the conclusion that the $5 billion award was not grossly excessive, the court does not perceive any principled means by which it can reduce that award. In their memorandum in opposition to the first renewed motion for reduction or remittitur of punitive damages, plaintiffs suggested that "a punitive damage[s] award of at least $4 billion satisfies the requirements of due process consistent with *BMW v. Gore,* 517 U.S. 559 (1996)."[115] In light of *State Farm,* which tells us that single-digit multipliers pass constitutional muster for highly reprehensible conduct, which is what we have here, and in light of *Zhang*, in which the Ninth Circuit Court of Appeals approved a 7-to-1 ratio for conduct that was also highly reprehensible, the court reduces the punitive damages award to $4.5 billion as the means of resolving the conflict between its conclusion and the directions of the court of appeals.

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[115] Plaintiffs' Opposition at 80, Clerk's Docket No. 7501.

Exxon's motion for reduction or remittitur of the punitive damages award is granted. The sum of $500 million of the $5 billion jury award is remitted, and therefore the punitive damages award in this case is reduced to $4.5 billion.[116] The clerk of court shall enter an amended partial judgment accordingly.[117]

All plaintiffs' lead counsel's motion for a Rule 54(b) determination[118] as to the punitive damages judgment is reinstated as is Exxon's opposition to the motion.[119] The court again concludes that there is no just reason to delay entry of a final judgment in this case. The court's judgment as to the $4.5 billion punitive damages award is deemed final for purposes of Rule 54(b), Federal Rules of Civil Procedure. In the alternative, the court concludes that an interlocutory appeal under 28 U.S.C. § 1292(b) is appropriate.

All plaintiffs' lead counsel's motion for a Rule 54(b) finality determination or, in the alternative, an interlocutory appeal, is granted.

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[116] If Exxon accepts this result by paying the punitive damages award plus accrued interest, this case should of course end at that point. However, if Exxon chooses to take a further appeal for the purpose of seeking a more generous reduction of the jury's punitive damages award, then the court again urges the plaintiffs to cross-appeal. If left to apply *BMW* and *State Farm* without the requirement that it effect some reduction of the $5 billion punitive damages award, this court would have, as set out above, denied Exxon any relief whatever on its third motion for reduction or remittitur of punitive damages.

[117] . Interest on the reduced award of punitive damages shall accrue from September 24, 1996, in accordance with 28 U.S.C. § 1961.

[118] Clerk's Docket No. 7569.

[119] Clerk's Docket No. 7577.

APPENDIX D

United States District Court,
for the D. Alaska.

In re: The EXXON VALDEZ, | No. A89-0095-CV (HRH)

This Order Relates to All Cases.

Dec. 9, 2002.

Commercial and subsistence fishermen, landowners and others brought environmental tort suits against owner of oil tanker that ran aground and caused oil spill. Following trial resulting in award of compensatory and punitive damages and remand of earlier appeal, 239 F.3d 985, the District Court resolved post-trial motions. Owner appealed, and various plaintiffs cross-appealed. The Court of Appeals, 270 F.3d 1215, affirmed in part, vacated in part, and remanded. On remand, owner moved for reduction or remittitur of punitive damages award. The District Court, Holland, J., held that: (1) $5 billion punitive damages award did not violate due process, but (2) reduction of award to $4 billion was required to comply with Court of Appeals' mandate.

Motion granted.

ORDER No. 358

HOLLAND, District Judge.

Renewed Motion for Reduction of Punitive Damages Award

Defendants Exxon Mobil Corporation (D-1) and Exxon Shipping Company (D-2), hereinafter referred to as "Exxon", have filed a renewed motion for reduction or remittitur of the punitive damages award entered against them.[1] The motion is opposed by the plaintiffs.[2] Exxon has replied.[3] Various affidavits in support of and in opposition to the motion as well as the underlying record have been considered by the court, and oral argument has been requested and heard.

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[1] Clerk's Docket No. 7487.

[2] Clerk's Docket No. 7501.

[3] Clerk's Docket No. 7535.

Facts

Terrible things have happened in Alaska on Good Friday. On Good Friday, March 27, 1964, the strongest earthquake ever recorded in North America literally relocated the seabed of most of Prince William Sound and the Kenai Peninsula. On Good Friday, March 24, 1989, the oil tanker Exxon Valdez was run aground on Bligh Reef in Prince William Sound, Alaska.

On March 24, 1989, Exxon's co-defendant, Joseph Hazelwood, was in command of the Exxon Valdez. He was assisted by a third mate and a helmsman. Captain Hazelwood was a skilled mariner, but he was an alcoholic. Worse yet, he was a relapsed alcoholic; and, before departing Valdez, Alaska, on March 23, 1989, he had, more probably than not, consumed sufficient alcohol to incapacitate a nonalcoholic. As the Exxon Valdez exited Valdez Arm, Captain Hazelwood assumed command of the vessel from a harbor pilot and made arrangements to divert the vessel from the normal shipping lanes in order to avoid considerable ice which had calved off Columbia Glacier. That diversion from the standard shipping lanes took the vessel directly toward Bligh Reef. The captain gave the third mate explicit, accurate orders which, if carried out by the third mate, would have returned the vessel to the shipping lanes without danger of grounding on Bligh Reef. The third mate, who had completed the requirements for a captain's license, was, more probably than not, overworked and excessively tired at the time in question. He neglected to commence a turn of the vessel at the point where, and the time when, he had been directed to do so. At that critical time, Captain Hazelwood had left the bridge to attend to paperwork. When the third mate realized that he had proceeded too far in the direction of Bligh Reef, he commenced a turn, but it was too late.

Like so many great tragedies, this one occurred when three or more unfortunate acts and/or omissions took place in close proximity to one another, and but for any one of them, the grounding would likely not have occurred. Joe Hazelwood was under the influence of alcohol. Instead of staying on the bridge to verify that his orders were carried out, he tended to paperwork below. The third mate, being overworked and tired, neglected to carry out the orders which he had been given. The grounding might still have been avoided but for several other converging circumstances: the captain had put the vessel on an automated system for increasing its speed prior to completing the maneuver around the ice in the shipping lane; and the third mate, upon realizing his oversight, did not turn the vessel as sharply as he might have.

It has never been established that there was any design, mechanical, or other fault in the Exxon Valdez. It responded to its human masters as intended and expected. Thus it is entirely clear why the Exxon Valdez grounded on Bligh Reef: the cause was pure and simple human frailty.

Defendant Exxon Shipping owned the Exxon Valdez. Exxon employed Captain Hazelwood, and kept him employed knowing that he had an alcohol problem. The captain had supposedly been rehabilitated, but Exxon knew better before March 24, 1989. Hazelwood was being watched by other Exxon officers. They knew that he had "fallen off the wagon." Nothing was done about it. As a consequence, Captain Hazelwood was the person in charge of a vessel as long as three football fields and carrying 53 million gallons of crude oil. Exxon officials well knew that oil and fisheries could not mix with one another. Exxon officials knew that carrying huge volumes of crude oil through Prince William Sound was a dangerous business, yet they knowingly permitted a relapsed alcoholic to direct the operation of the Exxon Valdez through Prince William Sound.

Captain Hazelwood came to the bridge immediately after the grounding. He timely reported to the United States Coast Guard:

"Exxon Valdez [calling Valdez Traffic Control]. We

> should be on your radar there. We've fetched up hard aground north of Goose Island off Bligh Reef and evidently leaking some oil and we're gonna be here for a while...."[4]

Despite the fact that he was aware of oil boiling up through the seawater on both sides of the vessel, Captain Hazelwood attempted to extract the vessel from the reef.[5] Had he succeeded in backing the vessel off the reef or driving it across the reef, the Exxon Valdez would probably have foundered, risking the loss of the entire cargo and the lives of those aboard. However, the vessel was really hard aground. It could wiggle but not be moved off Bligh Reef.

The best available estimate of the crude oil lost from the Exxon Valdez into Prince William Sound is about 11 million gallons. In the days following the grounding, about 42 million gallons of crude oil were lightered off the Exxon Valdez by other tankers. This process was very dangerous. The lightering process was necessarily taking place in a pool of crude oil. A spark from static electricity or other mechanical or electrical sources might have set fire to the crude oil.

The crude oil lost from the Exxon Valdez spread far and wide around Prince William Sound, mostly in a westerly direction. Counter-currents which pass through the sound in a westerly direction (the primary North Pacific currents flow from west to east) took the crude oil past numerous islands, spreading to the coast of the Kenai Peninsula, Cook Inlet, and Kodiak Island. Commercial fisheries throughout this area were totally disrupted. Lands and vessels were heavily oiled. Subsistence fishing by residents of Prince William Sound and Lower Cook Inlet villages was disrupted, as were recreational activities throughout the area. Shore-based businesses dependent upon the fishing industry were disrupted. The resources of cities such as Cordova were substantially disrupted.

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[4] Plaintiffs' Exhibit 92A, Excerpts of Record, Vol. II-Trial Exhibits, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[5] Transcript of Trial Testimony of Joseph J. Hazelwood at 439, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

In keeping with its legal obligations, Exxon undertook a massive cleanup effort.[6] Approximately $2.1 billion was ultimately spent in efforts to remove the spilled crude oil from the waters and beaches of Prince William Sound, Lower Cook Inlet, and Kodiak Island. Also in accordance with its legal obligations attendant to spilling crude oil,[7] Exxon undertook a voluntary claims program, ultimately paying out $303 million, principally to fishermen whose livelihood was disrupted for the year 1989 and ensuing years up to 1994.

Proceedings

Litigation over the grounding was soon commenced. The civil suits came first, but developed slowly because of their number and complexity. Both the United States Government and the State of Alaska sued Exxon for environmental damage. That litigation was expeditiously settled by means of consent decrees under which Exxon agreed to pay to the governments, for environmental damage, $900 million over a period of ten years.[8] The decrees contain an "opener" provision, allowing the governments to make additional claims of up to $100 million for environmental damage not known when the settlements were reached.[9]

Captain Hazelwood was prosecuted by the State of Alaska for operating a watercraft while intoxicated, reckless endangerment, negligent discharge of oil, and three felony counts of criminal mischief. That litigation became involved in legal complexities which led to multiple appeals. Some nine years after the grounding, a single misdemeanor conviction was affirmed on appeal.[10]

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[6] *See* 33 U.S.C. § 1321, which imposes a duty upon an owner or operator of a vessel that spills oil to clean up its discharge.

[7] AS 46.03.822.

[8] *United States v. Exxon Corp.*, No. A91-0082-CV (Clerk's Docket No. 46 at 7-8), and *Alaska v. Exxon Corp.*, No. A91-0083-CV (Clerk's Docket No. 26 at 7-8).

[9] *See* Consent Decree and Agreement at 18-19, Clerk's Docket No. 46 in *United States v. Exxon Corp.*, No. A91-0082-CV, and Clerk's Docket No. 26 in *Alaska v. Exxon Corp.*, No. A91-0083-CV.

Exxon was prosecuted by the federal government for various environmental crimes: violating the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); violating the Refuse Act, 33 U.S.C. §§ 407 and 411; violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); violating the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and violating the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon Corporation pled guilty to one count of violating the Migratory Bird Treaty Act. Exxon Shipping pled guilty to one count each of violating the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. They were jointly fined $25 million and were ordered to pay restitution in the amount of $100 million.[11]

The civil cases were ultimately (but with a few exceptions) consolidated into this case. Municipal claims and some Native corporation claims were tried in state court.[12] In the consolidated cases, there never was any dispute as to Exxon's liability for compensatory damages. Only the amount of the plaintiffs' losses was controverted. As a consequence of procedural orders in this case and the excellent, cooperative approach taken by counsel for all parties, an effective and efficient trial protocol for the plaintiffs' collective damage claims was developed. As the time for trial grew near, this court became convinced of the necessity of creating a single, punitive damages claims class.

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[10] *State v. Hazelwood,* 946 P.2d 875 (Alaska 1997); *State v. Hazelwood,* 866 P.2d 827 (Alaska 1993); and *Hazelwood v. State,* 962 P.2d 196 (Alaska App. 1998).

[11] *See* Judgments at Clerk's Docket Nos. 235 and 236 in *United States v. Exxon Corp.,* No. 90-0015-CR.

[12] More or less simultaneously with the trial in this case, a state court civil trial involving several Native corporations was conducted. The jury awarded the corporations almost $6 million in damages. *Chenega Corp. v. Exxon Corp.,* 991 P.2d 769, 774 (Alaska 1999). The trial court offset pretrial settlements and payments against the jury award. *Id.* at 775. Because the pretrial payments exceeded the jury award, final judgments were entered by which the corporations "took nothing" from Exxon. *Id.* Very recently, a straggling case involving six Alaska communities was tried in state court to a defense verdict. The cities were unsuccessful in their efforts to recover from Exxon for alleged additional expenses incurred by them as a consequence of the oil spill.

By agreement with the parties, trial as regards Exxon's and Captain Hazelwood's liability for punitive damages was commenced on May 2, 1994. In this Phase I of the trial, the jury found Exxon and Captain Hazelwood to be liable for punitive damages.

Phase II of the trial dealt with compensatory damages. In Phase IIA, the jury returned a verdict in favor of fishermen in the amount of $287 million. Phase IIB, a separate aspect of the compensatory claims having to do with Native claims, was settled without trial for $22.6 million.

Phase III of the trial focused upon the amount of punitive damages which should be imposed upon the defendants. As a predicate or base for the punitive damages trial, the parties entered into a stipulation regarding impacts from the oil spill which was read to the jury at the beginning of Phase III.[13] The stipulation outlined the actual damages that had been resolved in Phase IIB of the trial and the actual damages that were to be resolved in Phase IV of the trial and in Alaska state court proceedings. The damage estimates outlined in the stipulation exceeded $350 million. The jury was, of course, also aware that it had awarded $287 million in damages in Phase IIA of the trial.

In consultation with counsel, unusually detailed punitive damages instructions were developed for purposes of this case. The jury was instructed that punitive damages are awarded for the purposes of punishment and deterrence,[14] and the fact that it had found the defendants' conduct reckless did not require it to award punitive damages.[15] The jury was specifically instructed to use reason in setting the amount of punitive damages and that any award of punitive damages should bear a reasonable relationship to the harm caused the members of the plaintiff class by the defendants' misconduct.[16] Factors that the jury was told it could consider in setting an amount of punitive damages included the reprehensibility of the defendants' conduct,[17] the amount of actual and potential harm suffered by the members of the plaintiff class as a result of the defendants' conduct, and the financial condition of the defendants.[18] However, the jury was instructed that it should not

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[13] *See* Clerk's Docket No. 5634.

[14] *See* Jury Instruction No. 22:

> The purposes for which punitive damages are awarded are:

> (1) to punish a wrongdoer for extraordinary misconduct; and
>
> (2) to warn defendants and others and deter them from doing the same.

Clerk's Docket No. 5890.

[15] *See* Jury Instruction No. 20, which in pertinent part, reads: "The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them." Clerk's Docket No. 5890.

[16] *See* Jury Instruction No. 25, which in pertinent part reads:

> the amount of punitive damages may not be determined arbitrarily. You must use reason in setting the amount.... [A]ny punitive damages award must have a rational basis in the evidence in the case. A punitive damages award may not be larger than an amount that bears a reasonable relationship to the harm caused to members of the plaintiff class by a defendant's misconduct.... Also, the award may not be larger than what is reasonably necessary to achieve society's goals of punishment and deterrence.

Clerk's Docket No. 5890.

[17] The jury was instructed, however, that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible...." *See* Jury Instruction No. 30, Clerk's Docket No. 5890.

[18] *See* Jury Instruction No. 27, which reads in pertinent part:

> In determining the amount of punitive damages to award, if any, you may consider, among other factors:

count any damage to natural resources or the environment in general when assessing the harm suffered by members of the plaintiff class.[19] The jury was also instructed that it could consider as mitigating factors the existence of criminal fines or civil awards against the defendants for the same conduct and the extent to which the defendants had taken steps to remedy the consequences of the oil spill[20] and to prevent another oil spill.[21]

The Phase III trial was relatively short, lasting only five days, but the jury deliberated for approximately twenty-two days before returning a verdict. The jury awarded a breath-taking $5 billion in punitive damages against the

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> (a) the degree of reprehensibility of the defendants' conduct,
>
> (b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and
>
> (c) the financial condition of the defendants.

Clerk's Docket No. 5890.

[19] *See* Jury Instruction No. 29, which reads in pertinent part: "In determining the harm caused by the oil spill, you should not consider any damage to natural resources or to the environment generally [.]" Clerk's Docket No. 5890.

[20] *See* Jury Instruction No. 36, which reads in pertinent part:

> In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you may consider whether a defendant has paid other criminal fines or civil penalties. You may also consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures. You may also consider the extent to which a defendant has been subjected to condemnation or reproval by society as a result of other means, such as loss of standing in the community, public vilification, loss of reputation, and similar matters.

Clerk's Docket No. 5890.

[21] *See* Jury Instruction No. 35, which reads in pertinent part, that "[i]n considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you should consider steps taken by a defendant to prevent recurrence of the conduct in question-in this case, another oil spill." Clerk's Docket No. 5890.

Exxon defendants, and $5,000.00 against Captain Hazelwood.

There was to be a Phase IV of the civil litigation. The Phase IV claims embodied all of the compensatory damage claims remaining in federal court and not included in Phase II. As to these claims, a settlement was reached in the amount of $13.4 million.

Exxon moved for a reduction or remittitur of punitive damages.[22] That motion was denied.[23]

Appeal and Remand

Once a final judgment was entered,[24] Exxon appealed. Exxon sought and obtained a stay of execution on the judgment by posting a supersedeas bond in the amount of $6,750,000,000.00.[25] On appeal, Exxon contended first that punitive damages ought to have been barred as a matter of law. For reasons given, the court of appeals rejected this contention, concluding that:

> The Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights.... [W]hat saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment.

In re Exxon Valdez, 270 F.3d 1215, 1231 (9th Cir. 2001).

Exxon's second contention was that the plaintiffs' burden of proof should be to produce clear and convincing evidence of liability for punitive damages. The court of appeals held that this court did not abuse its discretion by employing the preponderance of the evidence standard. *Id.* at 1232-33. Similarly, this court was affirmed as regards its instructions to the jury concerning Exxon's vicarious liability for the conduct of its employees. *Id.* at 1235. Exxon did not challenge the substance of the court's instructions as to the determination of punitive damages; for, with prescient skill, counsel for plaintiffs and Exxon had proposed instructions which appropriately informed the jury as to what have become the "guideposts" for fixing punitive damages: the reprehensibility of defendant's conduct, the relationship of punitive damages to actual and potential harm, and comparison to other penalties.

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[22] Clerk's Docket No. 5970.

[23] Clerk's Docket No. 6234.

[24] Judgment as to Phases I and III was entered September 16, 1994. Clerk's Docket No. 5891. That judgment was vacated. Clerk's Docket No. 6055. A final judgment was entered September 24, 1996, Clerk's Docket No. 6911, and an amended judgment was entered January 30, 1997, Clerk's Docket No. 6966.

[25] Clerk's Docket No. 6914.

Captain Hazelwood and Exxon both challenged the sufficiency of the evidence to support an award of punitive damages against them. The Ninth Circuit Court concluded that there was substantial evidence to support a jury verdict of liability for punitive damages as to both Captain Hazelwood and Exxon. *Id.* at 1237-38.

Finally, with liability concluded, the court of appeals turned to Exxon's challenge of the $5 billion punitive damages award against it. In addition to passing muster under the sufficiency of the evidence test, punitive damages awards must now be subjected to a due process analysis which flows from the decision of the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In *BMW*, the Supreme Court held that a $2 million punitive damages award[26] based upon $4,000 in compensatory damages for pure economic loss was unconstitutional because the defendant lacked fair notice of so severe a punitive award. *Id.* at 574-75. The importance of the *BMW* factors in determining the outer constitutional limits of punitive damages was reinforced in *Cooper Industries, Inc. v. Leatherman Tool Group,*

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[26] The jury awarded Dr. Gore $4 million in punitive damages, which the Alabama Supreme Court reduced to $2 million.

Inc., 532 U.S. 424 (2001).[27]

Based upon *BMW*, the Ninth Circuit Court of Appeals in this case reiterated the three guideposts established by the Supreme Court for use in determining whether punitive damages are so grossly excessive as to constitute a violation of due process. The guideposts are:

> (1) the reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties in comparable cases.

In re Exxon Valdez, 270 F.3d at 1240.

The court of appeals recognized that this court did not have the benefit of *BMW* and *Cooper Industries* when it decided Exxon's original motion to reduce the punitive damages award and in this case remanded "for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW*." *Id.* at 1241. However, the court of appeals also provided its analysis of the *BMW* factors "to aid" the court in its consideration of the constitutional question. *Id.* In the end, the court of appeals unequivocally told this court that the "$5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW* and *Cooper Industries*" and "[i]t must be reduced." *Id.* at 1246 (citations omitted).

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[27] The issue in *Cooper Industries* was "whether the Court of Appeals applied the wrong standard of review in considering the constitutionality of the punitive damages award." *Cooper Industries,* 532 U.S. at 426. The Ninth Circuit had applied an abuse of discretion standard; the Supreme Court held that the constitutionality of punitive damages required *de novo* review and remanded the case to the appellate court to apply the appropriate standard. Although the constitutional issue was not before the Court, it nonetheless applied the *BMW* factors and found several potential problems with a punitive damages award of $4.5 million versus a compensatory damages award of $50,000. On remand, the Ninth Circuit Court of Appeals reduced the punitive damages award to $500,000. *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1152 (9th Cir. 2002).

Discussion

Since the Supreme Court's decision in *BMW*, the Supreme Court and various courts of appeal have considered and applied the *BMW* factors. The only significant Supreme Court case was *Cooper Industries*, discussed above.[28] Courts of appeal faithfully cite the three *BMW* factors and then apply them, with varying results. The courts of appeal have shown some consistency on the reprehensibility factor, perhaps because the Court provided some guidance in *BMW* as to how to apply this factor. The courts of appeals have also fairly consistently looked to legislative determinations to ascertain comparable sanctions for the third *BMW* factor, although some circuits have remarked on the difficulty of comparing a violation of common law tort duties with statutory penalties. *See, e.g., Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3d Cir. 1999), and *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996). As for the second *BMW* factor, a review of post-*BMW* cases reveals that courts are willing to find a wide variety of ratios constitutionally acceptable. The Ninth Circuit has found a 28-to-1 ratio acceptable. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 818-19 (9th Cir. 2001). The Eleventh Circuit found a 100-to-1 ratio acceptable. *See Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir. 1999). By the same token, in many cases involving large compensatory damages awards, the ratios found to be permissible are much smaller. *See, e.g., United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232-33 (10th Cir. 2000) ($58.5 million in punitive damages compared to $67 million in compensatory damages, a ratio of .87-to-1); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1350 (Fed.Cir. 2001) ($50 million in punitive damages compared to $15 million in compensatory damages, a ratio of 3.33-to-1). In the end, a review of the post-*BMW* cases provides little guidance to this court as it considers the constitutionality of the $5 billion punitive damages awarded in the instant case in light of the *BMW* guideposts. *In re Exxon Valdez*, 270 F.3d at 1241.

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[28] In the seven other post-*BMW* Supreme Court cases, the Court remanded to a lower court for reconsideration of the punitive damages award in light of the *BMW* decision.

Application of *BMW*-Punishable Interests

Little mention is made in current punitive damages jurisprudence about Section II of *BMW*[29] wherein the United States Supreme Court discusses how deterrence and punishment fit into the constitutional concept that grossly excessive awards of punitive damages offend due process requirements. *BMW*, 517 U.S. at 568-574. In *BMW*, the Court found it was first necessary to identify "the scope of Alabama's legitimate interests in punishing *BMW* and deterring it from future misconduct." *Id.* at 568. In *BMW*, it was conceded that Dr. Gore was endeavoring to achieve national punishment and deterrence. For reasons explained, the Supreme Court held that Alabama's interests, not those of the entire nation, were the proper scope of deterrence and punishment.

Most of the courts considering the constitutionality of punitive damages awards have ignored this first step in the analysis.[30] In *In re Exxon Valdez*, the Ninth Circuit Court did not expressly delineate between the first and second aspects of *BMW*. That it would not have done so probably flows directly from the circumstances of this case. The plaintiffs' claims for punitive damages expressly excluded consideration of harm to the environment. These claims were pursued and vindicated by consent decrees in favor of the State of Alaska and the United States Government. Here, the plaintiffs' focus has always been upon what happened in Prince William Sound,

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[29] *But see White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002), which was published as this order was being finalized.

[30] Both the Tenth and Eleventh Circuits have expressly stated that *BMW* requires a two-step analysis, with the three "guideposts" falling into the second step. *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1252-53 (10th Cir. 2000); *Johansen*, 170 F.3d at 1333.

Lower Cook Inlet, and the environs of Kodiak Island. While brought under both state and federal law, the focus of plaintiffs' complaints have always had to do with Alaska fisheries, Alaska businesses, Alaska property (both real and personal), and, to the extent that potential claims have been involved, they too have Alaskan roots. No one has contended that Exxon should be deterred from any particular conduct somewhere outside of Alaska, nor that it should be punished for conduct not having a direct nexus with the grounding of the Exxon Valdez on Bligh Reef in Prince William Sound.

In consideration of the foregoing, this court concludes that the plaintiffs in making their claims, this court in instructing the jury, and the jury in awarding punitive damages, were all focused upon the appropriate, relevant interests for which deterrence and punishment through punitive damages is permissible. This conclusion, of course, does not address the question: How much is enough? This court, like the court of appeals, will take up that subject in the course of evaluating the *BMW* guideposts.

Before moving on, and as a part of the first phase of the *BMW* analysis, further comment about the court's instructions on punitive damages may be in order. In *BMW*, the Supreme Court was concerned that punitive damages were determined with reference to an inappropriate set of interests. It is equally important that punitive damages be determined in the first instance with reference to appropriate factors. Here, given the jurisprudential changes which took place between the time this court first evaluated the $5 billion punitive damages award and the Ninth Circuit Court's review of the same, there could have been an absence of appropriate instructions to the jury or unintended misdirection as to how punitive damages should be determined by the jury. As discussed above, Exxon had its opportunity for input to those instructions, its opportunity to challenge those instructions, and we all have the results of that inquiry before us at the present time. The court's substantive jury instructions as to the determination of punitive damages were unchallenged. Nevertheless, given the nature of the present inquiry, it strikes the court as important to know and be mindful in understanding the second phase of the *BMW* analysis (the guideposts) that the trial jury in this case was, by and large, working with the very same concepts embodied within the *BMW* guideposts as set out above. The jury was instructed on the purpose of punitive damages: punishment and deterrence. The jury was admonished not to be arbitrary: punitive damages must have a rational basis in the record and bear a reasonable relationship to harm done or likely to result from the defendant's conduct. The jury also was instructed on the subjects of reprehensible conduct and consideration of mitigation (as by voluntary payments) and some comparison to other available sanctions.

Without proper instructions, jury verdicts are patently suspect. Here, we know that the trial jury, in making an award of $5 billion for punitive damages, was seeking to vindicate-through punishment and deterrence-the appropriate plaintiff interests, and not other interests such as environmental concerns which had been separately dealt with and which the jury was expressly told not to consider. In short, this is not a situation where the jury awarded $5 billion in punitive damages based upon one script, with this court second-guessing their work using a different script.

There is yet another consideration which, in the view of this court, should precede analysis of the *BMW* factors, for it too goes to the kind of question posed in the first aspect of *BMW*. In *BMW*, the United States Supreme Court was concerned that Dr. Gore was endeavoring to impose his view of things upon the nation, not just Alabama. *BMW* might have been sued and punitive damages sought in other jurisdictions. Here, Exxon was exposed to a multiplicity of claims, most but not all of which were pending in this court. But for the creation of a mandatory punitive damages class, Exxon was exposed to the risk of multiple punitive damages awards flowing from the same incident.[31] Where multiple suits for punitive damages have been brought, it strikes this court that there is a very real risk that two punitive damages awards in different courts, but based upon the same incident, would involve a considerable risk of doubling up on deterrence and punishment. How this concern is to be managed under *BMW* is not clear. What is clear is that the risk does not exist in this case. Because of the mandatory punitive damages class, the court can say with complete confidence that Exxon has not been exposed to excessive deterrence or punishment because of multiple suits for punitive damages. It follows that the whole of what is constitutionally foreseeable for purposes of due process is fairly put to the *BMW* test of whether $5 billion in punitive damages was or was not grossly excessive.

Application of *BMW*-Factors

Reprehensibility. The court considers first the quality of defendants' conduct which led the trial jury to find liability for punitive damages.

Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *In re Exxon Valdez*, 270 F.3d at 1241 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

This factor is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award...." *BMW*, 517 U.S. at 575. In the end, the punitive damages award must "not be 'grossly out of proportion to the severity of the offense.'" *Id.* at 576 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)). The trial jury was expressly instructed to consider "the degree of reprehensibility of the defendants' conduct."[32]

The reprehensibility of a party's conduct, like truth and beauty, is subjective. One's view of the quality of an actor's conduct is the result of complex value judgments. The evaluation of a victim will vary considerably from that of a person not affected by an incident. Courts employ disinterested, unaffected lay jurors in the first instance to appraise the reprehensibility of a defendant's conduct. Here, the jury heard about what Exxon knew, and what its officers did and what they failed to do. Knowing what Exxon knew and did through its officers, the jury concluded that Exxon's conduct was highly reprehensible.

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[31] Indeed, claims against Exxon were being tried at virtually the same time in both the United States District Court for the District of Alaska and the Superior Court for the State of Alaska.

[32] Jury Instruction No. 27, Clerk's Docket No. 5890.

In a case decided less than a month before this case, the Ninth Circuit Court of Appeals observed that the Supreme Court had outlined what has been termed the "hierarchy of reprehensibility":

> Acts and threats of violence [are] at the top, "followed by acts taken in reckless disregard for others' health and safety, affirmative acts of trickery and deceit, and finally, acts of omission and mere negligence."

Swinton, 270 F.3d at 818 (quoting *Florez v. Delbovo*, 939 F. Supp. 1341, 1348-49 (N.D. Ill. 1996) (citing *BMW*, 517 U.S. at 575-76)). These are objective criteria which the court employs to evaluate the jury's subjective appraisal of the quality of a defendant's conduct. With due deference to the jury process, verdicts should not be upset unless the jury result is grossly excessive in light of the objective evaluation of a defendant's conduct.

Some aspects of the quality of Exxon and Captain Hazelwood's conduct vis-a-vis the plaintiffs are pretty straightforward. The defendants' conduct was (a) criminal, but (b) non-violent. As set out above, the Exxon defendants pled guilty to violations of three federal environmental statutes. Captain Hazelwood was ultimately convicted of the state crime of negligent discharge of oil. Non-violent crimes are patently less serious than crimes of violence. The grounding of the Exxon Valdez and the consequential spilling of crude oil was not intentional. Captain Hazelwood's purpose just prior to the grounding was to avoid Bligh Reef, not park on it. The defendants' conduct did not involve trickery or deceit. There was no effort on the part of Exxon to hide what happened.[33]

It is undisputed that Exxon understood and well knew the risks attendant to transporting crude oil out of Valdez, Alaska, and through Prince William Sound. Moreover-and these additional facts make Exxon's conduct very reprehensible-Exxon knew that Captain Hazelwood was an alcoholic, it knew that he had resumed drinking, and it knew that Captain Hazelwood was drinking while on duty. Driving under the influence of alcohol is a crime anywhere in the country. Exxon knew that Captain Hazelwood was drinking and driving the crude oil tanker Exxon Valdez and did nothing about it.

The court of appeals observed in this regard that Exxon's knowledge "goes more to justify punitive damages than to justify punitive damages at so high a level." *In re Exxon Valdez*, 270 F.3d at 1242. Certainly Exxon's knowledge that Captain Hazelwood was drinking and driving the Exxon Valdez is an important, perhaps the most important, reason why the jury found and the court of appeals affirmed Exxon's liability for punitive damages. But, as the last-quoted observation of the circuit court implies, the extent of Exxon's knowledge may also be a consideration in the characterization of the quality of Exxon's conduct.

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[33] Hiding a 900-foot vessel capable of carrying more than 53 million gallons of crude oil-even in so large a body of water as Prince William Sound-would not have been possible. More to the point, however, Exxon not only made no effort to hide what happened but, rather, Captain Hazelwood reported the incident to the Coast Guard immediately.

Throughout these proceedings, plaintiff W. Findlay Abbott has contended that far more than 11 million gallons of crude oil were actually spilled from the *Exxon Valdez* into Prince William Sound. The court has repeatedly rejected these contentions for lack of any substantial evidence to support Mr. Abbott's contentions. For example, his *qui tam* action, *United States ex rel. Abbott v. Exxon Corp.*, No. 96-00041-CV, was dismissed by this court and that dismissal was affirmed by the Ninth Circuit Court of Appeals, 182 F.3d 930 (Table) (1999 WL 313320) (9th Cir. 1999). There is no reliable evidence in the record that a larger spill was covered up by Exxon.

Here we are concerned about due process and what Exxon should reasonably have anticipated as punishment for wrongful conduct. There is a direct nexus between what Exxon should reasonably have expected as punishment and the extent of its knowledge of Captain Hazelwood's situation. It is one thing to knowingly employ a recovering alcoholic. It is quite another-a far more serious matter-to have knowingly and intentionally allowed Captain Hazelwood to continue as the master of the Exxon Valdez despite his relapse. Some Exxon representatives contended that Captain Hazelwood was the most watched person in the fleet, and he may have been. Exxon officials nevertheless ignored the information that was at their disposal, leaving Captain Hazelwood to operate a huge tank vessel through Prince William Sound, a body of water known for its valuable fishing and recreational resources. This is not someone hauling dry cargo, the spilling of which would have minimal impact on the fisheries and other uses of Prince William Sound. Rather, this is an employer deliberately permitting a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic, crude oil. In the view of this court, the decision to leave Captain Hazelwood in command of the Exxon Valdez was highly reprehensible.

Exxon's and Captain Hazelwood's conduct was determined by the jury to have been reckless. In evaluating the reprehensibility guidepost, the court of appeals observes that the spill "did not kill anyone." *In re Exxon Valdez*, 270 F.3d at 1242-43. That statement is true based upon the record of this case. What it does not say, however, is that Exxon's decision to leave Captain Hazelwood in command of the Exxon Valdez recklessly put the captain himself, his crew, and all of his rescuers in harm's way. After its grounding, the Exxon Valdez was sitting in a pool of oil. Rescuers had to enter that pool of oil. Careless smoking of tobacco or an electrical or electro-static spark might have ignited the crude oil and incinerated everyone in the vicinity.[34]

Finally, Captain Hazelwood, for whom Exxon is responsible, did not just ground the Exxon Valdez. Perhaps because of judgment impaired by alcohol, but in the face of knowledge that the vessel had been holed and was rapidly losing crude oil into Prince William Sound, he endeavored to maneuver the vessel. The record reflects that this was a dangerous undertaking, one which might have taken a vessel from a point of more or less stability into a posture where a great deal more oil might have been spilled. Indeed, the vessel might have foundered. Exxon's claims program certainly mitigated the reprehensibility of its conduct. But in the view of this court, what might have happened as the result of a careless cigarette or an electrical failure on the grounded vessel or so simple an occurrence as an electro-static discharge when hoses are being connected or disconnected to a vessel appreciably aggravates Exxon's conduct.

Punitive damages "'should reflect the enormity of [the defendant's] offense....'" *In re Exxon Valdez*, 270 F.3d at 1241 (quoting *BMW*, 517 U.S. at 575). On the *BMW* hierarchy of reprehensibility, Exxon's conduct, while not reaching the top, falls just short. Its conduct was criminal. Exxon's decision to leave Captain Hazelwood in command of the Exxon Valdez demonstrated reckless disregard for the livelihood, health, and safety of the residents of Prince William Sound, the crew of the Exxon Valdez, and others. Exxon's conduct was highly reprehensible.

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[34] As an example, Captain William J. Deppe, who took over command of the *Exxon Valdez* after Captain Hazelwood was relieved of his duty, explained that:

> when we were pumping oil from the top like that, oxygen could come in through the openings ... and we would create an explosive atmosphere between the void space, the deck and the oil. By putting the tools and lines and equipment down there, we could get a spark, and if we had an explosive atmosphere, you could blow up the ship.

Transcript of Trial Testimony of William J. Deppe at 7206, lns. 15-20, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

Ratio. The second indicium of an unreasonable or excessive punitive damages award is its ratio to the harm inflicted on the plaintiff. *BMW*, 517 U.S. at 580. There must be a reasonable relationship between exemplary damages and compensatory damages. *Id.* The compensatory side of the ratio is made up of two components: actual harm to the victim and the harm that was likely to occur. *Id.* at 581. The trial jury was expressly instructed to consider the magnitude of "actual" and "likely" harm.[35]

There is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *BMW*, 517 U.S. at 583. In *Haslip*, 499 U.S. at 23, the Supreme Court found a 4-to-1 ratio "close to the line." In *TXO*, a 10-to-1 ratio was upheld. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993). In *BMW*, the Court stated that "[w]hen the ratio is a breathtaking 500 to 1 ... the award must surely 'raise a suspicious judicial eyebrow.'" *BMW*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481). Although it noted in this case that a 4-to-1 ratio has been found to be close to the line, the Ninth Circuit Court of Appeals has upheld far greater ratios in other cases. *See, e.g., Swinton*, 270 F.3d at 818-19 (28-to-1 ratio), and *Leatherman*, 285 F.3d at 1152 (10-to-1 ratio). Plainly, the ratio is "somewhat indeterminate." *In re Exxon Valdez*, 270 F.3d at 1243.

Not only is the ratio somewhat indeterminate, but also harm likely to occur and "potential harm" are often not subject to precise calculation. *TXO*, 509 U.S. at 460. In *TXO*, the United States Supreme Court observed that "[i]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* (emphasis in original). Clearly this court is not restricted to the jury's compensatory award in evaluating the ratio guidepost. Moreover, in another case flowing from the grounding of the Exxon Valdez (*Sea Hawk Seafoods, Inc. v. Exxon Corp.*, 246 F.3d 676 (Table) (2000 WL 1860726) (9th Cir. 2000)), the Ninth Circuit Court held that Western Alaska Fisheries, Inc., a seafood processor that did not file an independent lawsuit against Exxon, could nevertheless share in the class action punitive damages award on the same basis as other, eligible, seafood processors. The court of appeals stated that "[u]nder federal law, including federal maritime law, punitive damages are available to any person or entity that suffered actual injury arising from a defendant's violation of a federally protected right, independent of whether legal injury is established at trial." *Id.* 2000 WL 1860726, at *2. If this be true, then it also follows that claimants who were dismissed from this case and were not awarded any compensatory damages could also share in the punitive damages award if they suffered some actual injury that involved a "federally protected right."[36] In addition, there are plaintiffs' claims, dismissed by this court, which have been reinstated by the court of appeals. *See In re Exxon Valdez*, 270 F.3d at 1253.[37] All of these claimants certainly have "potential" for adding to the harm side of the ratio.

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[35] Jury Instruction No. 27, Clerk's Docket No. 5890.

As to actual harm-the compensatory damages associated with the grounding of the Exxon Valdez-the parties differ sharply. Exxon contends that the actual harm number for purposes of ratio calculation can be no higher than $20.3 million, which is the amount of the two compensatory judgments against Exxon. Exxon contends that all other payments it made were pre-judgment payments or settlements, which the court of appeals has said do not count for purposes of calculating actual harm.[38] If pre-judgment payments or settlements do not reduce actual harm, Exxon contends that the actual harm number is $369.4 million.[39] This number represents $354 million in payments by Exxon and $15,436,371 paid to the plaintiffs by the Trans-Alaska Pipeline Liability Fund (TAPL Fund).[40]

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[36] The court of appeals has not made it clear what federally protected right entitled Western Alaska Fisheries to participate in the punitive damages award.

[37] Specifically, the claims of tender boat operators and crews, cannery workers, and 34 seafood processors were reinstated.

The plaintiffs contend that the actual harm component of total compensatory damages is $517.2 million. This number is based on actual judgments and recoveries obtained by eight distinct categories of plaintiffs from Exxon and the TAPL Fund.[41]

The court finds that the best indicators of actual, compensatory damages in this case are the following items:

(1) $287,000,000 Phase II jury verdict[42]

(2) $9,515,000 paid by Exxon to Native corporation owned seafood processing operations[43]

(3) $113,500,000 paid to other commercial fish processors[44]

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[38] Exxon also argues that most of its pre-judgment payments could not reasonably be treated as compensation for actual harm caused by the oil spill because Exxon's prompt payment of claims protected the plaintiffs from economic loss that might have otherwise occurred. Whether Exxon's pre-judgment payments represent "actual" harm or harm that might otherwise have occurred is ultimately irrelevant since the court must consider both harms for purposes of calculating a ratio. *BMW,* 517 U.S. at 581.

[39] Declaration of John F. Daum at 4, ¶ 8, attached to Notice of Filing Original Declaration, Clerk's Docket No. 7540.

[40] *Id.* at 2, ¶ 5, and 3-4, ¶ 7[a].

[41] *See* chart summarizing judgments and recoveries at page 39 of Plaintiffs' Opposition, Clerk's Docket No. 7501.

[42] The precise amount the jury awarded was $286,787,739.22. *See* Minutes from the United States District Court (Aug. 11, 1994), Clerk's Docket No. 5716.

[43] Amended Stipulation Regarding Impacts for Phase III at 5, Part III, ¶ 5, Clerk's Docket No. 5634.

[44] *Id.* at ¶ 6.

(4) $6,000,000 paid to the Seattle Seven fish processors[45]

(5) $4,000,000 paid to fish processors by TAPL Fund[46]

(6) $20,000,000 paid by Exxon to members of the Native class[47]

(7) $2,600,000 paid by Exxon to Native class members who opted out[48]

(8) $17,790,510 net paid to Native corporations by TAPL Fund (after reimbursement by corporations to the Fund; Native corporations reimbursed the Fund $7.4 million)[49]

(9) $3,254,576 paid by Exxon to Native corporations[50]

(10) $152,275 Tatitlek state court jury verdict[51]

(11) $592,500 in other settlements to Native corporations[52]

(12) $8,521,667 paid by Exxon to municipalities and

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[45] 1996 Settlement Agreement at 4, Part II, ¶ A, Exhibit 16 to Oesting Declaration which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[46] *See* Exhibit C to Daum Declaration, which is appended to Defendants' Reply, Clerk's Docket No. 7535.

[47] Amended Stipulation Regarding Impacts for Phase III at 2, Part I, ¶ 1, Clerk's Docket No. 5634.

[48] *See* Order No. 307 (Jan. 19, 1996), Clerk's Docket No. 6600.

[49] *See* Daum Declaration at 3, ¶ 6, which is appended to Notice of Filing Original Declaration, Clerk's Docket No. 7540, and Exhibit C to his declaration, which is attached to Defendants' Reply, Clerk's Docket No. 7535. *See also,* Oesting Declaration at 7, ¶ 13, and 10, ¶ 15, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[50] *See* Memorandum from W. Monte Taylor at 53 (Mar. 20, 1992), attached as Exhibit 19 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[51] Oesting Declaration at 9, ¶ 14, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[52] *See* Exhibits 21 and 22 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

villages[53]

(13) $974,000 in additional settlements to municipalities and villages[54]

(14) $724,000 state jury verdict for Kodiak Island Borough[55]

(15) $1,340,178 paid BY TAPL Fund to municipalities and villages[56]

(16) $1,500,000 received by municipalities and villages as part of the State of Alaska's recovery against Alyeska[57]

(17) $13,400,000 Phase IV settlement[58]

(18) $4,071,694 paid by TAPL Fund to cannery workers, tenders, and seafood brokers[59]

(19) $11,964,793 paid by Exxon to cannery workers, tenders, and seafood brokers[60]

(20) $388,596 paid by Exxon to area businesses[61]

(21) $219,305 paid by TAPL Fund to area busi-

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[53] *See* Taylor Memorandum at 53, attached as Exhibit 19 to Oesting Declaration, and Exhibit 24 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[54] *See* Exhibits 25, 26, and 27 attached to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[55] *See* Exhibit 28 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[56] *See* Oesting Declaration at 8, ¶ 13, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501. This number should probably be slightly lower as it likely includes interest.

[57] *See id.* at 11, ¶ 16.

[58] *See id.* at 12, ¶ 17.

[59] *See id.* at 13, ¶ 18. This number probably includes interest and so should be slightly lower.

[60] *See id.*

[61] *See* Exhibit 30 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

nesses.[62]

These figures represent a total actual harm of $507,509,094.

Laying aside briefly the question of whether it is possible to place a number on the likely or potential harm flowing from the grounding of the Exxon Valdez, this court turns now to what it has found to be the most troubling aspect of the decision of the court of appeals in *In re Exxon Valdez*. Without citation of authority, and without explanation that has a nexus to the due process-fair notice issue which underlies the question of whether or not punitive damages are grossly excessive, the court of appeals observes with respect to the ratio analysis that:

> The amount that a defendant voluntarily pays before judgment should generally not be used as a part of the numerator, because that would deter settlements prior to judgment. *In re Exxon Valdez*, 270 F.3d at 1244.[63]

The briefing of the parties and the court's independent research suggest that authority in support of the foregoing proposition is nonexistent, and what sparse authority does exist reaches a contrary conclusion. In *Kelley v. Michaels*, 59 F.3d 1050 (10th Cir. 1995), the court dealt with an actual damage award of $292,750.00 and a punitive damages award of $500,000.00. However, the net actual damages recovered by the plaintiff were only $2,750.00 because of an offset of

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[62] Oesting Declaration at 13, ¶ 19, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[63] Following the suggestion that the court should generally discount compensatory damages by the amount of voluntary payments or settlements, the court of appeals goes on (as a part of its discussion of the ratio) to speak of cleanup expenses, observing that they "should be considered as part of the deterrent already imposed." *In re Exxon Valdez,* 270 F.3d at 1244. But cleanup costs have to do with environmental damage, and the jury was precluded from considering that harm in making its award of punitive damages. In this case, environmental harm and deterrence of it should stand apart from other harms and the punishment and deterrence of them.

$290,000.00 which was the result of a partial settlement of the plaintiff's claim. The Tenth Circuit employed the $292,750.00 compensatory award in calculating the ratio of harm to punitive damages. *Id.* at 1055. A similar result is to be found in *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219 (10th Cir. 2000), where the district court reduced a compensatory award made by a jury but did not reduce the punitive award. There, also, the Tenth Circuit rejected the argument that because the district court reduced the compensatory award to prevent a double recovery to the plaintiff, the punitive award should also be reduced. *Id.* at 1231 n.6. Thus, in determining harm for the second *BMW* factor (the ratio), the Tenth Circuit added back into the compensatory award those damages that had been subtracted out because of a double recovery. *Id.* at 1231.

As already noted, the court of appeals' reason for suggesting the subtraction of voluntary payments was because to do otherwise would, in the view of the appellate court, deter settlements prior to judgment. This court does not understand how or why encouraging settlements should be a part of the due process analysis of a punitive damages award made in a case which went to trial. Moreover, this court believes that a contrary argument is more logical. If a defendant knows that it will get credit for a partial settlement, voluntarily made before trial, it may be encouraged to go to trial; whereas, as a general proposition the specter of a large punitive damages award is a very powerful factor in encouraging settlements of entire cases. Reducing the risk of going to trial on punitive damages by discounting them for voluntary payments does not encourage settlements, it encourages trials.

In this case, the general rule adopted by the circuit should not apply. A reduction of the harm factor based upon voluntary payments is not appropriate. This position is not taken because of this court's view of how discounting harm for voluntary payments might impact the settlement process, but because of the specific punitive damages instructions given the jury in this case.

Generally, punitive damages instructions are very open-ended as regards how juries should come up with a punitive damages number if liability for such damages is determined. For example, the Ninth Circuit Model Civil Jury Instruction for punitive damages provides as to the amount of punitive damages only that:

> If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.[64]

In instructing the jury in this case, and as set out fully in marginal notes above, the parties went far beyond the norm in endeavoring to give the jury guidance on how to determine punitive damages. In those instructions, the jury was specifically admonished to take account of mitigating factors. It was instructed that it could "consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures."[65]

In arguing this case to the jury, the plaintiffs sought punitive damages of more than $5 billion and less than $20 billion.[66] The jury plainly did not buy plaintiffs' top-dollar analysis of how punitive damages should be calculated in this case. The court presumes that the jury followed and faithfully applied, to the best of their ability, the court's instructions. *See Leatherman,* 285 F.3d at 1150 ("we must presume the jury understood and followed the instructions"). Presumably the jury already considered whether and to what extent punitive damages should be mitigated based on voluntary payments by Exxon before judgment. Reducing actual harm for purposes of ratio analysis by the amount of voluntary payments unfairly skews the ratio in Exxon's favor, and in effect gives Exxon double credit for voluntary payments by reducing both punitive damages and actual harm for purposes of the punitive damages/harm ratio analysis. In this case, the court concludes that it should not discount actual harm by voluntary payments made by Exxon.

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[64] Ninth Circuit Model Civil Jury Instruction No. 7.5.

[65] Jury Instruction No. 36, Clerk's Docket No. 5890.

[66] *See* Transcript of Proceedings, Trial by Jury-70th Day, at 7587, lns. 23-25 (Aug. 29, 1994), Clerk's Docket No. 5778. Plaintiffs' counsel reiterated twice that the number should be more than $5 billion but something less than $20 billion.

The court turns now to its analysis of harms that have not been or cannot be quantified. In this case, there was harm that was purely non-economic; there was harm which likely occurred but has not yet been valued; and there was potential harm-all flowing from the grounding of the Exxon Valdez.

Firstly, there are some 32,677 punitive damages claimants.[67] These claimants did not get deceived about the quality of the paint on a new car. The most direct and palpable effect of Exxon's recklessness was upon the livelihood of Prince William Sound, Cook Inlet, and Kodiak area fishermen. In this regard, the court of appeals observed that:

> Although the huge oil spill obviously caused harm beyond the "purely economic," the punitive damages award was expressly limited by the instructions to exclude environmental harm....

In re Exxon Valdez, 270 F.3d at 1242. Laying aside that environmental damage, the effects of the spilling of 11 million gallons of crude oil into Prince William Sound, as the court of appeals observed, were not purely economic. The social fabric of Prince William Sound and Lower Cook Inlet was torn apart. "[R]esearch on the community impacts of the Exxon Valdez Oil Spill clearly delineate a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress."[68] Communities affected by the spill "reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems, and occupation related problems."[69] Also, several studies found that a high percentage of affected fishermen suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder or a combination of all three.[70] The spilling of 11 million gallons of crude oil into Prince William Sound and Lower Cook Inlet disrupted the lives and livelihood of thousands of claimants and their families. That harm cannot be quantified.

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[67] See Plaintiffs' Response to Court's Requests at Oral Argument at 4, Clerk's Docket No. 7553. This number includes claimants whose claims are based on recreational uses or commercial fishing activities in unoiled commercial fisheries. These claimants may be entitled to punitive damages under the Ninth Circuit's holding in *Sea Hawk Seafoods*, 246 F.3d 676 (Table) (2000 WL 1860726). But see Exxon's Memorandum with Respect to Plaintiffs' Response to Court's Questions, Clerk's Docket No. 7561. Here, the court discusses likely or potential harm, so use of the number of claimants potentially entitled to receive punitive damages seems most appropriate.

Secondly, there are plaintiffs whose claims have been reinstated in *In re Exxon Valdez*. Their damages have not yet been determined. Plaintiffs estimate damages to these plaintiffs to be between $77 million and $125 million.[71] Putting a number on these claims would be speculative, even though the harm is very likely to have occurred.

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[68] J. Steven Picou, *et al., Community Recovery From the Exxon Valdez Oil Spill: Mitigating Chronic Social Impacts* at 6-7, attached as Exhibit 4 to Declaration of David W. Oesting, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[69] Duane A. Gill, *Environmental Disaster and Fishery Co-Management in a Natural Resource Community: Impact of the Exxon Valdez Oil Spill, in Folk Management in the World's Fisheries* 227 (Dyer & McGoodwin, eds., 1994), pertinent part attached as Exhibit 5 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[70] *See* Plaintiffs' Opposition at 24, n. 20, for a complete list of the relevant studies, Clerk's Docket No. 7501. Pertinent portions of the studies are attached as Exhibits 4 and 6 through 9 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[71] Plaintiffs' Opposition at 40, Clerk's Docket No. 7501.

Thirdly, and in the area of potential harm, there is no way of calculating how much additional oil might have spilled into Prince William Sound and spread elsewhere had Captain Hazelwood's efforts to back the Exxon Valdez off Bligh Reef succeeded. Here, the risk of more extensive losses to the plaintiffs and the enhanced risks to the Exxon Valdez crew and its rescuers is immense and incalculable.[72] Moreover, the court views Exxon as having been fairly on notice that a serious accident in Prince William Sound could lead to the total loss of the vessel and its entire cargo of crude oil.

Because there is no way to quantify the non-economic, likely or potential harms discussed above, the appropriate approach is to proceed with the ratio calculation, but to accommodate the unknowns by allowing a higher ratio to pass muster.[73] This is in keeping with Supreme Court precedent. In *BMW*, the Court observed that "[a] higher ratio may... be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine." *BMW*, 517 U.S. at 582. If, as the court presently finds, the quantifiable harm in this case is $507.5 million, then the $5 billion punitive damages award in this case gives a 9.85-to-1 ratio. This result does not exceed the 10-to-1 ratio which was upheld by the United States Supreme Court in *TXO*, 509 U.S. 443.[74] Even if this case is viewed as one involving primarily economic harm, a ratio under 10-to-1 is in line with the general rule set forth by the Tenth Circuit in Continental Trend Resources, 101 F.3d at 639, which is cited affirmatively by the Ninth Circuit in *Neibel v. Trans World*

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[72] There are, of course, no such plaintiffs in this case. However, we here discuss potential harm (*see TXO*, 509 U.S. at 460, 113 S.Ct. 2711) in a context where, because of a mandatory punitive damages class, all harm and all punitive damages possibly recoverable from the defendants are at issue.

[73] For this reason, the court rejects Exxon's suggestion that a 2-to-1 ratio would be appropriate for this case.

[74] In *TXO*, the ratio, without considering potential damages, was 526-to-1.

Assur. Co., 108 F.3d 1123, 1132 (9th Cir. 1997) ("'From [*BMW*] we surmise that in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio.'"). This case involves far more than the quantified economic injuries, so a punitive-damages-to-dollars ratio of under 10-to-1 was appropriate under extant Ninth Circuit Court authority.

"Ratio analysis as required by *BMW* helps avoid overdeterrence." *In re Exxon Valdez*, 270 F.3d at 1244. The court of appeals suggests that cleanup costs paid by Exxon, its casualty losses with respect to the Exxon Valdez and its cargo, the fine and restitution payments made by Exxon, and its settlement with various parties (approximately $3.4 billion) would go a long way toward effecting appropriate deterrence. *Id.* Apparently taking a cue from Justice Breyer's concurrence in *BMW*,[75] the court of appeals discusses how entrepreneurs do their planning, suggesting that they are deterred by the prospect of cleanup costs and the like. The appeals court concludes by observing, "[a]s bad as the oil spill is, fuel for the United States at moderate expense has great social value and that value as well as the value of avoiding horrendous oil spills can be reconciled by ratio analysis." *Id.*

The court of appeals' economic analysis makes sense in the abstract or academic world. That analysis reflects what well-informed, rational entrepreneurs would do. In the real world, Exxon and its officials and others like them quite likely do not work this way. If they did, they would remove the Captain Hazelwoods from the bridge because leaving them there is what creates a risk of horrendous cleanup costs and other expenses. Thus, what it theoretically takes to deter a rational business person (cleanup costs, etc.), and what it takes to deter corporate officials given to reckless conduct are very different. Here, we are dealing with reckless corporate officials.

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[75] *BMW*, 517 U.S. at 593, 116 S.Ct. 1589 (Breyer, J., concurring).

The following considerations cause this court to believe that a higher ratio-one at about 10-to-1-presents no identified risk of over-deterrence. Firstly, a huge number of potential claimants suffered harm that was not purely economic. The harm struck at their livelihood. The health and safety of the Exxon Valdez crew and their rescuers were put at risk.

Secondly, the court is aware of no evidence in the record of this case suggesting that Exxon is able to pass its cleanup and other costs associated with the Exxon Valdez spill on to the public. Thus there is no showing that the deterrent effect of Exxon's costs (or the punitive sanctions) threatened the socially valuable availability of moderately priced fuel.[76]

Thirdly, it fairly requires a higher level of deterrence to capture and hold the attention of those given to reckless conduct than can be accomplished by the economic impact of bad business decisions.

Fourthly, the discussion thus far has said nothing about the financial circumstances of the defendants. Captain Hazelwood's financial circumstances are de minimus. He lost his job with Exxon as a consequence of the grounding of the Exxon Valdez. He is likely unemployable in his chosen profession except at the margins. He surely will never be the master of a large cargo vessel again because of the interrelated circumstances of his alcoholism and the wide publicity which attended the grounding of the Exxon Valdez.

Exxon on the other hand, at the time of the trial in 1994, was one of the five largest industrial corporations in the world.[77] For the years 1989-1993, its annual average revenue was $111.6 billion, its annual average net income was $4.83

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[76] As already observed, cleanup costs have to do with environmental damage; and in this case, environmental damages have been excluded from the punitive damages determination and this court's ratio analysis.

[77] Transcript of Trial Testimony of Jack Clarke (director and senior vice president of Exxon Corp.) at 7179, lns. 2-7, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

billion, and its average annual net cash flow from operations was $10.1 billion.[78] After judgment was entered on the punitive damages award, Exxon's treasurer advised the court that "the full payment of the Judgment would not have a material impact on the corporation or its credit quality."[79] In fact, Exxon was able to protect itself from the risk of the plaintiffs executing on the $5 billion judgment by posting an irrevocable, syndicated standby letter of credit for over $6 billion.[80]

As the name implies, punitive damages are intended to punish and deter; they are not intended to be an economic death sentence. Over-deterrence in the form of punitive damages is inconsistent with the concept of reform as opposed to cessation of conduct. The contrast between the economic circumstances of Captain Hazelwood and Exxon are instructive in the foregoing regard. What is sufficient to effect just but not excessive deterrence of Captain Hazelwood, and what is sufficient to effect just and not excessive deterrence of the Exxon defendants are vastly different. Indeed, the loss of his employment with Exxon and the notoriety of the grounding of the Exxon Valdez almost surely effect the appropriate deterrence; and the $5,000.00 punitive damages award, given Captain Hazelwood's financial circumstances and one other factor, is sufficient punishment. That other factor is Captain Hazelwood's alcoholism. Alcoholism has long been recognized to be an illness. We do not normally punish people because of their illnesses; however, as to drunk drivers, disablement and some punishment is socially necessary because of the great damage inflicted upon society by drunk drivers. Given the circumstances of this situation, Captain Hazelwood has been effectively disabled from operating tank vessels, and a modest fine on top of that is adequate punishment, given his financial circumstances.

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[78] *See* Exhibit PX6302A, Excerpts of Record, Vol. II-Trial Exhibits, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[79] Declaration of Edgar A. Robinson at 16, ¶ 30, pertinent portion attached as Exhibit 33 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[80] *See* Clerk's Docket No. 6914.

Exxon, on the other hand, is an economic powerhouse. Its profits, as discussed above, go into the billions of dollars each year. Its callous inattention to Captain Hazelwood's relapse and its reckless failure to remove him from command of the Exxon Valdez, knowing that he had relapsed into drinking, calls for major deterrence. There is absolutely no chance of a $5 billion punitive damages award amounting to an economic death sentence for Exxon. There is a good prospect that punitive damages in that amount will capture Exxon's attention for a long time. Since it is expected that Exxon and others will be transporting crude oil out of Valdez Arm and across Prince William Sound for many years into the future, a major message of deterrence was perceived necessary by the trial jury in this case and merits a punitive damages to total harm ratio at the high end of what is constitutionally permissible.

The foregoing discussion of deterrence says nothing about the coequal goal of punitive damages: punishment. The deterrence aspect of punitive damages is intended to be essentially forward-looking. The goal is to modify the future conduct of Exxon and others similarly situated. The punishment aspect of punitive damages awards is backward-looking. The law imposes sanctions for reckless conduct of the past. The concepts are therefore quite different and foster different societal goals.

The harms visited upon the plaintiffs and punitive damages class members (both actual, likely to have occurred, and potential harm) are, for reasons discussed above, not entirely economic (as was the case in *BMW*) and are highly reprehensible. Thus, the applicable ratio of punitive damages to harm must be such as to accommodate not just the deterrence of reckless conduct in the future, but also punishment for the recklessness which gave rise to the harm.

The court concludes that the dual purposes of punitive damages (punishment and deterrence) and the circumstances of this case justify a 10-to-1 punitive damages to harm ratio. Considering all of the foregoing, the court is not persuaded that a punitive damages award of $5 billion amounts to excessive deterrence or excessive punishment of Exxon.

Comparable Penalties. The court turns now to the third *BMW* factor which involves comparing the punitive damages award to the criminal and civil penalties that "could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. In *BMW*, the statutory sanctions which might have been imposed upon the defendant were much lower than the punitive damages award. In discussing this factor, the court of appeals observed that "[c]riminal fines are particularly informative because punitive damages are quasi-criminal." *In re Exxon Valdez*, 270 F.3d at 1245 (citing *Cooper Industries*, 532 U.S. at 432).

In criminal proceedings brought against them by the federal government, the Exxon defendants were charged with five separate counts. Count I charged a violation of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); Count II, a violation of the Refuse Act, 33 U.S.C. §§ 407 and 411; Count III, a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); Count IV, a violation of the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and Count V, a violation of the Dangerous Cargo Act, 46 U.S.C. § 3718(b).[81] Exxon Corporation pled guilty to Count III, and Exxon Shipping pled guilty to Counts I, II, and III. Pursuant to a joint plea agreement, Exxon was fined a net amount of $25 million and ordered to pay restitution in the amount of $100 million.[82] The net amount of the fine was affected by at least three considerations: (1) the plea agreement effected a settlement which avoided a difficult and expensive trial, (2) at the time of the disposition of the criminal case, this court did not have the benefit of the more robust development of actual damages which took place later in the civil proceedings, and (3) there were practical reasons why the court eschewed a larger fine in favor of a substantial restitution obligation. The court deemed it far preferable for Exxon to be sanctioned by means of a restitution obligation which would be employed for restoration of the environment than by a larger fine which would not be so employed. All of this said, the actual criminal penalty is not the proper criteria under *BMW*. We are engaged in a constitutional inquiry, the focus of which is the outer limits of potential sanctions that Exxon was charged with knowing prior to the grounding of the Exxon Valdez.

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[81] *See United States v. Exxon Corp.*, No. A90-0015-CR.

[82] *See* Judgments at Clerk's Docket Nos. 235 and 236 in Case No. A90-0015-CR.

For each of the five criminal offenses brought against it, the Exxon defendants might have been fined "twice the gross [pecuniary] loss" occasioned by the oil spill. 18 U.S.C. § 3571(d). Laying aside harm likely caused by the oil spill which has not been quantified, and laying aside harm that might potentially have been occasioned by the spill had Captain Hazelwood succeeded in backing the Exxon Valdez off Bligh Reef, the court has found the actual pecuniary loss for purposes of *BMW* to be $507.5 million. That amount doubled, as provided by the statute, and multiplied by five offenses equals $5.1 billion.[83] Because Exxon is on notice of the provi-sions of the criminal laws of the United States, in particular 18 U.S.C. § 3571(d), it was, for constitutional due process pur-poses, on notice that criminal sanctions for spilling even a modest portion of the cargo of the Exxon Valdez could lead to truly horrendous criminal penalties. Perhaps more important because we are concerned about notice of what could be, Exxon is fairly chargeable with knowledge that reckless conduct on its part could result in the spill of the entire cargo of a tank vessel such as the Exxon Valdez. While the court is not prepared to say that spilling the entire cargo of the Exxon Valdez would cause additional damage in direct proportion to that actually observed, spilling five times as much oil as was spilled would surely result in a significant increase in pecuniary losses. Surely Exxon knew that billions of dollars were at stake if it were to criminally spill a tanker-load of oil in Prince William Sound. Plainly those fines could exceed the jury's punitive damages award in this civil case.

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[83] Exxon suggests that voluntary pre-judgment payments should be deducted when calculating a potential fine, just as those payments should be deducted when calculating the ratio under the second *BMW* factor. In this case, a reduction would be no more appropriate here than it was for purposes of calculating the ratio.

Subsection 3551 of Title 18, United States Code, also provides for imprisonment.[84] While it is not possible to imprison a corporate defendant in a criminal case, provision for imprisonment is a recognized legislative signal of heightened seriousness of the offense, and therefore, for purposes of the *BMW* analysis, justifies a punitive damages award "'much in excess of the fine that could be imposed.'" *BMW*, 517 U.S. at 583 (quoting *Haslip*, 499 U.S. at 23).

The Ninth Circuit Court of Appeals observed that "[c]eilings on civil liability are also instructive." *In re Exxon Valdez*, 270 F.3d at 1245. The court of appeals discussed the $100 million "cap" on liability for discharging oil from a vessel as provided by the Trans-Alaska Pipeline Act. 43 U.S.C. § 1653(c)(1) & (3). This limit upon liability is not in any sense a sanction, nor is it a limit on civil liability. It is, rather, an upper limit of strict liability for harms caused by non-negligent spilling of oil. Here, we deal with Exxon's reckless conduct and focus upon sanctions as to which the statutory limit of strict liability for non-negligent conduct is not instructive. In *BMW*, the Court suggests that a more appropriate consideration is exposure to civil penalties for wrongful conduct. *BMW*, 517 U.S. at 584.

Both state and federal law make provision for the imposition of civil penalties for spilling crude oil into Prince William Sound. Alaska Statutes, Section 46.03.758, imposes civil penalties ranging from $1.00 per gallon to $10.00 per gallon, depending on where the oil is spilled. The plaintiffs estimate that state civil penalties for spilling 11 million gallons of oil in Prince William Sound would amount to $63.8 million, or an average of $5.80 per gallon.[85] Federal civil penalties of $270,000.00 could also have been imposed for the spill. See 16 U.S.C. §§ 668(b), 1858(a); 33 U.S.C. §§ 1232(a)(1), 1319(g), 1514(b)(3), 1908(b); 43 U.S.C. § 1350(b); and 46 U.S.C. § 3718(a)(1). Again, the foregoing presupposes the actual spill, whereas Exxon was fairly on notice that reckless conduct could cause the loss of the entire cargo thereby putting it at risk for state civil penalties approaching five times the civil penalty which would attend the actual spill. Such a civil penalty could be in excess of $255 million.

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[84] Exxon personnel with the authority and responsibility for placing a relapsed alcoholic in control of a large tank vessel might be imprisoned for up to one year. 33 U.S.C. §§ 407 and 411.

In consideration of the foregoing, the court is well satisfied that Exxon was quite fairly on notice that its officers could face imprisonment and the company could face in excess of $5 billion in criminal and civil penalties for recklessly spilling crude oil into Prince William Sound.

Summary

In its Order No. 267,[86] this court rejected Exxon's original motion for reduction or remittitur of the jury's $5 billion punitive damages award. The Supreme Court decision in *BMW* and Cooper Industries, as discussed in *In re Exxon Valdez*, necessitated reexamination of that determination. Based upon that reexamination and, it should be said, much more robust presentations from the parties with respect to the renewed motion for reduction or remittitur as to punitive damages, this court again concludes that a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of fair notice-its right to due process. This conclusion is based on the court's findings that:

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[85] Plaintiffs' Opposition at 70, Clerk's Docket No. 7501. Exxon could have received an offset equal to the amount of oil it removed from the environment as part of cleanup efforts. *See* AS 46.03.758(f).

[86] Clerk's Docket No. 6234.

> (1) Exxon's conduct was highly reprehensible;
>
> (2) the ratio of punitive damages to harm inflicted on the plaintiffs is a permissible one, 9.85-to-1; and
>
> (3) the comparable criminal and civil penalties could have exceeded $5 billion.

However, the court of appeals did not just remand this case for application of *BMW* and Cooper Industries. It instructed this court to reduce the punitive damages award, and the court must do that. Determining the amount of an award that will be constitutionally acceptable "'is not an enviable task.'" *Leatherman*, 285 F.3d at 1152 (quoting *Inter Medical Supplies*, 181 F.3d at 468). As the Third Circuit Court of Appeals explained:

> "We have searched vainly in the case law for a formula that would regularize this role, but have not found one....[T]he Supreme Court has instructed as to the analysis but has provided nothing concrete as to the amount."

Inter Medical Supplies, 181 F.3d at 468.

Because the court's independent evaluation of the *BMW* factors as applied to the facts of this case have led it to the conclusion that the $5 billion award was not grossly excessive, the court does not perceive any principled means by which it can reduce that award. Plaintiffs' memorandum in opposition to the renewed motion for reduction or remittitur of punitive damages concludes with the following:

> "For the reasons stated above, the Court should deny Exxon's motion and determine that a punitive damage[s] award of at least $4 billion satisfies the requirements of due process consistent with *BMW v. Gore*, 517 U.S. 559 (1996)."[87]

Since the $5 billion award must be reduced, the court adopts the plaintiffs' position as the means of resolving the conflict between its judgment and the directions of the court of appeals.

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[87] Plaintiffs' Opposition at 80, Clerk's Docket No. 7501.

Conclusion

Exxon's motion for reduction or remittitur of the punitive damages award is granted. The sum of $1 billion of the $5 billion jury award is remitted, and therefore the punitive damages award in this case is reduced to $4 billion.[88] The clerk of court shall enter judgment accordingly.[89]

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[88] If Exxon accepts this result by paying the punitive damages award plus accrued interest, this case should of course end at that point. However, if Exxon chooses to take a further appeal for the purpose of seeking a more generous reduction of the jury's punitive damages award, then the court urges the plaintiffs to cross-appeal, for, if left to apply *BMW* without the requirement that it effect some reduction of the $5 billion punitive damages award, this court would have, as set out above, denied Exxon any relief whatever on its second motion for reduction or remittitur of punitive damages.

[89] Interest on the reduced award of punitive damages shall accrue from September 24, 1996, in accordance with 28 U.S.C. § 1961.

APPENDIX E

United States District Court, D. Alaska.
In re the EXXON VALDEZ.
v.
This Order Relates to All Cases.
No. A89-0095-CV (HRH).

Jan. 27, 1995.

Lloyd Benton Miller, Anchorage, AK.
Douglas Serdahely, Anchorage, AK.
David Ruskin, Anchorage, AK.

ORDER NO. 267

HOLLAND, District Judge.

EXXON'S MOTION FOR JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIMS (PHASE III); AND EXXON'S MOTION FOR A NEW TRIAL ON PLAINTIFFS' PUNITIVE DAMAGES CLAIMS (WEIGHT OF THE EVIDENCE)

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (Exxon) have filed a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure on plaintiffs' punitive damages claims (Phase III issues).[1] Plaintiffs oppose the motion[2] and Exxon has replied.[3]

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[1] Clerk's Docket No. 5970. Pursuant to the 1991 amendments to the Federal Rules of Civil Procedure, both a motion for a directed verdict and a motion for judgment notwithstanding the verdict are now designated as motions for judgment as a matter of law. 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521 at 242 (1995). *See* Fed. R. Civ. P. 50 advisory notes, 1991 amendment.

[2] Clerk's Docket No. 6043. Plaintiff Tom Lakosh (P-108) filed an opposition to Exxon's motion and requested a hearing. Clerk's Docket No. 6017. The request for hearing is denied as unnecessary.

[3] Clerk's Docket No. 6099.

Exxon also filed a motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.[4] Plaintiffs oppose the motion[5] and Exxon has replied.[6] Oral argument on both motions is deemed unnecessary and is denied.

I. Review of punitive damages awards

A "[j]ury has considerable discretion to award punitive damages, and its award, if supportable, will not be lightly disturbed." *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1126 (9th Cir. 1994), *cert. denied,* 63 U.S.L.W. 3423 (U.S. Jan. 9, 1995) (No. 94-861) (quoting *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 707 n.3 (9th Cir. 1989)). Although the jury has "considerable discretion" in awarding punitive damages, that discretion is subject to "definite and meaningful constraint[s]" imposed by the Due Process Clause. *Hopkins,* 33 F.3d at 1127. *See Morgan v. Woessner,* 997 F.2d 1244, 1255 (9th Cir. 1993), *cert. dismissed,* 114 S. Ct. 671 (1994) (punitive damage awards in federal court are subject to the scrutiny of the Due Process Clause).

"As the first stage of scrutiny, a trial court should instruct the jury on the proper role of punitive damages." *Morgan,* 997 F.2d at 1256. The purpose of punitive damages is not to compensate plaintiffs but "to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 21 (1991). *See Morgan,* 997 F.2d at 1256 ("instructions should be fashioned to describe the proper purpose of punitive damages so that the jury understands that punitive damages are not to compensate the plaintiff, but to punish and deter the defendant and others from such conduct in the future.") (citing *Haslip,* 499 U.S. at 16).

In the case at bar, the court instructed the jury on the purposes of punitive damages in Phase III Jury Instruction Nos. 22, 23, 24 and 25. In Instruction No. 26, the court instructed the jury that punitive damages were not designed to provide compensatory relief. Instruction No. 27 focused on the reprehensibility of Exxon's conduct, the magnitude of the harm, Exxon's financial condition, and mitigating factors. Instruction Nos. 28 through 38 amplified the foregoing instructions. The instructions given in this case were more explicit than those which the Ninth Circuit considered "adequate" in *Morgan. Morgan,* 997 F.2d at 1256-57. The court concludes that the Phase III instructions satisfy the "first stage of scrutiny." *Id.* at 1256.

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[4] Clerk's Docket No. 5948.

[5] Clerk's Docket No. 6043.

[6] Clerk's Docket No. 6094.

"As the second stage of scrutiny, a trial court should review the punitive award and record its reasons for upholding or altering it." *Id.* at 1257. At this level, the trial court can look to the *Hammond* factors or other general elements of reasonableness. The *Hammond* factors, announced in *Haslip,* are as follows:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; (b) the degree of reprehensibility of the defendant's conduct, duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss; (d) the "financial position" of the defendant (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 499 U.S. at 21-22.

The district court must also compare the amount of punitive damages assessed to a "figure derived from the facts of the case at hand." *Morgan,* 997 F.2d at 1257. To ascertain this figure, "the court should look to awards in similar cases and to its own experiences." *Id.*

Although *Morgan* suggested that district courts should "look to awards in similar cases", *Id.*, the Supreme court places little value on such comparisons. *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), recognized that punitive damages are the product of numerous intangible factors, requiring the jury to "make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." *Id.* at 2720. In discussing the value of such comparisons, *TXO* stated:

> As an analytical approach to assessing a particular award, however, we are skeptical. Thus, while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a "test" for assessing the constitutionality of punitive damages awards.

Id. Similar concerns were expressed by Justice Kennedy in his concurring opinion in *Haslip:* Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand.

> These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity can not be equated with constitutional infirmity.

Haslip, 499 U.S. at 41 (Kennedy, J., concurring). *See E.E.O.C. v. Farmer Bros. Co.,* 31 F.3d 891, 904 (9th Cir. 1994) ("the amount of punitive damages required to deter and punish the defendant necessarily is dependent on the circumstances of each case...."). Based on the above case law, it is apparent that *Morgan*'s suggestion that the court "look to awards in similar cases" is of limited utility.[7]

TXO provided further guidance "on the issue of excessiveness of punitive damage awards." *Hopkins* 33 F.3d at 1127. The district court is not limited to comparing the punitive award to the actual damages, but may consider the magnitude of the harm that potentially could have occurred. *TXO* declined to develop a bright line test to determine a constitutional award, but held that a "'general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus.'" *TXO,* 113 S. Ct. at 2720 (quoting *Haslip,* 499 U.S. at 18). "While proportionality to actual damages sustained is relevant in the analysis, it is only one of several factors to be considered." *Hopkins,* 33 F.3d at 1127 (citation omitted).

II. Standard for judgment as a matter of law

According to Rule 50:

> [(a)(1)] If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue

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[7] Indeed, it would undercut the jury system for the court to base its review, in part, on what other juries have decided. It is meaningless to compare "numbers" from other cases because juries hear unique facts and are given dissimilar instructions. Neither the Supreme Court nor the Ninth Circuit has ever provided a uniform formula from which juries might determine a punitive award. Without such uniformity, it is impossible to make meaningful comparisons from among the myriad of punitive cases.

> against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (b) Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.

Fed. R. Civ. P. 50(a) and (b). Pursuant to Rule 50, Exxon argues that there is insufficient evidence to support the jury's Phase III verdict that Exxon is liable for $5 billion in punitive damages.

Judgment as a matter of law:

> [I]s proper when the evidence permits only one reasonable conclusion as to the verdict. The jury's verdict must be supported by substantial evidence in order to stand. We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. [[[Judgment as a mater of law] is improper if reasonable minds could differ over the verdict.

Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir. 1987) (citations omitted); *See George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1269 (1993) ("[s]ubstantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence") (citations omitted); *Glover v. BIC Corp.*, 6 F.3d 1318, 1330 n.5 (9th Cir. 1993) (the court must consider all evidence and not just evidence favoring the non-moving party). In *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), the Supreme Court stated:

> [I]n considering a motion for [judgment as a matter of law], the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'

Id. at 554-555 (citations omitted). *See Moore v. Local Union 569 of the Int'l Bhd. of Elec. Workers,* 989 F.2d 1534, 1537 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1066 (1994) (a motion for judgment as a matter of law "is proper when the evidence permits only one reasonable conclusion as to the verdict.") (citations omitted); *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir. 1991) (a motion for judgment as a matter of law "is appropriate only when the evidence, viewed in the light most favorable to the nonmoving party, could not reasonably support the verdict.") (citations omitted); *See also Vaughn v. Ricketts,* 950 F.2d 1464, 1468 (9th Cir. 1991); *Cockrum v. Whitney,* 479 F.2d 84, 85 (9th Cir. 1973).

To grant Exxon's motion would deprive plaintiffs of the jury's determination of the facts; thus, such motions are "granted cautiously and sparingly." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524 at 252 (1995). The court "must view the evidence most favorably to [plaintiffs] and give [plaintiffs] the benefit of all reasonable inferences that may be drawn from the evidence." *Id.* at 256-259. If the court finds evidence sufficient to support the jury's verdict, then Exxon's motion must be denied. *Id.* at 253-254. As noted, the court will not weigh the evidence, make credibility determinations, or substitute its judgment for that of the jury's. *Id.* at 255-256.

When a court is reviewing punitive damages, the court must uphold the award "whenever possible and all presumptions are in favor of the judgment." *Bouman v. Block,* 940 F.2d 1211, 1234 (9th Cir.), *cert. denied,* 112 S. Ct. 640 (1991). *See Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1216 (9th Cir.

1983), *cert. denied,* 471 U.S. 1007 (1985) (a damage award cannot stand if it "could only have been based on speculation or guesswork.") (citations omitted).

III. Phase III punitive damages award

In Phase I of the trial, the jury determined that Exxon acted recklessly and that such reckless conduct caused the *Exxon Valdez* to run aground.[8] In Phase III, at issue here, the jury determined that Exxon was liable for $5 billion in punitive damages.[9] Exxon seeks judgment as a matter of law under Rule 50 on plaintiffs' punitive damages claims on the ground that the jury's award of $5 billion is grossly excessive. Exxon requests that the award be set aside or drastically reduced.

Exxon devotes the bulk of its briefs to comparing the punitive award in this case to those of other cases. Despite *Morgan's* suggestion that the court look to awards in similar cases, the court can glean little of value from the many cases cited by Exxon. As *TXO* and *Haslip* recognized, no two punitive damages cases are truly identical and meaningful comparisons are difficult to make. The *Exxon Valdez* case in particular, is quite dissimilar from other punitive damage cases. The 11,000,000 gallon oil spill was the largest oil spill and greatest environmental disaster in American history. The spill disrupted the livelihoods of tens of thousands of people. This case simply does not compare to the numerous cases referenced by Exxon.

Exxon argues that the sole factor for the court to consider is whether the award is larger than that which is necessary to punish and deter, and argues that the *Hammond* factors are irrelevant except to the extent that they relate to what is necessary for punishment and deterrence. Exxon oversimplifies the court's task. The task for the court is to determine, based on a review of the evidence in the light most favorable to the plaintiffs, whether the award is so grossly excessive as to violate due process. Of course, if the court determines that the award is grossly excessive, it follows that the award will exceed that which is necessary to punish and deter. Regardless, the Supreme Court has stated that the *Hammond* considerations "are relevant to a determination of whether a punitive damages award is excessive...." *Hopkins* 33 F.3d at 1127 (citing *Haslip,* 499 U.S. at 21-22). Additionally, "[t]he [[[*Hammond*] standards provide a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." *Haslip,* 499 U.S. at 22. The court will be guided by the *Hammond* factors and "general concerns of reasonableness", *Haslip,* 499 U.S. at 18, in reviewing the punitive award.

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[8] The jury also determined that Captain Hazelwood acted negligently and recklessly and that his conduct caused the grounding of the Exxon Valdez.

[9] The jury also determined that Captain Hazelwood was liable for $5 thousand in punitive damages.

(a) The Hammond factors

1. Exxon's conduct[10]

The evidence presented at trial established the Exxon was aware that transporting crude oil through Prince William Sound could result in an oil spill with catastrophic consequences. The evidence also established that Captain Hazelwood suffered from an alcohol abuse problem and could relapse after treatment. The jury heard evidence that Hazelwood drank numerous times after treatment and that he was alcohol impaired at the time of the grounding. From the evidence, the jury could have found that Exxon, with knowledge of the risks, placed a relapsed alcoholic in charge of a supertanker. The jury also heard evidence that Exxon was aware that Hazelwood had relapsed but that Exxon failed adequately to monitor Hazelwood or to insure that his drinking would not interfere with his performance. The jury heard evidence that Exxon's work schedules led to crew fatigue and that Third Mate Cousins, whom Captain Hazelwood left in charge of the

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[10] The facts are well known to the court and have been reviewed numerous times during the court's review of Exxon's post trial motions. The facts need not be repeated in great detail here.

Exxon Valdez, was fatigued the night of the grounding.

Although disputed, the evidence, when viewed in the light most favorable to the plaintiffs, was sufficient for the jury to conclude that Exxon was aware that a disastrous spill could occur and that Exxon's reckless actions increased those risks.

The evidence established that with relatively small expense, when compared to the enormous risk, Exxon could have insured that its supertanker crews were rested and not captained by relapsed alcohol abusers.[11]

2. The harm caused by the oil spill

Broken down into dollar amounts, the spill caused the following harm: (1) Phase IIA verdict-- $287,000,000. Exxon argues that the total recovery will be no more than $120,000,000 after $167,000,000, paid as part of Exxon's claims program, is deducted. Nonetheless, the harm to commercial fishermen was $287,000,000; (2) Phase IIB settlement-- $20,000,000; (3) State court verdict-- $9,700,000; and (4) Damages to Phase IV plaintiffs-- $70,000,000 to $200,000,000.[12] Exxon argues the $98,000,000 paid by Alyeska in settlement should be deducted, given the maritime rule of proportionate fault. If the Alyeska settlement is deducted, the total harm could range from $288.7 million to $418.7 million.

In addition to considering the harm that did occur, the court may also consider "the magnitude of the harm likely to result from the defendants' conduct" . Phase III Jury Instruction No. 27; *Haslip,* 499 U.S. at 21; *Morgan,* 997 F.2d at 1257 n.15. *See Hopkins,* 33 F.3d at 1127 (citing *TXO* 113 S. Ct. at 2720) ("a court is not limited to considering the proportionality of the punitive award to actual damages sustained, but may also consider the magnitude of the harm that potentially could have occurred...."). The evidence established that the *Exxon Valdez* spilled 11,000,000 gallons of crude oil, approximately one-fifth of its cargo. Had the remaining 45,000,000 gallons of oil spilled, the disaster and harm would have been many times greater.[13]

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[11] Exxon argues that its failure to remove alcohol abusing tanker captains from their positions was motivated by concern for employee rights, and not costs. Exxon's argument does not change the fact that, at a small cost when compared to the risk, Exxon could have insured that its supertankers were not captained by alcohol abusers.

[12] Plaintiffs add $123 million representing payments to processors. The court has held that processors may not recover under *Robins Dry Dock*. Those damages were not a legal result of the spill and were not considered by the jury. Plaintiffs also include another $50,000,000 to $140,000,000 as damages of commercial fishermen in state court for permits and vessels. Exxon argues that the claim is barred by *Robins Dry Dock* and should not be considered.

No mathematical formula exists for comparing the relationship between the punitive award and actual and potential harm. *Boyle v. Lorimar Prod. Inc.*, 13 F.3d 1357, 1361 (9th Cir. 1994). *See TXO,* 113 S. Ct. at 2732 (O'Connor, J., dissenting) (noting the Court's "inability to discern a mathematical formula" in assessing punitive awards). At a minimum, the court must insure that the punitive award is "not grossly out of proportion to the severity of the offense and [has] some understandable relationship to compensatory damages." *Boyle,* 13 F.3d at 1359 (quoting *Haslip,* 499 U.S. at 22). Ultimately, "[t]he question is whether the difference between the two figures is so wide that the punitive damages have been divorced from the societal goals of retribution and deterrence." *Boyle,* 13 F.3d at 1361.

The *Exxon Valdez* jury had to "make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." *Hopkins* 33 F.3d at 1127

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[13] The potential for a greater disaster certainly existed. It is undisputed that Hazelwood began to maneuver the ship after it was aground, either to dislodge it from the reef or to firmly settle it aground. Regardless, the maneuvering could have resulted in the ship breaking apart, capsizing, or exploding. *See* deposition of Exxon Captain William Deppe at Tr. 7220-21. The Supreme Court has "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused...." *TXO,* 113 S. Ct. at 2721-22.

(quoting *TXO,* 113 S. Ct. at 2720). Considering the potential that harm of a much greater magnitude could easily have occurred, the $5 billion punitive verdict was not disproportionate to the harm.

In addition to considering the magnitude of the harm and potential harm, the jury may have considered that Exxon is one of the largest and wealthiest corporations in the world and that only a large award could effectively punish and deter. (Exxon's financial condition is discussed below). As stated in *Boyle,* "while the difference between the punitive and compensatory damages was significant ... defendant was so wealthy a smaller award would have had little deterrent or retributive effect." *Boyle,* 13 F.3d at 1361 (citing *Neal v. Farmers Ins. Exchange,* 21 Cal. 3d 910 (1978)). The "harm" evidence, when viewed in the light most favorable to plaintiffs, supports the verdict.

Given the extent of the disaster that did occur, and the very real potential for the disaster to have been four times greater, Exxon can not show, under the standards for granting judgment as a matter of law, that the only reasonable conclusion as to the verdict is that punitive damages should not have been awarded or should be drastically reduced.

3. Exxon's financial condition

Phase III Jury Instruction No. 27 instructed the jury that in determining the amount to punitive damages to award, it could consider Exxon's financial condition. Instruction No. 27 follows the *Hammond* requirements. *See Morgan,* 997 F.2d at 1257 n.14. Instruction No. 27 was amplified by Instruction No. 32 which stated:

> In considering whether an award of punitive damages is appropriate in this case and, if so, in what amount, you may consider the financial condition of a defendant. This does not necessarily mean that you should punish one defendant more than another defendant simply because of their relative financial conditions. If you find that a defendant's financial condition affects the

> level of award necessary to punish the defendant and to deter future wrongful conduct by that defendant and others, you may take the defendant's financial condition into account for that purpose.

Phase III Jury Instruction No. 32, Clerk's Docket No. 5890.

Jury Instruction No. 33 provided:

> In considering a defendant's financial condition, you may not consider the defendant's gross wealth, that is, the value of its assets without subtracting any debts or obligations that the defendant may owe, but only the defendant's net worth, that is, the difference between the defendant's assets and the defendant's liabilities. Similarly, if you consider a defendant's income in assessing its financial condition, you may not consider a defendant's gross income (that is, the total amount of money received by the defendant) but only the difference between gross income and all expenses that must be paid out of that income.

Phase III Jury Instruction No. 33, Clerk's Docket No. 5890.

Finally, Instruction No. 34 provided:

> In considering a defendant's net worth or net income, you may consider what portion of the defendant's net worth or net income is most relevant to a defendant's activities that were implicated in the defendant's wrongful conduct. You may also decide that all of a defendant's net worth and net income is relevant to determining the appropriate amount of punitive damages, if any, necessary to punish a defendant and deter a defendant and others.

Phase III Jury Instruction No. 34, Clerk's Docket No. 5890.

Exxon argues that the punitive award may not be justified on the basis of its wealth because the award must be based on conduct not wealth. The award was not based exclusively on wealth, however, because wealth was just one of many factors the jury was permitted, but not required, to consider in Instruction No. 27.[14] Furthermore, *TXO, Haslip, Hopkins,* and *Morgan* all stated that consideration of a defendant's wealth was appropriate. *See TXO,* 113 S. Ct. at 2722 n.28 ("factors such as [net worth] are typically considered in assessing punitive damages.") (citing *Haslip,* 499 U.S. at 22).

Exxon argues that the size of a punitive award must, at a minimum, be based on more than a defendant's net worth. The jury, however, was permitted to consider all of the relevant *Hammond* factors in Instruction No. 27, and possibly, although doubtfully, did not consider wealth at all. Exxon argues that its wealth was virtually the exclusive focus of plaintiffs' Phase III case. Exxon is correct, but the point bears little weight. Plaintiffs' Phase III case took less than 12 hours, while Phases I and IIA, which focused on conduct and harm, lasted several days.[15]

There is simply no basis for a conclusion that the jury concentrated exclusively on wealth in determining the punitive award. The jury was instructed that it might consider wealth, and if it did consider wealth, those considerations were to be made within strict parameters. As noted in *Boyle,* consideration of the wealth of a corporation is appropriate where smaller punitive awards could have "little deterrent or retributive effect." *Boyle,* 13 F.3d at 1361 (citations omitted).[16]

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[14] Instruction No. 27 stated in pertinent part:

> In determining the amount of punitive damages to award, if any, you may consider, among other factors:
>
> (a) the degree of reprehensibility of the defendants' conduct,
>
> (b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and
>
> (c) the financial condition of the defendants.
>
> You may also consider, as mitigating factors:
>
> (a) the existence of prior criminal sanctions or civil awards against the defendants for the same conduct, and
>
> (b) the extent to which a defendant has taken steps to remedy the consequences of his or its conduct or prevent repetition of that conduct.

Phase III Jury Instruction No. 27, Clerk's Docket No. 5890.

[15] Each trial day lasted approximately five and one-half hours, taking two fifteen-minute breaks into account. Phase III opened on August 22, 1994, at 8:00 a.m. and plaintiffs rested at 8:48 a.m. on August 24, 1994.

When compared to the entire trial, evidence regarding wealth was a rather small percentage of the total presentation of evidence. Exxon has not shown that the award was a function of wealth, as opposed to a function of all of the *Hammond* factors.[17] At most, Exxon has shown that wealth, in all probability, was one of the factors considered. That alone does not violate due process.[18]

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[16] Exxon's enormous wealth cannot lightly be discounted. The evidence included Exxon's 1990 Annual Report which stated: Over time, Exxon's consistently strong earnings performance has enabled the company to achieve and maintain a position of extraordinary financial strength and flexibility. For example, over the past ten years, Exxon's internal cash generation from operations amounted to more than $100 billion.

Plaintiffs' opposition at 117 (quoting 1990 Annual Report at 202-03, Tr. 7135-36), Clerk's Docket No. 6043. Jack Clarke, Senior Vice-President of Exxon Corporation, testified that the spill did not have any adverse effects on Exxon's operations and that Exxon's substantial costs in responding to the spill did not effect Exxon's AAA rating. Tr. at 7175-76.

[17] Exxon devotes much of its briefing on the wealth issue to comparisons of this case with other punitive damages cases. As the court previously noted, "'punitive damages are the products of numerous, and sometimes intangible factors; a jury imposing punitive damages must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it.'" *Hopkins,* 33 F.3d at 1127 (quoting *TXO,* 113 S. Ct at 2720). Certainly, the *Exxon Valdez* litigation, which concerns America's largest oil spill recklessly caused by one of the world's largest corporations involves a "'host of facts and circumstances unique to the particular case.'" *Id.* The *Exxon Valdez* litigation simply does not compare to other punitive damage cases.

[18] As stated in *Boyle,* "[t]he 'key question' is whether the 'damages "exceed[] the level necessary to ... deter."'" A comparison of the award to

4. Punitive damages impact on Exxon shareholders

Though not specifically a *Hammond* factor, it is appropriate to discuss Exxon shareholders in relation to Exxon's financial condition. The jury was given an instruction regarding the impact of punitive damages on shareholders:

In determining whether an award of punitive damages should be made, and if so in what amount, you may consider whether, and if so to what extent, an award of punitive damages against the corporate Exxon defendants might be borne by the Exxon shareholders. Consideration of who may bear the ultimate financial impact of punitive damages is but one of many factors you may consider in fixing the amount of punitive damages.

Phase III Jury Instruction No. 38, Clerk's Docket No. 5890.

Exxon argues that the Supreme Court and the Ninth Circuit have recognized that the quantification of punitive damages should take into account the "impact on innocent third parties." *Haslip* 499 U.S. at 20 (citation omitted); *Morgan,* 997 F.2d at 1256 n.10. Instruction No. 38 adequately instructed the jury to consider such innocent third parties.

The court previously considered the impact on shareholders in Order No. 196. The court stated:

> [S]hareholders who invest in Exxon bear the risk that Exxon will spill oil, and if they do not wish to bear that risk, they may invest elsewhere. Concern over a shareholder's investment is no reason to avoid punitive damages when they are warranted.

Order No. 196 at 4, Clerk's Docket No. 4755. The jury heard evidence from both parties regarding the impact of a punitive award on shareholders. Instruction No. 38 and the presentation of applicable evidence satisfied Exxon's due process concerns regarding innocent third parties.

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gross revenues does not answer this question because it does not indicate ability to pay." *Boyle,* 13 F.3d at 1361 (citation omitted).

5. The costs of litigation

The costs of litigation were only briefly discussed. Specifics costs were not presented to the court or the jury. Plaintiffs assure the court that, in the five years since the 1989 spill, they "have had to endure ... great expense to bring this matter to a jury." Plaintiffs' opposition at 127, Clerk's Docket No. 6043. No doubt Exxon's expenses have been equally great. Exxon has not argued that the costs of litigation rendered the verdict grossly excessive and the court does not so find.

6. Imposition of criminal sanctions

Instruction No. 36 permitted the jury to consider, as a mitigating factor, "whether a defendant has paid other criminal fines or civil penalties." Phase III Jury Instruction No. 36, Clerk's Docket No. 5890. The evidence established that Exxon paid a $25 million criminal fine plus $100 million in restitution to the state and federal governments imposed as part of the criminal sentence. The award was one of the largest criminal fines ever paid in the history of the United States. Exxon argues that the criminal payment is evidence that Exxon has been sufficiently punished. The evidence was presented to the jury, and the jury, which considered all of the evidence, including evidence of harm and conduct, determined that a $125 million criminal payment was not a sufficient punitive award against Exxon. The existence of the criminal payment, in light of the other evidence, does not establish that the only reasonable conclusion is that the verdict should be set aside or reduced. The criminal payment may have been one of the greatest on record, but so was the oil spill. Additionally, the criminal payment was made before the harm to plaintiffs was quantified; therefore, the criminal payment does not reflect the true extent of the harm. The jury had the opportunity to consider the evidence of Exxon's criminal payments and due process on that issue was satisfied.

7. Civil awards against Exxon

In addition to the criminal and compensatory payments, Exxon has made various other payments. Exxon will pay, over ten years, $900 million in settlement of government claims for natural resources damages and punitive damages (with the possibility of $100 million reopener). Exxon has paid $2.1 billion in cleanup expenditures through 1992, and $304 million in settlement of private damage claims paid through the Exxon claims program.[19] In Instruction No. 36, the jury was instructed that it could "consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures.... These are factors which you may consider in mitigation of any award of punitive damages that you might otherwise find proper." Phase III Jury Instruction No. 36.

Nearly $3 billion of the payments referenced above, were for natural resources harm.[20] The payments were not made to compensate victims, but, quite simply, to clean up Exxon's mess.[21] Exxon's settlement with the governments and its decision to fund the cleanup are laudable. Exxon's voluntary payment of damages to some fishermen was both laudable and extraordinary given that litigation was sure to follow irrespective of the voluntary payments. But that does not mean that Exxon should go unpunished for reckless conduct in causing the spill and the damages it caused for commercial fishermen and native Alaskans. Exxon has not shown that the jury did not consider the evidence in mitigation. The jury was presented with the evidence and properly instructed that it could consider it in mitigation. Accordingly, Exxon's due process rights were protected.

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[19] Exxon also argues that it paid $46 million in casualty losses for the vessel and cargo. The cost Exxon paid for wrecking its own ship should not be considered in mitigation.

[20] The jury was specifically instructed not to "consider any damage to natural resources or to the environment generally; you may not base an award of punitive damages on such harms." Phase III Jury Instruction No. 29, Clerk's Docket No. 5890.

[21] Exxon cleaned up the mess, but that did not erase the harm to the commercial interests of fishermen or to the livelihoods of native Alaskans. Additionally, the jury had an opportunity to view Prince William Sound to assess Exxon's cleanup measures.

IV. The amount required to punish and deter

"[T]he amount of punitive damages required to deter and punish the defendant necessarily is dependent on the circumstances of each case...." *Farmer Bros.*, 31 F.3d at 904. This basic principle is fundamental when reviewing a punitive damages award. Exxon argues that "plaintiffs have not shown that this award is anywhere within the range of previous awards." Exxon's reply at 30. Plaintiffs need not make such a showing. Rather, the court must find, based on the unique circumstances of this case, considered in light of *TXO, Haslip, Hopkins,* and *Morgan,* that the award is not grossly excessive in punishing and deterring Exxon.

Exxon argues that it was punished sufficiently by paying a large criminal fine. As noted, the jury considered the fine, and the fine was paid before the extent of the harm was learned. Furthermore, the fine was paid before the court established, on Exxon's motion, a mandatory punitive damages class. Thus, the punitive award is the total award for Exxon's reckless conduct which effected tens of thousands of people. Exxon is not exposed to any further punitive damage awards. The jury was instructed that it could

> [C]onsider harms to all persons who suffered actual damages as a legal result of the spill. All such claims have been consolidated into this single proceeding for purposes of determining whether punitive damages should be awarded against the defendants and, if so, the amount of such damages. This includes claims of persons who are suing for their actual damages in the state courts. Because of this consolidation of claims, there will be no other claims for punitive damages in any other court.

Phase III Jury Instruction No. 28, Clerk's Docket No. 5890.

The criminal penalty did not have the all-inclusive nature of the mandatory punitive damages class and did not comprehend the enormity of the harm or number of people adversely effected by the spill. The jury was entitled to consider both the criminal penalty and the mandatory punitive damages class, and there was substantial evidence for the jury to decide that the criminal penalty alone did not sufficiently punish Exxon.[22]

Exxon also argues that the verdict cannot serve any deterrence purposes because Exxon has behaved properly since the spill, learned its lesson, and modified its behavior to prevent future spills. Exxon argues that it paid $2.1 billion in cleanup costs, and $304 million in private damage claims through its claims program. Exxon provides the following examples of how it has modified its behavior:

> (1) Exxon revised its alcohol policies to specify that employees who have been treated for alcohol dependency may not be assigned to safety-sensitive positions;
>
> (2) Exxon implemented improved monitoring practices, random testing for alcohol or substance abuse, and anonymous reporting procedures;
>
> (3) Exxon adopted a prohibition of alcohol use by vessel officers while on a tour of duty;
>
> (4) Exxon assigned additional mates in port to assist with loading and lightering operations and an extra third mate aboard vessels;
>
> (5) Exxon strengthened requirements regarding mandatory rest periods and work hours;

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[22] Exxon also argues that it has been punished sufficiently by virtue of the "opprobrium heaped on Exxon and its employees from every quarter of the country." Exxon's motion at 2, Clerk's Docket No. 5970. The jury was entitled to consider, as a mitigating factor, "the extent to which a defendant has been subjected to condemnation or reproval by society as a result of other means, such as loss of standing in the community, public vilification, loss of reputation, and similar matters." Phase III Jury Instruction No. 36, Clerk's Docket No. 5890. The jury's return of a large punitive award does not mean that they did not consider opprobrium heaped upon Exxon. The jury may have considered that opprobrium alone was insufficient punishment in relation to the conduct and harm.

> (6) Exxon adopted new navigation policies specifying daylight only departures in icy conditions, limitations on deviations from traffic lanes, and increased use of tug escorts;
>
> (7) Exxon implemented use of an advanced satellite navigation tool;
>
> (8) Exxon strengthened policy requiring masters to remain on the bridge while in Prince William Sound;
>
> (9) Exxon instituted an enhanced safety training program; and
>
> (10) Exxon established a Safety, Environmental and Regulatory Department and improved spill response capabilities.

See Exxon's motion at 25-28, Clerk's Docket No. 5970.

Exxon argues that other oil companies, such as ARCO, have adopted measures similar to the ones listed above. For these reasons, Exxon argues that it and other companies have been deterred sufficiently and have "gotten the message." Exxon's motion at 28, Clerk's Docket No. 5970. Consequently, Exxon argues that the punitive verdict will not result in any change in Exxon policy or procedure that has already been implemented.

The jury received specific instructions regarding Exxon's policy changes. Instruction No. 35 stated:

> Evidence of changes in policies, practices, and procedures by the Exxon defendants has been put before you so that you can consider this issue. The fact that changes have been made after an event does not tend to show that such changes should have been made before the event, or that the policies, practices, or procedures in place before the event were negligent or otherwise improper. Accordingly, if you find that changes were made that have reduced the likelihood of an oil spill in the future, you may consider the making of such changes as a factor tending to mitigate any punitive damages award that you might otherwise find proper.

Phase III Jury Instruction No. 35, Clerk's Docket No. 5890.

Exxon presented all of the "policy change" evidence to the jury. A $5 billion verdict does not mean that the evidence was not considered. It may have been that the jury would have reached a higher punitive award had they not considered the evidence. It is also possible that, from the testimony of Exxon executives, the jury could have inferred a lack of remorse. Regardless, when all of the evidence is considered in the light most favorable to the plaintiffs, the jury could reasonably have reached a conclusion that a very large punitive award was necessary for purposes of punishment and further deterrence despite the evidence concerning Exxon's changes in policy and procedure.

V. Summary

A judgment as a matter of law is improper, unless the evidence, viewed in the light most favorable to plaintiffs, permits only one reasonable conclusion contrary to the verdict. Exxon has not established that only one reasonable conclusion is possible. At best, Exxon has established that reasonable minds could reach two inconsistent conclusions from the evidence. The court has considered the verdict in light of the *Hammond* factors and the concerns raised by *TXO* and *Haslip* in evaluating the award, and finds that it was neither grossly excessive nor a violation of due process. The jury made a "qualitative assessment based on a host of facts and circumstances unique to the particular case before it", *TXO,* 113 S. Ct. at 2720, and their verdict should not be overturned simply because of its record size. The jury received conservative and comprehensive instructions on the purpose of punitive damages and the manner in which they were to be assessed. The comprehensive instructions insured that jury was not left to whim, conjecture, or speculation. Furthermore, the jury was instructed not to base its verdict on "dislike for, bias, prejudice, or sympathy toward any party", thus directing the jury not to base its verdict on passion or prejudice, and the court finds that the verdict was not a function of passion or prejudice. *See* Phase III Jury Instruction No. 25. The jury deliberated 13 days as to Phase III. Judging from contacts which the court and counsel had with jurors during those deliberations, the jury reached its verdict only after much difficult analysis of the evidence. The jury did not vote precipitously. The deliberations became emotional at times; but the 11 men and women chosen by counsel resolved their differences. This verdict and the amount awarded were not the result of passion or prejudice against Exxon. For these reasons, Exxon's motion for judgment as a matter of law on plaintiffs' punitive damage claims (Phase III) is denied.

VI. Motion for a new trial

Exxon moved for a new trial in the event that the court denied its motion for judgment as a matter of law. Pursuant to Rule 59 of the Federal Rules of Civil Procedure:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States....

Fed. R. Civ. P. 59(a).

Exxon's motion for a new trial on plaintiffs' punitive damages claims applies to Phases I and III and is based on the weight of the evidence.

> [A] stringent standard applies when the motion is based on insufficiency of the evidence. A motion for a new trial may be granted on this ground only if the verdict is against the "great weight" of the evidence or "it is quite clear that the jury has reached a seriously erroneous result."

Venegas v. Wagner, 831 F.2d 1514, 1519 (9th Cir. 1987) (citations omitted). In considering a motion for a new trial, the district court may weigh the evidence and assess the credibility of witnesses. The court need not view the evidence in the light most favorable to plaintiffs. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.,* 880 F.2d 176 (9th Cir. 1989), *cert. denied,* 493 U.S. 1058 (1990).

> [I]n most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter.... If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Landes Constr. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365, 1371-72 (9th Cir. 1987) (citations omitted).[23]

The court has reviewed the evidence on numerous occasions during the *Exxon Valdez* litigation. The Phase I verdict that Exxon was reckless and the Phase III verdict that Exxon is liable for $5 billion in punitive damages are not against the great weight of the evidence. The court might have reached different conclusions in both phases, but from the "entire evidence" the court is not "left with the definite and firm conviction that a mistake has been committed...." *Id.* The jury's verdict is defensible under the evidence, and the court must restrain itself from substituting its own conclusions for that of the jury. The court respects the "collective wisdom of the jury" and accepts its findings. *Id.* at 1371 (citation omitted). Exxon's motion for a new trial is denied.

VII. Conclusion

In summary, Exxon's motion for judgment as a matter of law on plaintiffs' punitive damages claims (Phase III issues) is denied and Exxon's motion for a new trial (weight of the evidence) is denied.

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[23] *Landes Constr.* further stated that:

> Doubts about the correctness of the verdict are not sufficient grounds for a new trial: the trial court must have a firm conviction that the jury has made a mistake.... Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Id. 833 F.2d at 1372 (citations omitted).

APPENDIX F

United States District Court, D. Alaska.
In re the EXXON VALDEZ.
This Order Relates to All Cases.
A89-0095-CV (HRH).

Jan. 27, 1995.

ORDER NO. 265

EXXON'S MOTION FOR JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIMS (PHASE I ISSUES)

HOLLAND, Chief Judge.

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (Exxon) have filed a motion, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, for judgment as a matter of law[1] on plaintiffs' punitive damages claims (Phase I issues).[2] Plaintiffs oppose the motion[3] and Exxon has replied.[4] Oral argument has not been requested and is deemed unnecessary.

According to Rule 50(b):

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later de-

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[1] Pursuant to the 1991 amendments to the Federal Rules of Civil Procedure, both a motion for a directed verdict and a motion for judgment notwithstanding the verdict are now designated as motions for judgment as a matter of law. 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521 (1995) (footnote omitted). *See* Fed. R. Civ. P. 50 advisory notes, 1991 amendment.

[2] Clerk's Docket No. 5969.

[3] Clerk's Docket No. 6043.

[4] Clerk's Docket No. 6098.

> termination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.[5]

Fed. R. Civ. P. 50(b).

Exxon argues that plaintiffs' punitive damages award can not be justified because substantial evidence was not presented that would allow a reasonable jury to find that Exxon's conduct was reckless. Exxon argues that its conduct was not the legal cause of the grounding of the *Exxon Valdez* because:

The evidence was legally insufficient to allow a finding that Exxon was liable for punitive damages on the basis of conduct of Captain Hazelwood; and

> The evidence was legally insufficient to allow a finding that Exxon was liable for punitive damages on any other basis.

Exxon brief in support of motion at 3.

I. Standard for judgment as a matter of law

Judgment as a matter of law:

> [I]s proper when the evidence permits only one reasonable conclusion as to the verdict. The jury's verdict must be supported by substantial evidence in order to stand. We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. [Judgment as a mater of law] is improper if reasonable minds could differ over the verdict.

Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir.1987) (citations omitted); *See George v. City of Long Beach,* 973 F.2d 706, 709 (9th Cir.1992), *cert. denied,* 113 S.Ct. 1269 (1993) ("[s]ubstantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence") (citations omitted); *Glover v. BIC Corp.*, 6 F.3d 1318, 1330 n. 5 (9th Cir.1993) (the court must consider all evidence and not just evidence favoring the nonmoving party). In *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), the Supreme Court stated:

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[5] Exxon moved for judgment in each phase of the trial and at the close of all the evidence; and the parties have stipulated that the motion may be filed prior to the entry of judgment.

> [I]n considering a motion for [judgment as a matter of law], the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'

Id. at 554-55 (citations omitted). *See Moore v. Local Union 569 of the Int'l Bhd. of Elec. Workers,* 989 F.2d 1534, 1537 (9th Cir.1993), *cert. denied,* 114 S.Ct. 1066 (1994) (a motion for judgment as a matter of law "is proper when the evidence permits only one reasonable conclusion as to the verdict.") (citations omitted); *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir.1991) (a motion for judgment as a matter of law "is appropriate only when the evidence, viewed in the light most favorable to the nonmoving party, could not reasonably support the verdict.") (citations omitted). *See also Vaughn v. Ricketts,* 950 F.2d 1464, 1468 (9th Cir.1991); *Cockrum v. Whitney,* 479 F.2d 84, 85 (9th Cir.1973).

To grant Exxon's motion would deprive plaintiffs of the jury's determination of the facts; thus, such motions are "granted cautiously and sparingly." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524 at 252 (1995). The court "must view the evidence most favorably to [plaintiffs] and give [plaintiffs] the benefit of all reasonable inferences that may be drawn from the evidence." *Id.* at 256-59. If the court finds evidence sufficient to support the jury's verdict, then Exxon's motion must be denied. *Id.* at 253-54. As noted, the court will not weigh the evidence, make credibility determinations, or substitute its judgment for that of the jury's. *Id.* at 255-56.

II. Conduct which permits an award of punitive damages

Phase I Jury Instruction No. 28 stated:

> In order for conduct to be in reckless or callous disregard of the rights of others, four factors must be present. First, a defendant must be subjectively conscious of a particular grave danger or risk of harm, and the danger or risk must be a foreseeable and probable effect of the conduct. Second, the particular danger or risk of which the defendant was subjectively aware must in fact have eventuated. Third, a defendant must have disregarded the risk in determining how to act. Fourth, a defendant's conduct in ignoring the danger or risk must have involved a gross deviation from the level of care which an ordinary person would use, having due regard to all the circumstances.
>
> Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

Phase I Jury Instruction No. 28, Clerk's Docket No. 5309.

Exxon argues that Instruction No. 28 provides the framework for analyzing whether a reasonable jury could find that Exxon's conduct was reckless.[6] Exxon argues that neither the conduct of Captain Hazelwood nor Exxon meets the above standard for recklessness.

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[6] In a footnote, Exxon argues that the jury should have been instructed that reckless conduct must be proved by clear and convincing evidence as opposed to a preponderance of the evidence. The court rejected this argument in Order No. 264.

II. The conduct of Captain Hazelwood[7]

Exxon argues that Captain Hazelwood's decision to leave the bridge at 11:52 p.m. on the night of the grounding was the only act committed by Hazelwood which could be the legal cause of the accident.[8] The jury heard evidence that Hazelwood, upon electing to leave the bridge, gave Gregory Cousins certain navigation instructions. Both Hazelwood and Cousins were confident that Cousins could maneuver the ship. If Cousins had followed the instructions, the grounding would not have occurred. Exxon argues that Hazelwood's leaving the bridge was not a reckless act for three distinct reasons:

> [1] Under the objective conditions present, no grave danger or risk of harm existed.
>
> [2] Nothing about Hazelwood's leaving the bridge, although admittedly negligent, involved a "gross deviation from appropriate standards of conduct."
>
> [3] There is no evidence that Captain Hazelwood, or anyone else, was subjectively conscious of a grave risk of harm.

Exxon's brief in support of motion at 14.

The court has reviewed all of the evidence on this issue in the light most favorable to the plaintiffs. The evidence does not mandate only one conclusion; that Hazelwood was not reckless. Rather, the evidence, when taken as a whole, provides a sufficient probative basis upon which a reasonable jury could find that Hazelwood was reckless in leaving the bridge.

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[7] The briefing on this motion exceeds 150 pages, not including exhibits. The bulk of the briefing is devoted to the evidence presented at trial. It would serve no purpose for the court to repeat all of the evidence here. The court has previously considered the majority of the evidence during pretrial motion practice and, of course, heard all of the evidence during trial. Having reviewed the evidence a third time in consideration of the instant motion, the court will discuss the evidence only when warranted.

[8] Exxon argues that under the "strict complicity" rule, Captain Hazelwood's conduct may not be attributed to Exxon. The court has considered and rejected this argument in Order No. 264.

Evidence was submitted which showed that it was the Master's duty to be on the bridge during the Prince William Sound transit. When Hazelwood left the bridge of his supertanker which was carrying over one million barrels of crude oil, she was on a course headed directly at Bligh Reef, some five miles distant. There was evidence that Hazelwood gave Cousins instructions to turn when he was abeam of Busby Island light. Although the critical turn was to be made in only two minutes, Hazelwood left the bridge, and the turn was made several minutes late. Evidence was presented that Hazelwood should have checked with Cousins or returned to the bridge when the turn was not made after two minutes. Hazelwood remained in his stateroom even after Cousins belatedly called to say that the turn was commenced.

The jury could reasonably have found that it was reckless for Hazelwood to leave the bridge of a supertanker headed directly at a known reef only minutes away.

Given that the turn was made several minutes late, and that supertankers respond slowly to the helm, the jury could reasonably have found that Hazelwood was reckless for having remained off the bridge upon learning that the vessel had belatedly begun the turn, particularly when Hazelwood recognized that Bligh Reef was a "very nasty spot". Plaintiffs' opposition at 97 n. 111 (citation omitted). Even though the vessel was headed into a known danger, Hazelwood remained in his stateroom until the grounding was reported.

Although Cousins had been on the bridge during previous voyages through Prince William Sound, he did not, as Hazelwood was aware, have a pilotage endorsement for Prince William Sound. The evidence showed that Cousins had never before been left alone in Prince William Sound heading toward a known reef.

Finally, quite apart from the foregoing, and arguably most important of all, the jury could have found that it was reckless for Hazelwood to have assumed command of the *Exxon*

Valdez on the night in question based upon alcohol consumption in close temporal proximity to his departure from the Valdez, Alaska Tanker Terminal. (*See* discussion on alcohol at part IV below).

The evidence does not permit only one reasonable conclusion as to the verdict. Plaintiffs have the benefit of all reasonable inferences, and a consideration of all of the evidence in the light most favorable to plaintiffs establishes only that reasonable minds might draw two inconsistent conclusions from the evidence. There was sufficient probative evidence for the jury to conclude that Hazelwood was reckless for leaving the bridge the night of the grounding. Accordingly, judgment as a matter of law cannot be entered on the issue of Hazelwood's leaving the bridge.

III. Deck officer fatigue

Substantial evidence existed such that reasonable minds might differ on whether Exxon was reckless regarding deck officer fatigue. The jury heard evidence that Exxon management had received reports of excessive levels of fatigue but ignored the reports. The jury also heard conflicting evidence on whether Cousins was fatigued on the night of the grounding. It is undisputed that Cousins had only 4 1/2 hours off during the twelve hour period before sailing. Moreover, from 8:00 a.m. until the time of the grounding, Cousins worked a total of 11 1/2 hours. On the other hand, Cousins and others testified that fatigue was not a factor in the grounding.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions [and] all justifiable inferences are to be drawn in [plaintiffs'] favor." *Lytle v. Household Mfg., Inc.,* 494 U.S. 545, 554-55 (1990) (citations omitted). Substantial evidence was presented so that a reasonable jury could conclude that Cousins was fatigued at the time of the grounding and that Exxon was aware that its vessels embarked with fatigued crews but recklessly ignored the attendant risks. Exxon has shown that reasonable minds might draw inconsistent conclusions based upon the evidence, but that is insufficient to grant Exxon's motion on the fatigue issue.[9]

IV. Captain Hazelwood and alcohol

The evidence regarding Hazelwood's alcohol consumption raises several different issues. The court will not discuss each issue separately, but will, in general terms, discuss them all.

Evidence regarding both Hazelwood's alcohol consumption and Exxon's awareness of and reactions to Hazelwood's alcohol consumption have been before the court on numerous occasions. The evidence has been thoroughly reviewed by the court once again and the facts need not be repeated in this order. The court will, however, highlight the more pertinent facts which establish that, at the very most, reasonable minds could reach inconsistent conclusions over whether Exxon was reckless concerning Hazelwood's drinking and whether Hazelwood's alcohol consumption on the night of the grounding made his conduct reckless.

Substantial evidence existed to show that Hazelwood was treated for alcohol abuse,[10] that he was assigned to command a supertanker upon his release from treatment, that he relapsed, and that Exxon was aware of the relapse. There was evidence presented to the jury that after Hazelwood was released from treatment at South Oaks, he drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers.

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[9] The parties debate whether Exxon was in compliance with 46 U.S.C. § 8104 (the six hour rule). Although Exxon did not keep records of its officers' time, officers were instructed to comply with § 8104. The Coast Guard did not charge Exxon with failure to comply with § 8104. Sufficient evidence did exist, however, such that reasonable minds could reach inconsistent conclusions on whether Exxon was reckless regarding compliance with § 8104.

[10] Substantial evidence existed for the jury to find that Hazelwood was an alcoholic. Hazelwood entered an alcohol rehabilitation program and participated in Alcoholics Anonymous. Hazelwood's wife attended Al-Anon.

There was evidence that Exxon failed to evaluate Hazelwood before returning him to duty and did not consider whether he should be given a shoreside assignment. Exxon never discussed with Hazelwood whether he was attending AA (Alcoholics Anonymous) meetings, nor was he ever asked about his drinking or told to refrain from drinking. The jury also heard conflicting evidence regarding whether Exxon relied on the Rehabilitation Act 29 U.S.C. § 794, in placing Hazelwood in command of a supertanker because he was a recovered alcohol abuser.

The jury heard evidence that, subsequent to his return to sea duty, Hazelwood drank with Exxon officers and that Exxon management received reports of Hazelwood's relapse. The jury heard conflicting evidence on whether Hazelwood was closely monitored regarding his alcohol consumption. Exxon did not document any monitoring activities and neither Hazelwood nor his peers were aware that Hazelwood was being monitored. The jury heard conflicting evidence regarding whether Exxon had a monitoring program and, if one existed, the quality of the monitoring program.

The jury's finding that Exxon was reckless regarding the alcohol issues is supported by substantial evidence. Although Exxon presented contrary evidence, it only established that reasonable minds could reach different conclusions. Exxon's evidence does not establish that the only reasonable conclusion was that Exxon was not reckless.

It was not disputed that Hazelwood consumed alcohol on March 23, 1989. The amount he drank is unclear, but it was the jury's responsibility to judge the credibility of witnesses who saw Hazelwood drink. The jury heard evidence that Hazelwood's blood alcohol level was .061 at 10:50 a.m. on March 24, 1989, and .241 at the time of the grounding. Exxon challenged the validity of the blood tests regarding breaks in the chain of custody and threats to the integrity of the specimens. The jury also heard evidence that the specimens were not compromised despite evidence of mishandling. Here again, the evidence might result in inconsistent conclusions, but that does not warrant granting judgment as a matter of law.

Substantial evidence existed for the jury to find that Hazelwood's judgment was impaired by alcohol on the night of the grounding. Based upon the evidence, the jury was entitled to find that Hazelwood, and therefore Exxon, acted recklessly in causing the grounding.

The court cannot ignore the heavy burden which Exxon must meet to warrant granting a motion for judgment as a matter of law. As the court has noted, "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions ... [and] ... all justifiable inferences are to be drawn in [plaintiffs'] favor.'" *Lytle v. Household Mfg., Inc.,* 494 U.S. 545, 554-55 (1990) (citations omitted). Upon consideration of the above standard, Exxon has not established that the only possible conclusion is that neither Exxon nor Hazelwood acted recklessly. At the very most, Exxon has only shown that reasonable minds could reach inconsistent conclusions. When reasonable minds could differ over the verdict, then judgment as a matter of law is improper. *Venegas v. Wagner,* 831 F.2d 1514, 1517 (9th Cir. 1987). The jury's verdict in Phase I was supported by substantial evidence and Exxon's motion for judgment as a matter of law (Phase I issues) is denied.

APPENDIX G

United States District Court, D. Alaska.
In re the Exxon Valdez.
This Order Relates to All Cases.
No. A89-0095-CV (HRH).

Jan. 27, 1995.

ORDER NO. 264

Exxon's and Hazelwood's Motions for a New Trial on Plaintiffs' Punitive Damages Claims (Jury Instructions)

Exxon Corporation (D-1), Exxon Shipping Company (D-2) (collectively Exxon), and Joseph Hazelwood (D-7) have filed motions for a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure, on the punitive damages issues tried in Phases I and III.[1] Plaintiffs oppose the motions[2] and Exxon has replied.[3] Oral argument has not been requested and is deemed unnecessary.

Exxon argues that a new trial is warranted because the court committed errors in its Phase I and Phase III jury instructions.[4] "[E]rroneous jury instructions, as well as the failure to give adequate instructions are ... bases for a new trial." *Murphy v. City of Long Beach,* 914 F.2d 183, 187 (9th Cir. 1990) (citations omitted). "An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless." *Caballero v. City of Concord,* 956 F.2d 204, 206 (9th Cir. 1992) (citing *Coursen v. A.H. Robins Co., Inc.,* 764 F.2d 1329, 1337 (9th Cir. 1985)).

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[1] Clerk's Docket No. 5946. Exxon's motion and reply brief were adopted by Hazelwood at Clerk's Docket Nos. 5957 and 6120 (§§ IV and V only).

[2] Clerk's Docket No. 6043.

[3] Clerk's Docket No. 6125.

[4] In Phase I of the trial, the jury found that Exxon and Captain Hazelwood acted recklessly in the grounding of the *Exxon Valdez.* In Phase III, the jury determined the amount of punitive damages to be paid by Exxon and Hazelwood for their reckless acts.

> In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party.

Caballero, 956 F.2d at 207.

Exxon argues that the court's charge to the jury was prejudicially erroneous in that:

> (1) The jury should not have been charged that it could not consider, on the issue of whether Exxon was reckless, the existence of corporate policies violated by Captain Hazelwood. Phase I Jury Instruction No. 36. As a practical matter, the effect of the Court's charge on this point was to direct a verdict against Exxon on the issue of recklessness.
>
> (2) The jury should not have been charged that a corporation can be liable for the reckless acts of shipboard employees if those employees are acting in a managerial capacity; instead the jury should have been told that vicarious liability is permissible only if there is compliance with the strict complicity doctrine of maritime law. Phase I Jury Instruction No. 33.
>
> (3) The jury should not have been charged in Phases I and III that a preponderance of the evidence was the evidentiary standard for the award of punitive damages, but should have been charged that it was required to make its findings by clear and convincing evidence.
>
> (4) The jury should not have been charged that reckless conduct is sufficient to allow an award of punitive damages, but should have been charged that punitive damages may be awarded only on the basis of conduct which is the moral equivalent of actual malice.

Exxon's motion at 2-3.

I. *Phase I Jury Instruction No. 36*

Exxon argues that the principal error involves Phase I Jury Instruction No. 36, in which the court instructed the jury that if it found that Hazelwood was a "managerial agent", then Hazelwood's conduct was attributable to Exxon regardless of whether that conduct was contrary to corporate policies and instructions. According to Exxon, the instruction had the effect of directing a verdict against Exxon if the jury found Hazelwood reckless. Exxon argues that the jury was forbidden to consider the fact that Hazelwood's leaving the bridge at 11:52 p.m. on the night of the grounding was in direct violation of Exxon policies and instructions, was not for the benefit of Exxon, and was not within the scope of Hazelwood's employment.[5]

Phase I Jury Instruction No. 36 read as follows:

> Since plaintiffs in this case seek punitive damages against corporations, you must consider whether the actions of employees were in violation of direct instructions or policies of the defendant corporations.
>
> Merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions. It is a question of fact whether a corporation has taken adequate measures to enforce corporate policy in a given area. If you find that adequate measures were taken to establish and enforce the

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[5] Plaintiffs argued in their opposition to Exxon's motion to strike plaintiffs' inadmissible and non-record evidence that Exxon never argued to the jury that Hazelwood was not acting within the scope of his employment on the night of the grounding. Clerk's Docket No. 6118. Accordingly, plaintiffs suggest that the issue should not be considered. *See* Order No. 260, Clerk's Docket No. 6150. The court finds that issues regarding scope of employment were in evidence at trial and should be considered herein.

> policies or directions, then an employee's acts contrary to such policies or instructions are not attributable to the employer, and you should find that the employer's conduct was not reckless.
>
> *However, if the employee was a managerial agent, then as stated in Instruction No. 33*[6]*, the acts of the employee are attributable to the employer whether or not those acts are contrary to the employer's policy or instructions.*

Phase I Jury Instruction No. 36, Clerk's Docket No. 5309 (emphasis added).

Exxon argues that the jury considered the last paragraph of Instruction No. 36 in conjunction with Instruction No. 34, which read:

> An employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.

Phase I Jury Instruction No. 34, Clerk's Docket No. 5309. Exxon argues that Instruction Nos. 34 and 36 instructed the jury that Exxon was responsible for Hazelwood's actions even if those actions were outside the course and scope of Hazelwood's employment. Exxon argues that the final paragraph of Instruction No. 36 was contrary to law and prejudicial to Exxon. According to Exxon: A correctly instructed jury would have been told that it could consider company policies on the issue of whether Hazelwood's conduct should be imputed to Exxon. If it found Hazelwood's reckless conduct contrary to corporate policies adequately established and enforced, the jury should have been told, it could not attribute Hazelwood's conduct to Exxon -- or at the very least, it was not *required* to do so.

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[6] Phase I Instruction No. 33 stated:

> The Exxon defendants, as corporations, may act only through natural persons, and especially through their officers and employees. A corporation is not responsible for the reckless acts of all of its employees. A corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

Phase I Jury Instruction No. 33, Clerk's Docket No. 5309.

Exxon's memorandum in support of motion at 5 (citing *United States v. Beusch,* 596 F.2d 871, 878 (9th Cir. 1979); *United States v. Hilton Hotels Corp.,* 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied,* 490 U.S. 1125 (1973); *United States v. Basic Constr. Co.,* 711 F.2d 570, 573 (4th Cir. 1983), *cert. denied,* 464 U.S. 956 (1983). Essentially, Exxon argues that the jury should have been instructed that Hazelwood's conduct could not be attributed to Exxon unless Hazelwood acted within the scope of his employment.

Exxon argues that on the night of the grounding, Hazelwood left the bridge in direct violation of company policy.[7] Having violated Exxon policy, Exxon argues that Hazelwood's action in leaving the bridge was outside the scope of his employment. Thus, Exxon argues that Hazelwood's conduct cannot be attributed to Exxon.

In support of its argument, Exxon cites, *In re American Biomaterials Corp.,* 954 F.2d 919, 924 (3d Cir. 1992), which stated that, "[i]n every jurisdiction ... for punitive damages to be imposed vicariously on the employer, the employee must be acting within the scope of the employment." *Id.* (citations omitted). The key Ninth Circuit case to speak to the issue is *Protectus Alpha Navigation v. Northern Pac. Grain Co.,* 767 F.2d 1379 (9th Cir. 1985). *Protectus,* an admiralty and punitive damages case, states:

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[7] According to Exxon's Navigation and Bridge Organization Manual, "[t]he Master must be on the bridge when 'passing in the vicinity of shoals, rocks or other hazards which represent any threat to safe navigation' and when entering or leaving port." Exxon's memorandum in support of motion at 7-8 (citation omitted). Exxon required that one copy of the manual be kept in the Master's library and another on the bridge. Officers were required to acknowledge by signature that they had read and understood the manual. *Id.* Other than arguing that the manual was kept on board ship and apparently read by the officers, Exxon has not discussed how it enforced the manual's requirements. *See United States v. Beusch,* 596 F.2d 871, 878 (9th Cir. 1979) ("[m]erely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment.") (citation omitted).

> 'A majority of courts ... have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification' .... This is in accord with the 'general rule of agency law, [under which] principals are liable when their agents act with apparent authority and commit torts....'

Id. at 1386 (citations omitted).

Protectus adopted *Restatement (Second) of Torts* § 909 which states:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
>
> (c) *the agent was employed in a managerial capacity and was acting in the scope of employment,* or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

Restatement (Second) of Torts § 909 (1977). *See Protectus,* 767 F.2d at 1386 (emphasis added).

For the jury to have found Exxon liable for Hazelwood's acts, under subsection (c) above, the jury would have found that Hazelwood acted in a managerial capacity and that the act of leaving the bridge was within the scope of employment.

Exxon argues, however, that "the principal error involving Instruction 36 [is that it] erroneously forbade the jury to consider, on the issue of Exxon's vicarious liability for Captain Hazelwood, whether his allegedly reckless acts violated specific company policies ...." Exxon reply at 1.[8]

Although Exxon argues that the principal issue is the jury's inability to consider whether Hazelwood's reckless acts violated Exxon policy, the more salient issue is whether the final paragraph of Instruction No. 36 is a correct statement of law. As previously noted, the final paragraph of Instruction No. 36 stated:

> However, if the employee was a managerial agent, then as stated in Instruction No. 33, the acts of the employee are attributable to the employer whether or not those acts are contrary to the employer's policy or instructions.

Phase I Instruction No. 36, Clerk's Docket No. 5309. Instruction No. 33, referenced above, stated that, "[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment." Phase I Jury Instruction No. 33, Clerk's Docket No. 5309.

It cannot be disputed that Instruction Nos. 36 and 33 are to be read together. The concept from the two instructions is that when a managerial agent acts within the scope of his employment, those actions are attributable to the employer. It might have been better had the instructions defined "scope of employment", but neither party requested such an instruction.

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[8] Exxon does not dispute that Hazelwood was a managerial employee. Instruction No. 34 stated:

> An employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.

Phase I Jury Instruction No. 34, Clerk's Docket No. 5309. *See* Exxon's reply at 5 n.4 (Exxon "does not attack" Instruction No. 34).

Regardless, Instruction Nos. 36 and 33, when taken together, correctly state the law.

The *Restatement* permits punitive damages where the employee, acting in a managerial capacity, performs a reckless act within the scope of his employment. In the case at bar, it cannot be disputed seriously that the captain of a supertanker acts in a managerial capacity. As stated in *Protectus,* "[w]e agree that a corporation can act only through its agents and employees, and that no reasonable distinction can be made between the guilt of the employee in a managerial capacity acting within the scope of his employment and the guilt of the corporation." *Protectus,* 767 F.2d at 1386 (citations omitted). Instruction Nos. 33 and 36 fall within the *Protectus* and *Restatement* standards. Given that Instruction No. 36 correctly states the law, Exxon's "principal error" -- whether the jury was forbidden to consider whether Hazelwood's acts violated Exxon policy -- loses significance.

Exxon also argues that the jury was entitled to consider Exxon's policies because the policies are the most relevant indicia of "scope of employment" . The first paragraph of Instruction No. 36 told the jury to do exactly what Exxon argues it was precluded from doing-- consider Exxon's policies. Instruction No. 36 paragraph one stated in pertinent part, "you must consider whether the actions of employees were in violation of direct ... policies of the defendant corporation." Phase I Jury Instruction No. 36, Clerk's Docket No. 5309. Despite the clear language of the first paragraph of Instruction No. 36, Exxon argues that the final paragraph of Instruction No. 36 negated the first paragraph. According to Exxon, the final paragraph of Instruction No. 36 negated the first paragraph by instructing the jury that if it found Hazelwood to be a managerial agent, then it must attribute those acts to Exxon, whether or not they were contrary to company policy.

The court disagrees with Exxon's argument that the final paragraph of Instruction No. 36 negated the first paragraph. The final paragraph of Instruction No. 36 directed the jury to consider Instruction No. 33. Instruction No. 33 instructed the jury that the reckless acts of a managerial officer done in the scope of employment were attributed to the employer. The first paragraph of Instruction No. 36 then instructed the jury to consider whether the employee's actions violated company policies. The instructions, when read together, do not negate paragraph one of Instruction No. 36.[9] Rather, the instructions are mutually supporting in reiterating that the jury should consider whether the employee acted within the scope of employment and whether those actions violated company policy.[10]

Exxon's argument assumes that Hazelwood's scope of employment was strictly circumscribed by company policy to the effect that Hazelwood should have been on the bridge when the grounding occurred. Yet a managerial employee's scope of employment is not circumscribed by company policy to the extent Exxon suggests and a managerial employee, particularly a supertanker master, can interpret policy and engage in policy-making decisions as part of the scope of employment. Accordingly, the final paragraph of Instruction No. 36 correctly stated the law and did not negate the first paragraph of the same instruction.[11]

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[9] The second paragraph of Phase I Jury Instruction No. 36 stated: Merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions. It is a question of fact whether a corporation has taken adequate measures to enforce corporate policy in a given area. If you find that adequate measures were taken to establish and enforce the policies or directions, then an employee's acts contrary to such policies or instructions are not attributable to the employer, and you should find that the employer's conduct was not reckless.

[10] Another reason why the final paragraph of Instruction No. 36 does not negate the first paragraph is that the jury could have found that a particular company policy was non-existent or not enforced.

[11] It is also the case that the jury may have found that Exxon's liability for punitive damages arose from circumstances other than Hazelwood's managerial capacity. Plaintiffs contended at trial that other officials of Exxon were reckless in their supervision of Hazelwood.

Exxon next argues that the jury was entitled to attribute Hazelwood's leaving the bridge to Exxon only if leaving the bridge was within the scope of Hazelwood's employment. Exxon's argument does not accurately reflect the law. "An act, although forbidden, or done in a forbidden manner, may be within the scope of employment." *Restatement (Second) of Agency* § 230 (1958). Thus, even if Hazelwood's leaving the bridge was a violation of company policy, that does not mean that his action was outside the scope of employment.

Exxon further argues that an action is within the scope of employment only if the employee's actions are authorized or are motivated by an intent to benefit the corporation. *United States v. Cincotta,* 689 F.2d 238, 241-242 (1st Cir), *cert. denied,* 459 U.S. 991 (1982). *See United States v. Halpin,* 145 F.R.D. 447, 449 (N.D. Ohio 1992) (citations omitted) ("it is essential that the illegal conduct be related to and done within the course of employment and have some connection with the furtherance of the business of the corporation.").

The *Restatement* defines scope of employment as follows:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master;
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency § 228 (1958).[12] *See Re-*

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[12] Section 229 provides:

statement (Second) of Agency § 229 cmt. a ("the scope of employment includes ... acts which, as between the master and servant, the servant is not privileged to do.").

Hazelwood was commander of a modern supertanker, whose position required certain flexibility. Captain Bolton, an expert on the duties of a master, testified about a master's responsibilities.

> [O]nce a ship is at sea [the master] has no umbilical cord of support. He is the sole decision maker and he lives with the responsibility that he's got to discharge, under adverse and varied conditions, calling upon those levels of expertise at moments and when he's least expecting it.

Plaintiffs' opposition at 40 n.44 (quoting Bolton Tr. at

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(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place, and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

Restatement (Second) of Agency § 229 (1958).

3853-3854).

Exxon argued at trial that Hazelwood left the bridge to work on weather charts. He had received a report of a storm moving eastward in the Gulf of Alaska which would cross the intended southbound course of the *Exxon Valdez*. Prior to leaving the bridge, he left specific, correct navigation instructions with his third mate. Given Hazelwood's multi-faceted responsibilities, it cannot be contended that leaving the bridge under those circumstances violated company policy or was outside the scope of employment. On the other hand, even if leaving the bridge could be considered a violation of company policy, Hazelwood's action, as master of a supertanker, was "related to and done within the course of employment and [had] some connection with the furtherance of the business of the corporation." *United States v. Halpin*, 145 F.R.D. 447, 449 (N.D. Ohio 1992) (citations omitted).[13]

Instruction No. 36, when read in conjunction with Instruction No. 33, provided a correct statement of the law. One can violate company policy yet act within the scope of employment. *See Restatement (Second) of Torts* § 909 cmt. b ("although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity ... does an outrageous act" punitive damages are warranted). The jury was not forbidden to consider whether Hazelwood's actions violated Exxon policies. In fact, as previously discussed, paragraph 1 of Instruction No. 36 instructed the jury to "consider whether the actions of employees were in violation of direct instructions or policies of the defendant corporations." Phase I Jury Instruction No. 36.

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[13] According to the Navigation and Bridge Organization Manual, the Master was entitled to leave the bridge to rest during times when certain conditions, such as weather, rocks, or traffic, presented a potential threat to the vessel. "In such circumstances, the Master should consider delegating navigational conning responsibilities to the Senior Officer to allow sufficient time for adequate rest." Manual, DX-3450 at 6. If the Master could leave the bridge for a prolonged period to rest, certainly he could leave the bridge for a short period to consult navigation and weather charts.

Paragraph 1, combined with the final paragraph of Instruction No. 36, which instructed the jury to make a scope of employment inquiry pursuant to Instruction No. 33, adequately stated the law.[14] It is doubtful that Hazelwood violated company policy, but even if he did, there was ample evidence for the jury to find that Hazelwood was a managerial agent who, upon leaving the bridge, acted within the scope of his employment.[15]

II. *Phase I Jury Instruction No. 33*

Exxon argues that Instruction No. 33 erroneously attributed to corporations the reckless conduct of sea-based employees acting in a managerial capacity. Instruction No. 33 instructed the jury that "[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment." Phase I Jury Instruction No. 33. Exxon argues that the maritime "strict complicity" rule should have been applied.

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[14] *See Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*, 118 N.M. 140, 879 P.2d 772, 778 (N.M. 1994), which states:

> If we were to adopt the position that misconduct by managing agents who actually control daily operations is not sufficient to trigger corporate punitive damages, large corporations that routinely delegate managerial authority to shape corporate policy by making important corporate decisions could unfairly escape liability for punitive damages by virtue of their size.... When a corporate agent with managerial capacity acts on behalf of the corporation, pursuant to the theoretical underpinnings of the Restatement rule of managerial capacity, his acts are the acts of the corporation; the corporation has participated.

[15] Plaintiffs also argue that Exxon admitted that Hazelwood acted within the scope of employment because Exxon, in a stipulation, admitted that Hazelwood was negligent in leaving the bridge and that Exxon was responsible for Hazelwood's negligence. The stipulation is silent on the scope of employment issue and bears no relevance to Exxon's motion. Additionally, plaintiffs argue that Exxon did not specifically state its reasons for objecting to Instruction No. 36, thus waiving any objection under Federal Rule of Civil Procedure 51. The transcripts reveal that Exxon adequately objected to Instruction No. 36. *See* Exxon's reply at 25 n.18 (quoting 23 Tr. 4085:12 - 4086:8).

The "strict complicity" rule holds principals liable for punitive damages only if it authorizes or ratifies wanton actions of the agent. *Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642, 650 (5th Cir. 1989). *See The Amiable Nancy*, 16 U.S. (3 Wheat) 546 (1818). In *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970), the court, sitting in admiralty, held:

> We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before of after the accident. Punitive damages may also be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him.

Fuhrman, at 1148 (citations omitted).

P & E Boat Rentals recognized that "[t]he only other circuit court sitting in admiralty which has ruled on this question is the Ninth Circuit in *Protectus Alpha Navigation Co. v. N. Pacific Grain Growers*, 767 F.2d 1379 (9th Cir. 1985)." *P & E Boat Rentals*, 872 F.2d at 652. In *Protectus*, a dock foreman cast off the lines securing a burning vessel to the dock. A fireman left aboard was killed and the vessel destroyed.

> The Ninth Circuit, relying primarily on the Restatement of Torts § 909, held that the defendant dock owner was properly cast for punitive damages because his foreman was a managerial employee acting in the course of his employment.

P & E Boat Rentals, 872 F.2d at 652. This court, bound by *Protectus*, followed the *Restatement* and *Protectus* in Instruction No. 33, rather than the "strict complicity" rule.

Exxon argues that *Protectus* is not controlling authority in this case because the actions of sea-based employees were not before the Ninth Circuit. Exxon also argues that *Protectus* did not evaluate any of the "strict complicity" cases in reaching its decision. Exxon argues that the court cannot extend the land-based principles of *Protectus* to sea-based employees because such an extension would be inconsistent with other Ninth Circuit authority.

The only significant Ninth Circuit case upon which Exxon relies is *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987). On orders of the captain, the crew of the St. Patrick abandoned the ship in heavy seas and most were lost. The district court found the vessel owners liable for punitive damages for failing to provide a licensed master and mate for the vessel. The Ninth Circuit reversed the district court, holding that the vessel owners' negligent failure to comply with licensing requirements could not, without additional findings, be considered willful conduct justifying punitive damages. *Id.* at 1349-50.

Bergen does not undermine *Protectus*. *Bergen* neither mentions nor discusses "strict complicity" and none of the key "strict complicity" cases are cited. *Protectus* followed the *Restatement* instead of "strict complicity", and *Protectus* is binding on this court.

Exxon next argues that the court should not follow *Protectus* because its reasoning is questionable and unpersuasive. Exxon argues that *Protectus* imposed punitive damages not to punish and deter, but to encourage employers to choose its management personnel wisely. *Protectus,* 767 F.2d at 1386. *Protectus* did not base the punitive award on the reason suggested by Exxon. *Protectus* did state that one purpose of the *Restatement* § 909 was to place upon employers the burden of choosing management personnel wisely. *Id.* Nonetheless, *Protectus* recognized that "[p]unitive damages serve the purpose 'of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.'" *Id.* at 1385 (citations omitted). *Protectus* imposed punitive damages for the same reasons the *Exxon Valdez* jury did; to punish and deter.

The "strict complicity" rule does not apply in the Ninth Circuit, and *Protectus* is binding authority, whether land-based or sea-based employees are involved, for the proposition that "[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment." Phase I Jury Instruction No. 33. Accordingly, Instruction No. 33 was not erroneous.[16]

III. *The evidentiary standard for awarding punitive damages*

Exxon argues that the jury was improperly instructed in Phases I and III that the evidentiary standard for awarding punitive damages in maritime cases is a "preponderance of the evidence", as opposed to a standard requiring "clear and convincing evidence". The court previously considered this issue in Order No. 171.[17] In Order No. 171, the court recognized, as do the parties in the instant briefing, that no federal court has held that the clear and convincing standard of proof for punitive damages should apply in a maritime case. This court further noted:

> [T]he Ninth circuit pattern jury instructions and Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions* (Civil) (1987), use the preponderance of the evidence standard for punitive damages. In the maritime context, the *Federal Jury Practice and Instructions* specifically refer to the preponderance of the evidence standard for punitive damages.

Order No. 171 at 3-4. The court then held:

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[16] Plaintiffs argue that Phase III Instruction No. 30 cured any possible error in Phase I Instruction Nos. 36 and 33. Phase III Instruction No. 30 stated, among other things, that the jury could consider "whether the wrongful conduct and the participation of the employees in such conduct was in conformity with corporate policies." Phase III Jury Instruction No. 30. Phase III instructions, however, did not permit the jury to revisit its Phase I liability determinations. Phase III Jury Instruction No. 20. Phase III Instruction No. 30 did not "cure" any alleged Phase I "errors" .

[17] Clerk's Docket No. 4405.

> [T]here is no persuasive authority for the court to create and adopt a new rule for maritime cases. No federal court has held that the clear and convincing standard should be used in maritime punitive damage cases. This court finds that, in the maritime setting, punitive damages shall be considered under the preponderance of the evidence standard.

Id. at 4.

Based on a recent Supreme Court case, *Honda Motor Co., Ltd. v. Oberg,* 114 S. Ct. 2331 (1994), Exxon asks the court to reconsider the evidentiary standard for punitive damages in maritime cases. *Honda Motor Co.* is a non-maritime personal injury case in which the Supreme Court held that the state of Oregon violated due process by prohibiting review of the size of a punitive damages award. The law violated due process because judicial review of a punitive award is a safeguard against excessive awards.

Honda Motor Co. did not hold that the clear and convincing evidentiary standard for punitive damages should be used in either maritime or non-maritime cases. Rather, the significance of *Honda Motor Co.,* and other recent Supreme Court cases which have considered punitive damages, is that procedural safeguards must be employed to ensure that punitive damage awards will comport with due process. *See TXO Prod. Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Corp. v. Haslip,* 499 U.S. 1 (1991). In *TXO,* the court affirmed use of jury instructions which followed the preponderance of the evidence standard because due process protections were in place. *TXO,* 113 S. Ct. at 2723. *Haslip,* also approved a preponderance standard. *Haslip* stated:

> There is much to be said in favor of a State's requiring, as many do ... a standard of "clear and convincing evidence" ... We are not persuaded, however, that the Due Process clause requires that much. We feel that the lesser standard ... "reasonably satisfied from the

> evidence" - when buttressed ... by ... procedural and substantive protection[s] ... is constitutionally sufficient.

Haslip, 499 U.S. at 23 n.11.

Throughout the course of the *Exxon Valdez* pre-trial motion practice and trial, this court has followed the holdings of *TXO, Haslip,* and more recently *Honda Motor Co.*, to guarantee that plaintiffs' claim for punitive damages would comport with due process. The court has also granted the majority of Exxon's motions to exclude evidence. The court, on Exxon's motion, created a mandatory punitive damages class for *Exxon Valdez* claims for punitive damages to prevent separate state and federal court punitive damage awards which might escape collective judicial review. In the case at bar, the preponderance of the evidence standard has been buttressed by procedural and substantive protections and is, therefore, constitutionally sufficient to satisfy the due process clause.

The parties debate the significance of *Alegria Enterprises v. Immel's Marine and John Dykstra,* No. 90-8127, 1992 WL 97913, (E.D. Pa. May 5, 1992), in which the court, sitting in admiralty, considered a claim against a salvage company that allegedly damaged a yacht during salvage operations. Exxon argues that *Alegria* is a case for compensatory but not punitive damages. Plaintiffs, of course, argue that *Alegria* applied the preponderance of the evidence standard in a punitive damages case. The *Alegria* court stated as follows:

> Finally, plaintiff seeks punitive damages. Obviously, since I have concluded that plaintiff has not proved negligence and certainly has not proved gross negligence or wilful or wanton misconduct, punitive damages cannot be awarded.

Id. at * 14, 1992 U.S. Dist. Lexis 6469 at *38. The court later held, in language typically associated with punitive damages, that:

> Plaintiff failed to prove by a preponderance of the

> evidence that the defendants ... were ... grossly or wilfully negligent or acted carelessly, wantonly, or maliciously in conducting and carrying out the salvage of *Alegria.*

Id. at *15, 1992 U.S. Dist. Lexis 6469 at *42. *Alegria* considered punitive damages under the preponderance of the evidence standard, and *Alegria* reached the definitive conclusion that "[p]laintiff is not entitled to recover punitive damages...." *Id.* at *15, 1992 U.S. Dist. Lexis 6469 at *43.

Alegria is the only case to consider the appropriate evidentiary standard in maritime punitive damage cases. Yet the significance of *Alegria* is secondary to the Supreme Court's concern that all punitive damage cases, maritime or otherwise, comport with due process. The clear and convincing standard may be necessary when due process protections are not employed. In the case at bar, however, the court is satisfied that Exxon's due process rights were protected; therefore, the preponderance of the evidence standard was appropriate.[18]

IV. *Conduct which warrants punitive damages*

Exxon argues that the court improperly instructed the jury that it could award punitive damages for conduct which manifests "reckless disregard for the rights of others" . Exxon's motion at 40 (quoting Phase I Jury Instruction No. 27).[19] The court defined reckless conduct as follows:

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[18] Exxon argues that of the 45 states that allow punitive damages, 28 follow the clear and convincing evidence standard. Exxon recognizes, however, that *Haslip* does not require that the clear and convincing evidence standard be followed in punitive cases. Exxon argues that, "[t]he issue here ... is not whether a clear and convincing evidence requirement is required by due process, but whether the Court should adopt such a requirement as a matter of substantive federal maritime law." Exxon's reply at 35. This court elects to follow *Haslip's* finding that the clear and convincing evidence standard is not required. Exxon's due process concerns were protected, and this court again declines to be the first admiralty court to adopt the clear and convincing standard for maritime punitive damages cases.

[19] Phase I Jury Instruction No. 27 stated:

> In order for conduct to be in reckless or callous disregard of the rights of others, four factors must be present. First, a defendant must be subjectively conscious of a particular grave danger or risk of harm, and the danger or risk must be a foreseeable and probable effect of the conduct. Second, the particular danger or risk of which the defendant was subjectively conscious must in fact have eventuated. Third, a defendant must have disregarded the risk in determining how to act. Fourth, a defendant's conduct in ignoring the danger or risk must have involved a gross deviation from the level of care which an ordinary person would use, having due regard to all the circumstances.
>
> Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

Phase I Jury Instruction No. 28.

Exxon argues that the jury should have been instructed that punitive damages may be awarded only for conduct which is malicious, or conduct which is consciously done in such deliberate disregard of serious danger as to be the moral equivalent of actual malice. Exxon argues that the court failed

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> The burden is on the plaintiffs to establish, by a preponderance of the evidence in the case, the essential elements of their claims for punitive damages. In this case, the essential elements are:
>
> First, that a defendant's conduct before the grounding of the *Exxon Valdez* manifested reckless or callous disregard for the rights of others; and
>
> Second, that such conduct by a defendant was a legal cause of the grounding of the *Exxon Valdez*.

Exxon also argues that Phase I Jury Instruction No. 40, which refers to reckless conduct, is erroneous.

to instruct the jury that punitive damages require despicable conduct, aggravation, outrage, evil motive, fraud or oppression and that negligence or carelessness, no matter how gross or aggravated, do not suffice.

Exxon argues that "[p]unitive damages should be awarded in maritime cases *only* for conduct which is malicious, or conduct which is consciously done in such deliberate disregard of serious danger as to be the moral equivalent of actual malice." Exxon's memorandum in support of motion at 45. Exxon's concerns were reflected in Instruction No. 28, quoted above, which defined reckless behavior. Instruction No. 28 told the jury that a defendant must be "subjectively conscious of a particular grave danger" and that the defendant "disregarded the risk in determining how to act."[20]

The language used in Instruction No. 28 is similar to that used in *Protectus Alpha Navigation v. Northern Pac. Grain Growers, Inc.*, 767 F.2d 1379 (1985). *Protectus* stated that punitive damages:

> [M]ay be imposed for that conduct which manifests 'reckless or callous disregard' for the rights of others, *Smith v. Wade,* 461 U.S. 30, 51 (1983), or for conduct which shows 'gross negligence or actual malice or

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[20] In a footnote to Exxon's motion, Exxon argues, without support, that Instruction No. 28 does not cure the prejudice in Instruction No. 27 because "as long as the term 'reckless' is used, there is a great danger that the jury will base an award on conduct that constitutes aggravated negligence as opposed to wilful or malicious conduct or its functional equivalent." Exxon's memorandum in support of motion at 40 n.39. Instruction No. 28 carefully defined recklessness and distinguished between recklessness and negligence. It is always possible for a jury to misconstrue or misunderstand any instruction, but Exxon does not argue that Instruction No. 28 was incomprehensible. In fact, Exxon states that "the Court gave a careful definition of the conduct which qualifies as 'reckless or callous disregard for the rights of others.'" Exxon's memorandum in support of motion at 40 n.39. Instruction No. 28 was clear and understandable. Use of the term "reckless" when carefully defined, would not pose a "great danger" that the jury would base it decision on aggravated negligence as opposed to recklessness.

> criminal indifference.' *In re Marine Sulphur Queen,* 460 F.2d [89], 105 [(2d Cir.), *cert. denied,* 409 U.S. 982 (1972)].

Protectus, 767 F.2d at 1385.

Although *Protectus* stated that punitive damages could be imposed upon a finding of "actual malice", *Protectus* also stated that punitive damages could be imposed for reckless and callous conduct. In *Protectus,* the Ninth Circuit found that the conduct of a dock foreman "clearly manifested a 'reckless or callous disregard' for the rights of Protectus Alpha sufficient for the imposition of punitive damages." *Id.*[21] Having followed *Protectus,* Instruction No. 28 was not erroneous.

Exxon argues that, "[t]he jury should have been instructed that punitive damages can only be awarded for conduct which is malicious, or which is consciously done in such deliberate disregard of serious danger as to be the moral equivalent of actual malice". Exxon's reply at 39 (emphasis omitted). Exxon subsequently argued that:

> Defendants do not contend that punitive damages can be awarded only upon a showing of "actual malice" or specific intent to cause harm; they recognize that conscious and deliberate disregard of serious danger can supply the requisite state of mind.... [D]efendants' objection is that the term "recklessness," no matter how carefully defined, too easily slips into a colloquial shorthand for what is merely aggravated negligence.

Exxon's reply at 40. As noted above at note 16, Exxon offers no support for the proposition that a strict and careful definition of recklessness will somehow become "colloquial shorthand" for aggravated negligence. The court gave the jury a detailed, four-part definition of "reckless" and carefully distinguished between "reckless" and "negligence" . The language of Instruction No. 28 followed *Protectus* so that punitive damages could not be imposed unless the jury found that Exxon's conduct "clearly manifested a 'reckless or callous disregard' for the rights of [plaintiffs]." *Protectus,* 767 F.2d at 1385.[22]

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[21] *Protectus* followed *Smith v. Wade,* 461 U.S. 30 (1983), which held that in a § 1983 action, punitive damages could be awarded when the defendants conduct "involves reckless or callous indifference to the federally protected rights of others." *Id.* at 56.

V. *Conclusion*

For the above stated reasons, Exxon's and Hazelwood's motions for a new trial on plaintiffs' punitive damages claims (jury instructions) are denied.

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[22] Exxon argues that the court should follow the trend in state court cases to allow punitive damages only where there is "conscious or deliberate disregard" or "willful and conscious disregard" of the rights of others. Exxon's memorandum in support of motion at 43-44 (citations omitted). The language of the state cases is similar to both *Protectus* and Instruction No. 28.

Exxon also argues that in maritime cases, punitive damages involve intentional, deliberate misconduct. None of Exxon's supporting cases are from this century. Regardless, Instruction No. 28 referred to a "conscious choice of action ... with knowledge of serious danger to others...." Phase I Jury Instruction No. 28. The language in Instruction No. 28 differs little in substance from language requiring "deliberate misconduct".

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	No. A89-0095-CV (HRH) (Consolidated)

ORDER NO. 196

MOTION IN LIMINE TO EXCLUDE EVIDENCE OF OR COMMENT UPON EXXON DEFENDANTS' TOTAL WEALTH, NET WORTH, EARNINGS, CASH FLOW OR OTHER INDICIA OF FINANCIAL CONDITION

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively Exxon) have filed a motion in limine to exclude evidence of, or comment upon, their total wealth, net worth, earnings, cash flow or other indicia of financial condition[1]. Plaintiffs oppose the motion,[2] and Exxon has replied.[3] Exxon's request for oral argument is deemed unnecessary and is denied.[4]

Exxon recognizes that common law traditionally regards wealth as a permissible consideration in setting a punitive I damage award. Clerk's Docket No. 4186 at 4. See TXO Prod. Corp. v. Alliance Resources Corp., 113 S.Ct. 2711, 2722 n.28 (1993) ("Under well-settled law . . . factors such as [net worth] are typically considered in assessing punitive damage.");[5] Newport v. Fact Concerts, Inc., 453 U.S. 247, 270

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[1] Clerk's Docket No. 4186.

[2] Clerk's Docket No. 4360.

[3] Clerk's Docket No. 4441.

[4] Clerk's Docket No. 4452.

[5] TXO recognized that emphasis on the wealth of a wrongdoer in a jury instruction increased the risk that the award may have been influenced by prejudice against large corporations. Nonetheless, the Supreme Court stated that a defendant's financial position could be taken into account

(1981) ("evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded"). Exxon asserts that it "is not arguing that a maritime court cannot admit evidence of wealth in an appropriate case." Clerk's Docket No. 4441 at 2. Additionally, Exxon recognizes the notion "that wealth should be admitted because the amount required for deterrence must be proportional to the means of the offender." Id. at 4, and notes the ample "support for that rationale in land-based case law . . . ." Id. Nonetheless, Exxon argues that under the circumstances of the case at bar, this court, applying maritime law, should disregard the common law, "blaz[e] the trail," Clerk's Docket No. 4186 at 12, and preclude evidence of Exxon's wealth as irrelevant under Rule 402 of the Federal Rules of Evidence.

Admiralty law does not specifically address whether a defendant's wealth should be considered when assessing punitive damages. When maritime law is silent, courts typically look to land-based law for guidance. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 366 (9th Cir. 1992).

As Exxon concedes, land-based law permits a jury to consider a defendant's wealth when assessing punitive damages. Exxon's arguments that the court should ignore land-based law and fashion a new rule for admiralty are not persuasive. Exxon argues that punishing Exxon will, in reality, punish innocent shareholders and other blameless parties. See, Zazu v. Designs v. L'Oreal. S.A., 979 F.2d 499, 508-09 (7th Cir. 1992).[6] That argument, however, addresses more the

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when assessing punitive damages. 113 S.Ct. at 2723. See also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (financial position is one factor which may be considered in assessing punitive damages).

[6] Zazu noted that a defendant's wealth is a factor when "'[a]n amount sufficient to punish or to deter one individual may be trivial to another.'" 979 F.2d at 508. (citations omitted). Zazu stated in dicta, however, that corporations are not wealthy in the sense that persons are because investors own the net worth of the business. Thus, according to Zazu, investors of average wealth pay the punitive awards because their shares decrease in

propriety of punitive damages than a jury's consideration of corporate wealth. The propriety of punitive damages as a legal remedy is not the point of Exxon's motion. Furthermore, shareholders who invest in Exxon bear the risk that Exxon will spill oil, and if they do not wish to bear that risk, they may invest elsewhere. Concern over a shareholder's investment is no reason to avoid punitive damages when they are warranted.

Exxon argues that a consideration of corporate wealth could mean that Exxon would be punished to a greater extent than a small, less successful company when each committed the same harm. Exxon also argues that it is illogical to assume that a successful corporation values money less than a less successful corporation and that it takes a larger award to deter the successful corporation. Again, these arguments are more suited to the propriety of punitive damages or argument to the jury. Regardless, the arguments are specious. A dollar amount which would seriously impact a small company might not even merit a footnote in an annual report of one of the largest corporations in the world.

Exxon argues that to consider wealth perversely assumes that "having a large net worth [is] the wrong to be deterred." Zazu Designs, 979 F.2d at 508. Exxon's argument mixes the issues. If all companies, no matter how large or small, were assessed the same punishment for the same misconduct, the largest companies could afford to continue to misbehave. That is why common law permits consideration of corporate wealth.

Exxon's arguments that the court should ignore well-settled law are not persuasive, and the court finds that evidence of Exxon's wealth, net worth, earnings, cash flow

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value. Consequently, Zazu stated that "[s]eeing the corporation as wealthy is an illusion . . . ." Id. To suggest that a corporation which earns multi-billion dollar profits annually is not "wealthy" is also an illusion. Regardless, the Supreme Court has specifically found that it is permissible for a jury to consider the wealth of a corporation when assessing punitive damages. TXO Prod. Corp v. Alliance Resources Corp., 113 S.Ct. 2711, 2723 (1993).

and other indicia of financial condition may be considered by the jury as relevant evidence under Rule 402 in the punitive damages phase of this case.

Exxon also argues that the evidence, even if relevant, should be excluded under Rule 403 as unfairly prejudicial. Evidence is excluded when it could "arouse irrational fears and prejudices." United States v. Hitt, 981 F.2d 422, 424 (9th Cir. 1992). The comments to Rule 403 suggest that evidence should be excluded for risk of unfair prejudice if it could "suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed R. Evid. 403 (comment). Given that a jury's consideration of a wrongdoer's wealth is well established in the common law, there is no reason to suggest that such a consideration could lead to unfair prejudice or a decision based on emotions. The court finds that it would not be unfairly prejudicial to Exxon for the jury to consider its corporate wealth.

For the above stated reasons, Exxon's motion in limine to exclude evidence of, or comment upon, its total wealth, net worth, earnings, cash flow or other indicia of financial condition is denied.

DATED at Anchorage, Alaska, this 31 day of March,

1994.

s/

United States District Judge

IMMEDIATE NOTIFICATION
IS REQUESTED

APPENDIX I

United States Court of Appeals
For The Ninth Circuit.

In re: The EXXON VALDEZ, Grant Baker; Sea Hawk Seafoods, Inc.; Cook Inlet Processors, Inc.; Sagaya Corp.; William Mcmurren; Patrick L. Mcmurren; William W. King; George C. Norris; Hunter Cranz; Richard Feenstra; Wilderness Sailing Safaris; Seafood Sales, Inc.; Rapid Systems Pacific Ltd.; Nautilus Marine Enterprises, Inc.; William Findlay Abbott, Jr., *Plaintiffs-Appellees*, *v.* Exxon Mobile Corp; Exxon Shipping Co., *Defendants-Appellants*.	No. 04-35183 D.C. No. CV-89-00095-HRH ORDER AMENDING OPINION AND DISSENTS TO ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief Judge, Presiding

Argued and Submitted
January 27, 2006-San Francisco, California
Filed December 22, 2006
Amended May 23, 2007

Before Mary M. Schroeder, Chief Judge,
James R. Browning and Andrew J. Kleinfeld, Circuit Judges.

Order;
Dissent to Order by Judge Kozinski;
Dissent to Order by Judge Bea;
Per Curiam Opinion;
Dissent by Judge Browning

COUNSEL

Walter Dellinger, O'Melveny & Myers, LLP, Washington, DC, and John F. Daum, O'Melveny & Myers LLP, Los Angeles, CA, for the defendants-appellants, cross-appellees.

Brian B. O'Neill, Faegre & Benson, Minneapolis, MN, and David C. Tarshes, Davis, Wright, Tremaine, LLP, Anchorage, AK, for the plaintiffs-appellees, cross-appellants.

ORDER

IT IS ORDERED THAT:

The opinion in *In re Exxon Valdez,* 472 F.3d 600 (9th Cir. 2006) is amended as follows: On page 621, delete the first full paragraph commencing with "There is also a limit on the law of the case doctrine ..." and concluding with "... may not generally be used as part of the calculation of harm."[*]

With that amendment, the panel has voted to otherwise deny the petition for panel rehearing.

The petition for panel rehearing is DENIED.

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. 35.[1]

The petition for rehearing en banc is DENIED.

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[1] Judges Wardlaw, Tallman, and Ikuta were recused in this matter and took no part in the voting.

[*The deleted paragraph read as follows:

There is also a limit on the law of the case doctrine. One exception to this doctrine exists for an intervening change of law. *See United States v. Bad Marriage,* 439 F.3d 534, 538 (9th Cir. 2006). In this case, there is such a change. Subsequent to our decision in *Punitive Damages Opinion I,* the Supreme Court decided *State Farm.* In that case, the fact that State Farm "paid the excess verdict before the complaint was filed," *State Farm,*538 U.S. at 426, 123 S.Ct. 1513, was a mitigating factor reducing the ratio. The Supreme Court did not use it to reduce the amount of total harm. The Court in *State Farm* itself took into account, in its consideration of whether the ratio was proper, the substantiality and completeness of the compensatory award, the essentially economic nature of the harm, the likelihood that the punitive award duplicated the compensatory, and the defendant's prompt settlement of compensatory damages. *Id.* All these mitigating factors were used to assess whether the ratio itself was likely to comply with due process. *State Farm* did not use such mitigating factors to reduce the harm. *State Farm* makes untenable the idea that a defendant's voluntary, pre-judgment payment of compensatory damages may not generally be used as part of the calculation of harm. *Punitive Damages Opinion I,* 270 F.3d at 1244.]

KOZINSKI, Circuit Judge, dissenting from the order denying the petition for rehearing en banc.

For two centuries, maritime law has protected ship owners from liability for punitive damages based solely on the fault of captain and crew. *See* Thomas J. Schoenbaum, Admiralty & Maritime Law § 5-17 (2005) ("[A]dmiralty cases deny punitive damages in cases of imputed fault."). The Supreme Court first erected this bulwark in *The Amiable Nancy,* 16 U.S. 546, 558-59 (1818), explaining that a ship owner can't be subject to "exemplary damages" for the actions of its agent if the owner is "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree."

Dutifully following *The Amiable Nancy*, we held in *Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577, 580 (9th Cir. 1905), that punitive damages are unavailable against a ship owner for the reckless conduct of the captain. We abruptly changed course in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), and held that, under maritime law, punitive damages are available against an owner for the actions of his agent who "was employed in a managerial capacity and was acting in the scope of employment." *Id.* at 1386 (quoting Restatement (Second) of Torts § 909).[1]

The conflict between *Protectus Alpha* and *Pacific Packing* washed ashore in *In re the Exxon Valdez* (*Valdez I*), 270 F.3d 1215 (9th Cir. 2001).[2] Following *Protectus Alpha*, and consigning *The Amiable Nancy* and *Pacific Packing* to the dustbin of history, the district court instructed the jury that Exxon was responsible for the reckless acts of the captain if he was "employed in a managerial capacity while acting in the scope of [his] employment." *See Valdez I*, 270 F.3d at 1233 (internal quotations omitted). Once the jury found that the captain acted recklessly, it was also required to find that Exxon acted recklessly. On appeal, the panel recognized that *Protectus Alpha* conflicts with *Pacific Packing;* at that point, it was duty-bound to call this case en banc. *See United States v. Hardesty,* 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam). Instead, it scuttled the en banc process and held that *Protectus Alpha's* imposition of punitive damages based on vicarious liability is now the maritime rule in our circuit. *See Valdez I,* 270 F.3d at 1235-36.[3]

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[1] While taking no account of *The Amiable Nancy*, *Protectus Alpha* pointed to state cases imposing vicarious punitive liability based upon "the reality of modern corporate America," 767 F.2d at 1386, but nothing has changed in the relationship between ship owner and captain that would justify importing this innovation into maritime law, *see* Schoenbaum, Admiralty & Maritime Law § 5-17 ("[S]tate tort law reforms do not affect admiralty punitive damage awards."). The captain has always borne the responsibility for safeguarding his crew and third parties, and this hasn't changed in modern times. *See, e.g.*, *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81, 84-85 (5th Cir. 1960); *Northern Queen Inc. v. Kinnear*, 298 F.3d 1090, 1096 (9th Cir. 2002).

[2] While this conflict didn't come to the full court's attention until Exxon's petition for rehearing after *In re the Exxon Valdez* (*Valdez II*), 472 F.3d 600 (9th Cir. 2006) (per curiam), we can consider en banc any issue in *Valdez I* under *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 995-96 & n. 13 (9th Cir. 2003) (en banc).

This decision puts us at loggerheads with every other circuit that has considered this issue. In *United States Steel Corp. v. Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970), the Sixth Circuit followed *The Amiable Nancy* and *Pacific Packing* in holding that a ship owner cannot be held liable for punitive damages "unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident ... [or] the acts complained of were those of an unfit master and the owner was reckless in employing him." *Id.* at 1148. The Fifth Circuit followed the same course in *In re P & E Boat Rentals, Inc.,* 872 F.2d 642 (5th Cir. 1989). In rejecting *Protectus Alpha,* it observed that admiralty courts, going back to *The Amiable Nancy,* have held that punitive damages are unavailable based on vicarious liability. *See id.* at 652. Finally, in *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 705 (1st Cir. 1995), the First Circuit, while taking a somewhat broader view of what constitutes a ship owner's fault, endorsed the principle that "some level of culpability" on the part of the ship owner is required before punitive damages may be imposed under maritime law.

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[3] In overruling *Pacific Packing,* the panel relied exclusively on *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991). *See Valdez I,* 270 F.3d at 1235-36. The panel badly missed the mark. *The Amiable Nancy* and *Pacific Packing* held that punitive damages, based on vicarious liability, are not available under maritime law. By contrast, *Haslip* was a constitutional decision, holding that state law could, consistent with due process, impose punitive damages based on vicarious liability. No one disputes that maritime law *could* constitutionally impose punitive damages under such circumstances. The question is whether it does. For two centuries, every court (except ours in *Protectus Alpha*) has held it doesn't, and nothing the Supreme Court said in *Haslip* could possibly have changed that.

The panel's decision is also contrary to the modern drift of maritime law, which has reaffirmed its historical reluctance to impose hedonic and punitive damages at all. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1508 n. 11 (5th Cir. 1995) (en banc). In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990), a unanimous Supreme Court held that the family of a seaman couldn't recover nonpecuniary damages in a wrongful death action brought under general maritime law. Courts have read *Miles* as barring nonpecuniary damages, including punitive damages, for wrongful death, personal injury and other related actions brought on behalf of seamen, *see Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 150205 & n. 14 (9th Cir. 1995); *Guevara*, 59 F.3d at 1503, 150607, 1512, and some have interpreted *Miles* as applying to non-seamen, *see Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1092 (2d Cir. 1993). While these cases involve the intersection of federal statutes with maritime common law, they confirm the Supreme Court's observation in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 270 (1972), that the "long experience [of] the law of the sea ... is concerned with ... limitation of liability." It makes no sense to hold that families of those who are killed and maimed at sea can't get punitive awards, or even damages for pain and suffering or loss of consortium, and yet *reverse* centuries of maritime law to make it easier for businessmen to recover billions in punitive damages for harm to their commercial interests.

The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction-a staggeringly huge area-to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious liability, ship owners won't be able to protect themselves against our newfangled interpretation of maritime law through careful hiring practices. Accidents at sea happen-ships sink, collide and run aground-often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the under standing that they won't be subject to punitive damages if they "[n]either directed it, nor countenanced it, nor participated in" the wrong, *The Amiable Nancy,* 16 U.S. at 559; the panel opinion has thrown this protection overboard.

This case demonstrates the pernicious impact of departing from the traditional protections of maritime law. The plaintiffs here suffered no physical injuries-their only claim was that the oil spill harmed their commercial fishing interests. *See Valdez I,* 270 F.3d at 1221. After the accident, Exxon acted as a model corporation-it spent over $2 billion to remove oil from the water and adjacent shore and $900 million to restore damaged natural resources. *Id.* at 1223. Furthermore, before the jury ever entered a verdict, Exxon compensated the plaintiffs for most of their damages. *See Valdez II,* 472 F.3d at 611-12. Yet the jury, perhaps subscribing to the maxim that a rising tide lifts all boats, took advantage of the vicarious liability instruction to award billions in punitive damages as a windfall to their fellow Alaskans.

As Exxon learned, a company can voluntarily compensate harmed parties, take every step imaginable to undo the tragic mess its agents created, and still be subject to the largest punitive award ever upheld by a federal court-all because it had the misfortune of hiring a captain who committed a reckless act. Moreover, the effects of this opinion are not limited to shippers and docks based in the Ninth Circuit: The shipping business knows no circuit, or even national, boundaries. Shippers everywhere will be put on notice: If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

Because my colleagues don't seem to share my concern that we have undermined the uniformity of maritime law and contravened long-settled Supreme Court precedent, as well as the unanimous view of our sister circuits, I dissent.

BEA, Circuit Judge, dissenting from the order denying the petition for rehearing en banc.

I agree with Judge Kozinski that punitive damages should not have been awarded in this case. However, even if punitive damages were appropriate, I note that the ratio of punitive damages to compensatory damages is excessive. The Supreme Court has instructed that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North America v. Gore,* 517 U.S. 559, 575 (1996). As the panel itself noted, the reprehensibility of Exxon's conduct here is "at most, a mid range." *In re the Exxon Valdez* (*Valdez II*), 472 F.3d 600, 618 (9th Cir. 2006) (per curiam). Importantly, the panel correctly concluded that "Exxon's conduct caused no actual physical harm to people," although it did cause "more than mere economic harm to them, because the economic effects of its misconduct produced severe emotional harm as well." *Id.* at 614.

Of course, the plaintiffs in *State Farm Mutual Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003), had economic and emotional harm also. In that case, the Campbells brought a claim against State Farm for bad faith failure to settle within policy limits, fraud, and intentional infliction of emotional distress. The emotional distress the Campbells suffered was not limited to that caused by their business losses, as the Exxon Valdez plaintiffs suffered. The Campbells were faced with a large potential judgment beyond insurance limits coverage-which the insurance company gaily told them would probably cost them their house. As in *Valdez II,* State Farm liquidated all economic damage by paying the third-party judgment *before* the Campbells filed their complaint. Nonetheless, the court awarded $1 million in compensatory damages and $25 million in punitive damages. The Supreme

Court reversed the judgment and held that a 25 to 1 ratio of punitive to compensatory damages was constitutionally invalid as excessive. Instead, even considering the economic and emotional harm, in remanding, the Supreme Court stated "a punitive damages award at or near the amount of compensatory damages" would be appropriate. *Id.* at 425.

Although the Supreme Court has declined to set a bright-line ratio for punitive damages awards, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Moreover, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps *only equal to compensatory damages,* can reach the outermost limit of the due process guarantee." *Id.* (emphasis added). The Supreme Court characterized the Campbells's $1 million compensatory damages award as "substantial." *Id.* at 426. Surely, then, the $513 million in compensatory damages here is also "substantial" damages. Hence, the 5:1 ratio adopted by the majority seems to violate the limits implied by the Court for a case where the reprehensibility of the conduct of the defendant does not include infliction of physical injury, nor an assessment for environmental damage. Accordingly, I respectfully dissent from denial of rehearing en banc.

APPENDIX J

STATUTORY PROVISIONS INVOLVED

RELEVANT CRIMINAL AND CIVIL PENALTIES UNDER THE CLEAN WATER ACT

Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c), 1319(d), 1321(b) and 1321(f), as they read on March 24, 1989:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

. . .

§ 1319. Enforcment

. . .

(c) Criminal penalties

(1) Negligent violations

Any person who-

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title . . .

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who-

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328 or 1345 of this title . . .

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

. . .

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

. . .

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title . . . and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

. . .

§ 1321

. . .

(b) Congressional declaration of policy against discharges of oil or hazardous substances; . . . ; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

(1) The Congress hereby declares that is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]).

. . .

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

. . .

(6) . . .

(B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based on consideration of the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this clause where a penalty has been assessed under clause (A) of this paragraph.

(C) In addition to establishing a penalty for the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(D) Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 1319(b) of this title.

(E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

. . .

(f) Liability for actual costs of removal

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

. . .

(4) The costs of removal of oil or hazardous substance for which the owner or operator of a vessel or on shore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

18 U.S.C. § 3571(d)

> **(d) Alternative fine based on gain or loss.** — If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined nor more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

APPENDIX K

JURY INSTRUCTIONS ON VICARIOUS LIABILITY FOR PUNITIVE DAMAGES

JURY INSTRUCTION NO. 33

The Exxon defendants, as corporations, may act only through natural persons, and especially through their officers and employees. A corporation is not responsible for the reckless acts of all of its employees. A corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

JURY INSTRUCTION NO. 34

An employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.

JURY INSTRUCTION NO. 36

Since plaintiffs in this case seek punitive damages against corporations, you must consider whether the actions of employees were in violation of direct instructions or policies of the defendant corporations.

Merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions. It is a question of fact whether a corporation has taken adequate measures to enforce corporate policy in a given area. If you find that adequate measures were taken to establish and enforce the policies or directions, then an employee's acts contrary to such policies or instructions are not attributable to the employer, and you should find that the employer's conduct was not reckless.

However, if the employee was a managerial agent, then as stated in Instruction No. 33, the acts of the employee are attributable to the employer whether or not those acts are contrary to the employer's policy or instructions.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re
the EXXON VALDEZ,

No. A89-0095-CV (HRH)
(Consolidated)

SPECIAL VERDICT
FOR PHASE I OF TRIAL

Interrogatory No. 1: Do you unanimously find from a preponderance of the evidence that defendant Hazelwood was negligent, as that term has been defined in the instructions, and that his negligence was a legal cause of the grounding of the Exxon Valdez on March 24, 1989.

Yes: ✓ No: _____

Interrogatory No. 2: Do you unanimously find from a preponderance of the evidence that defendant Hazelwood was reckless, as that term has been defined in the instructions, and that his recklessness was a legal cause of the grounding of the Exxon Valdez?

Yes: ✓ No: _____

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that the Exxon defendants were reckless, as that term has been defined in the instructions, and that their recklessness was a legal cause of the grounding of the Exxon Valdez?

Yes: ✓ No: _____

If you have completed all of the answers to the questions required of you by this verdict, please have your presiding juror sign the verdict and date it and return it to the court.

DONE at Anchorage, Alaska, this 13th day of June 1994.

/s _______________
Presiding Juror

OPPOSITION
BRIEF

⑤

No. 07-219

FILED

SEP 20 2007

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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Exxon Valdez Oil Spill Trustee Council, *Lingering*
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9A WRIGHT & MILLER, FEDERAL PRACTICE
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INTRODUCTION

This is a one-of-a-kind case that, in context, has resulted in an unexceptional judgment. Unlike any other shipowner of which we are aware, Exxon placed a relapsed alcoholic, who it knew was drinking aboard its ships, in command of an enormous vessel carrying toxic cargo across treacherous and resource-rich waters. And unlike any previous shipping disaster, Exxon's wrongdoing inflicted such widespread harm to private parties' interests that the district court, at Exxon's request, certified a mandatory punitive damages class to protect Exxon from the threat of multiple punitive damage verdicts. The 83-day trial and subsequent appeals established that 32,677 claimants suffered an average of about $15,500 in economic harm and awarded them an average of approximately $76,500 each in punitive damages – a sum that is just less than five times their average individual economic harm. Viewed collectively, the aggregated judgment is $2.5 billion, which represents barely more than three weeks of Exxon's current net profits.[1]

Exxon now seeks *certiorari* to challenge the court of appeals' analysis of the case's unique facts, intricate procedural history, and idiosyncratic legal issues.

STATEMENT

1. In 1973, Congress authorized the Trans-Alaska Pipeline to allow oil companies, including Exxon, to bring crude oil from Alaska's North Slope to market in the lower 48 States. From the pipeline's terminus in Valdez, Alaska, oil companies would load oil tankers and set sail through the "icy and treacherous waters" of Prince William Sound, Pet. App. 22a (quotation omitted), before proceeding south.

The opening of the Port of Valdez promised Exxon the opportunity to reap enormous economic returns. At the same time, Exxon took on a well-documented responsibility to respect the resources on which Alaskans depend. The waters of the Sound were "pristine" and "valuable [for their] fishing resources." Pet. App. 41a, 155a. The proceedings leading to the authorization of the pipeline emphasized that "[t]he economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities." 3 U.S. Dep't of Interior, Final Envtl. Impact Stmt., Proposed Trans-Alaska Pipeline, at 370 (1972) (C.A. 2004 Supp. ER 1775).

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[1] *See* Exxon Mobil 2006 Annual Report, at 5, *available at* http://www.exxonmobil.com/corporate/files/corporate/XOM_2006_SAR.pdf.

Like the rest of the industry, Exxon knew that "a major spill in the Valdez area would cause [an] incalculable disaster to the rich fisheries," as well as to Native Alaskans' subsistence living. C.A. 2004 Supp. ER 1797; *see also* Pet. App. 122a, 232a. Equipment adequate to contain such a spill did not exist in Alaska. The official contingency plan for the area acknowledged that any spill exceeding 200,000 barrels (8.4 million gallons) could not be contained; Exxon, like others, knew that oil from such a spill would "persist for years." C.A. 2004 Supp. ER 913-15, 1114.

Exxon Shipping Company ran Exxon's transportation operations out of the Port of Valdez, and an alcoholic culture pervaded the company.[2] Supertanker crews held parties on board ship; drank together in port; "destroyed" confiscated liquor by drinking it; and violated rules that forbade returning to duty within four hours of drinking.[3] Although on paper Exxon had a policy that prohibited drinking aboard ship, it did not enforce the policy, and Exxon's crews were "pretty conscious of" the fact that reporting alcohol violations by officers "could come back to haunt you."[4]

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[2] Petitioners stipulated that Exxon Corporation (now Exxon Mobil Corporation) and its subsidiary Exxon Shipping Company would be treated as one entity and that the acts and omissions of each would be chargeable against both. Pet. 5; Stipulation and Order re: Certain Trial and Evidentiary Issues (No. 1), Dkt. 4365. Except where context requires, this brief refers to the two entities collectively as "Exxon."

[3] Tr. 144-54, 352-54, 365-66, 383-85, 415-18, 875, 1696, 1710-12, 2221, 2223-24; C.A. 2004 Supp. ER 978-88.

Exxon put Captain Joseph Hazelwood in command of the EXXON VALDEZ, one of the supertankers that regularly transited Prince William Sound. Hazelwood was a relapsed alcoholic, and Exxon knew it. "[T]he highest executives in Exxon Shipping knew Hazelwood had an alcohol problem, knew he had been treated for it, and knew that he had fallen off the wagon and was drinking on board their ships and in waterfront bars." Pet. App. 64a. Exxon began receiving reports of Hazelwood's relapse in the spring of 1986, less than a year after he returned to duty following a 28-day alcohol treatment program. Pet. App. 63a, 121a, 154a-155a. At that time, an Exxon employee warned Exxon's port captain that Hazelwood "had fallen off the wagon." Tr. 2490; Pet. App. 121a. The report was relayed to the President of Exxon Shipping, who was told that Hazelwood was "acting kind of crazy or kind of strange." Tr. 2914-16. Multiple reports of Hazelwood's relapse continued until just two weeks before the grounding of the EXXON VALDEZ. At that time, Hazelwood's supervisor received a report that Hazelwood had been drinking and making insulting comments about another Exxon captain, including hurling curses at the other captain over the ship's radio. It was apparent that "something was wrong with" Hazelwood. Tr. 2140-53, 2189-96. Thus, as the district court later explained:

> For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving. Exxon repeatedly allowed Captain Hazelwood to sail into

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[4] Tr. 800, 1070, 1631, 1707-08, 2153, 2175, 2183, 2207, 3456; C.A. 2004 Supp. ER 1321.

> and out of Prince William Sound with a full load of crude oil.[5]

Pet. App. 154a; *see also* Pet. App. 64a, 83a, 89a-91a, 121a-122a, 155a-157a. To make matters worse, Exxon "routine[ly]" staffed its ships, including Hazelwood's, with overworked and fatigued crews. Pet. App. 90a, 254a.

On the night of March 23, 1989, the EXXON VALDEZ departed Valdez almost fully loaded with 53 million gallons of crude oil. Hazelwood was the captain and the only officer on board licensed to navigate through the critical parts of Prince William Sound. Predictably, he also was drunk – "so drunk that a non-alcoholic would have passed out." Pet. App. 87a. Before boarding the ship, Hazelwood had consumed "at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars." Pet. App. 64a. Once underway, Hazelwood pointed the vessel toward Bligh Reef, a "known and foreseen hazard," Pet. App. 61a, and then left the bridge and descended to his cabin, leaving control to the "fatigued" third mate. Pet. App. 64a. Shortly thereafter, with the third mate left to perform both his own job and Hazelwood's, the tanker ran aground on the reef. Although Exxon tells this Court that the "immediate cause of the grounding" was the third mate's failure to execute a turn to avoid the reef, Pet. 3, Exxon stipulated in the district court that Hazelwood "was negligent in leaving the bridge on the night of the grounding, that such negligence was a legal cause of the oil spill, and that the Exxon defendants are responsible for this act of negligence." Tr. 5.

The reef ripped open the ship's hull, releasing 11 million gallons of crude oil into the Sound, causing the "most notorious oil spill in recent times." *United States v. Locke*, 529 U.S. 89, 96 (2000). Wind and water spread the oil across 600 linear miles (roughly the distance from Cape Cod, Massachusetts to Cape Lookout, North Carolina) and over 10,000 square miles of the surrounding saltwater ecosystem.

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[5] Westlaw's electronic version of this opinion, from which Exxon's Appendix apparently is drawn, omits nine words from this quotation.

"In keeping with its legal obligations, Exxon undertook a massive cleanup effort." Pet. App. 124a (citing 33 U.S.C. § 1321). But the jury could have concluded that Exxon directed its efforts more at appearances than effects. Exxon cleaned up only 14 percent of the oil. *See* Exxon Valdez Oil Spill Trustee Council, *Lingering Oil, available at* http://www.evostc.state.ak.us/Habitat/lingering.cfm (last visited Sept. 18, 2007). Audiotape captured an Exxon official demanding cleanup equipment as follows: "I don't care so much whether it's working or not but . . . it needs to be something out there that looks like an effort is being made. . . . I don't care if it picks up two gallons a week. Get that shit out there . . . and . . . standing around where people can see it." C.A. 2004 Supp. ER 1096.

As the courts below observed, the oil spill "disrupted the lives (and livelihood) of thousands of [people in the Prince William Sound area] for years." Pet. App. 24a. It made it likely that any "fish harvested [would be] adulterated by oil," Tr. 4495-96, requiring the State of Alaska to close fishing seasons in 1989, reduced harvests in later years, and caused fish prices to drop. It damaged approximately 1,300 miles of shoreline, much of it privately owned. It destroyed the subsistence activities of Native Alaskans, "for whom subsistence fishing is not merely a way to feed their families but an important part of their culture." Pet. App. 123a. As would be expected from a disaster that cripples an entire regional economy, "[t]he social fabric of Prince William Sound and Lower Cook Inlet was torn apart," producing a high incidence of severe depression, post-traumatic stress, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound. Pet. App. 150a-151a, 166a-167a.

2. Thousands of private claimants sued Exxon. While state and federal governments separately sought civil and criminal penalties against Exxon for the oil spill's effect on the environment, this consolidated case was (and is) the only proceeding addressing harm to "private economic and quasi-economic interests." Pet. App. 2a. And because Exxon quickly entered into settlements with the governments, this litigation provided the first opportunity for an adversarial proceeding to develop the facts fully. Pet. App. 174a n.111.

As the Ninth Circuit later observed, the district court "did a masterful job of managing this very complex case." Pet. App. 67a. After years of discovery, it tried the case in 1994 to a jury in three phases over 83 trial days (reported in 7,714 pages of transcript), with 155 witnesses and 1,109 exhibits. Because counsel advised Exxon that it "will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood," App. 43a, Exxon did not seek to limit its liability under the Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. § 181 *et seq.*

In the first trial phase, the jury found that Hazelwood and Exxon had each been reckless, which allowed the punitive damage claims to proceed. Pet. App. 67a.

In the second phase, the jury awarded $287 million in compensatory damages for economic harm to fishermen in the major commercial fisheries. Pet. App. 160a. Other proceedings addressed harm to other victims, including fishermen in other fisheries, fish processors, other area businesses, landowners, Native Alaskans, municipalities, and others. In post-trial proceedings, the district court and the court of appeals determined that class members suffered economic harm exceeding $500 million. Pet. App. 38a, 160a-163a. Unlike plaintiffs in an ordinary modern tort action, however, these plaintiffs could not recover damages for all their harm: maritime law retains narrow nineteenth-century conceptions of compensatory damages that preclude recovery for certain kinds of economic harms or for any emotional and psychological injuries. *See generally Union Oil Co. v. Oppen*, 501 F.2d 558, 565-71 (9th Cir. 1974).

In the third phase, the jury was asked "to determine liability for and the amount of punitive damages, if any, for all plaintiffs." Third Amended Revised Trial Plan, Dkt. 4798, at 4. At Exxon's request, the district court certified a mandatory punitive damages class of 32,677 commercial fishermen, related individuals and businesses, private landowners, Native Alaskans, and others, encompassing "all persons or entities who possess or have asserted claims for punitive damages against Exxon . . . which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill." Pet. App. 126a. Accordingly, unlike any other punitive damages trial before or since, this case would determine, once and for all, the total amount of any punitive liability. *See* Pet. App. 126a, 146a-147a.

The Phase III instructions told the jury that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made." App. 17a.[6] Exxon therefore urged that it should not have to pay punitive damages because even if it had been reckless, it did not act reprehensibly. Tr. 7602-03. After "unusually detailed" instructions that "embodied" "the very same concepts" later elaborated in this Court's due process cases, Pet. App. 127a, 146a, the jury returned a verdict for $5 billion against Exxon.

3. The Ninth Circuit issued an opinion in 2001 affirming the jury's compensatory verdict and its decision to award punitive damages against Exxon, confirming that Exxon's knowledge of Hazelwood's relapse and the attendant risks rendered its conduct reprehensible. Pet. App. 97a. Nevertheless, the court of appeals remanded for the district court to reconsider the size of the punitive award in light of this

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[6] The Appendix to this brief reproduces the Phase III jury instructions (App. 1a-25a), which Exxon's petition unaccountably omits.

Court's intervening decisions in *BMW v. Gore*, 517 U.S. 559 (1996), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Pet. App. 104a.

4. On remand, the district court analyzed the voluminous record and concluded that "a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of . . . its right to due process." Pet. App. 221a. However, because the Ninth Circuit had asked it not only to apply *BMW*'s guideposts "in the first instance," Pet. App. 95a, but also to reduce the award, Pet. App. 104a, the district court cut the amount to $4 billion. Pet. App. 223a.

5. Exxon appealed, and the plaintiffs cross-appealed. While the cross-appeals were pending, this Court further elucidated the due process principles governing punitive damages in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Accordingly, the Ninth Circuit again remanded the case to the district court, so it could reconsider its latest decision in light of *State Farm*.

In an eighty-one page opinion that painstakingly applied this Court's guidance, the district court again concluded that the $5 billion jury verdict satisfied due process. It based this conclusion on findings that: (1) Exxon's conduct was "highly reprehensible"; (2) the ratio of punitive damages to concrete economic harm was 9.74 to 1,[7] which lies within the "single-digit" guidepost endorsed in *State Farm* and falls still lower once non-economic and potential harms are taken into account; and (3) "comparable criminal and civil penalties could have exceeded $5 billion." Pet. App. 179a. But because the Ninth Circuit's second remand order had not disturbed its direction to reduce the verdict, the district court entered a new judgment setting punitive damages at $4.5 billion – representing roughly a 9 to 1 ratio between punitive damages and economic harm. Pet. App. 179a-180a.

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[7] The district court found that the economic harm totaled $513 million. Pet. App. 163a. The Ninth Circuit later adjusted that calculation downward to $504 million, Pet. App. 38a, making the ratio 9.92 to 1.

6. Both sides again cross-appealed. A divided Ninth Circuit reduced the award to $2.5 billion. The majority accepted the district court's factual findings, but concluded that Exxon's actions, including its mitigation efforts immediately following the spill, placed its misconduct in the "mid" or "higher realm" of reprehensibility, "but not in the highest realm." Pet. App. 31a. Unlike the district court, the panel majority interpreted *State Farm* as "reserv[ing] the upper echelons of constitutional punitive damages (a 9 to 1 ratio) for conduct done with the most vile of intentions." Pet. App. 24a. Accordingly, the majority settled on a 5 to 1 ratio to economic harm, without accounting for the additional non-economic harm and potential harm. Pet. App. 40a.

Judge Browning dissented. Pet. App. 42a. He concluded that Exxon's conduct was "highly, if not extremely reprehensible" and that its post-tort actions did not retroactively diminish the reprehensibility of what it did. Pet. App. 46a, 52a. He reasoned that a ratio higher than 5 to 1 was permissible in view of the uncompensated harm and potential harm. Pet. App. 53a, 55a. He "therefore agree[d] with the district court's assessment that there is no principled means by which this award should be reduced." Pet. App. 56a.

7. Exxon petitioned for rehearing en banc. The Ninth Circuit denied the petition, with two of its twenty-three non-recused active judges dissenting. Without even a nod to the district court's and the panel's extensive factual findings detailing Exxon's failure to remove Hazelwood from command despite multiple reports of his relapse, Judge Kozinski argued that Exxon should not have to pay punitive damages at all because it merely had "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a.[8] Judge Bea argued that a 5 to 1 ratio was excessive on the facts. Pet. App. 293a.

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[8] In 1995, shortly after the jury's verdict, and before the Ninth Circuit commenced review, Judge Kozinski publicly criticized the verdict in a widely circulated op-ed piece that questioned the common law system of

8. In the 13 years during which Exxon has pursued its post-verdict challenges, about 20 percent of the class has died. Exxon, however, has more than recouped the $2.5 billion judgment by operation of the differential between its internal rate of return and the statutory judgment rate.

REASONS FOR DENYING THE WRIT

Exxon's portrait of this litigation bears no resemblance to the case that the parties tried in 1994. At trial, the evidence showed that over a span of years Exxon's highest executives condoned placing an alcoholic who they knew had relapsed at the helm of an oil supertanker that regularly transited the resource-rich waters of Prince William Sound. The catastrophe that predictably resulted "disrupted the lives of thousands of people who depend on Prince William Sound for their livelihoods." Pet. App. 31a. The jury awarded punitive damages proportionate to the harm.

None of Exxon's arguments for further review has force. "Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where [a] defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995). This is such a case. In any event, Exxon has waived, or is estopped from raising, most of the arguments it presses. Many are fact-bound and depend on distorting this case's complex procedural history and voluminous record. Others pertain to issues that rarely arise, including one that will never arise again. And none of the questions presented implicates any conflict among the

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allowing private plaintiffs to recover punitive damages. The piece bracketed this verdict with such widely criticized punitive damage verdicts as that in the McDonald's "hot coffee case." Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18, *available at* http://alex.kozinski.com/articles/Case_of_Punitive_Damages.pdf. Judge Kozinski nevertheless did not recuse himself from the en banc proceedings here. *See* 28 U.S.C. § 455(a).

circuits or any tension between the decision below and this Court's precedent. After more than eighteen years, it is "time for this protracted litigation to end." Pet. App. 42a.

I. Exxon's Vicarious Liability Argument Does Not Warrant Review.

Exxon first asks this Court to consider whether a shipowner may be held vicariously liable for punitive damages under maritime law based solely on "the conduct of a ship's master at sea," even when the conduct runs counter to policies "enforced by the owner." Pet. i. But this case does not present any vicarious liability issue. The jury instructions during the punitive damages phase of this multi-phased trial required the jury to base any award against Exxon on its own corporate conduct, and Exxon never seriously pressed the proposition that Captain Hazelwood's actions violated company polices that it enforced. Even if this case did raise the question Exxon posits, it still would not merit this Court's review because waiver and harmless error principles render any supposed error irrelevant; the issue hardly ever arises; the Ninth Circuit's decision does not implicate any conflict; and the jury instruction that Exxon challenges was correct under the circumstances.

1. This case does not present any vicarious liability issue because the phase of this multi-phase trial in which punitive damages were assessed focused exclusively on Exxon's corporate conduct, and the jury awarded punitive damages on that basis. The parties tried this case in three separate phases. Pursuant to that agreed plan, Phase I of the 1994 trial considered whether reckless conduct had caused the grounding of the EXXON VALDEZ. Consistent with *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), a Phase I instruction told the jury that a "corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment." Pet. App. 301a. Thus, the jury was allowed to find Exxon reckless based on

the conduct of Hazelwood's superiors – the managerial agents who left him in command despite knowing that he had relapsed – or on Hazelwood's own conduct, as Exxon never disputed that it gave Hazelwood the responsibilities of a managerial agent. Pet. App. 264a n.8. The jury found both Exxon and Hazelwood reckless. Pet. App. 303a.

But the Phase I verdict did *not* impose punitive damages. Phase III of the trial dealt with that issue from scratch, using instructions that never mentioned vicarious liability. The Phase III instructions emphasized that the Phase I verdict "does not mean that you are required to make an award of punitive damages against either" Exxon or Hazelwood. App. 12a. The court explained that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made." App. 17a. The court gave twenty instructions covering every nuance of evolving punitive damages jurisprudence, directing the jury to consider the relevant factors separately as to "each of" Exxon and Hazelwood. App. 11a-21a. The verdict form, using language that Exxon proposed, contained separate interrogatories for Exxon and Hazelwood. As to each, the jury was first asked to decide *whether* punitive damages should be awarded against that defendant. App. 26a. Only if the jury answered "yes" would it decide what amount of punitive damages was necessary to punish and deter that defendant. *Id.*

In line with the jury instructions, the Phase III closing arguments focused on whether *Exxon's* conduct warranted punitive damages. Plaintiffs' counsel never mentioned vicarious liability. *See* Tr. 7556-88, 7629-44. Exxon's counsel likewise focused on the conduct of Hazelwood's superiors, not Hazelwood. Tr. 7600-05. He stressed to the jury that the Phase I recklessness verdict "does not mean that you are required to make an award of punitive damages," Tr. 7603, and, echoing the verdict form, noted that the "first issue you have is, should you award punitive damages at all." *Id.* Exxon emphasized the Phase III instruction that the earlier recklessness finding did not necessarily mean that Exxon's conduct was sufficiently reprehensible to warrant punitive damages, *id.*, and argued that while Exxon may have acted recklessly, it did not act reprehensibly:

> I don't know why precisely you found us reckless, *and it's not relevant*, you may have found that returning Captain Hazelwood was such a bad judgment, that was reckless, so be it. And we tried to monitor Captain Hazelwood. I suspect we didn't do the world's best job of monitoring Captain Hazelwood, and as I think about it now, it's probably impossible to monitor the master of a seagoing vessel. . . . [W]e tried, and we may have made bad mistakes in there and that may be why you found us reckless, but we didn't ignore – we didn't ignore the risk.

Tr. 7602 (emphasis added).

This Court presumes that juries follow their instructions, especially when counsel's arguments reinforce them. *Buchanan v. Angelone*, 522 U.S. 269, 278-79 (1998). Accordingly, the verdict assessing punitive damages against Exxon means that the jury found that "the corporation, not just [Hazelwood], was reckless." Pet. App. 83a. The subsequent *de novo* reviews of the punitive damage verdict similarly emphasized that "the relevant misconduct" and the "critical factor" supporting punitive damages was "Exxon's keeping Hazelwood in command with knowledge of Hazelwood's relapse," Pet. App. 22a, 155a-156a, and confirmed that the verdict was supported by the evidence: "The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." Pet. App. 83a. *See also* Pet. App. 64a, 89a-91a, 121a-122a, 154a-157a.

The question Exxon frames also is not presented here because Exxon's discussion of its purported policies likewise lacks any basis in this record. The Phase III instructions told the jury it could consider whether the "wrongful" "conduct . . . was contrary to corporate policies" in deciding whether to award punitive damages. C.A. 2004 Supp. ER 880-81. During Phase III testimony, however, Exxon discussed only one policy: the requirement that two officers man the bridge when transiting Prince William Sound, Tr. 7400-01, which Exxon enforced inconsistently at best. Tr. 1066-67, 1080, 1111, 3666-67. In its closing, Exxon did not claim diligence in enforcing *any* policy, Tr. 7588-7628; instead, it conceded that it "didn't have a written detailed policy" to monitor alcoholics returning to duty, Tr. 7613; *see also supra* at 2-3 & n.4, and acknowledged criticism that the policy of two officers on the bridge "was ambiguous." Tr. 7616. Exxon did not even argue to the Ninth Circuit that it enforced any alcohol policy; it argued instead that the Americans with Disabilities Act prevented it from doing so – a claim the Ninth Circuit easily rejected, and which Exxon does not pursue here. Pet. App. 89a; Exxon 1997 C.A. Br. 65.

2. Even if one could ignore the structure of this trial and suppose that the Phase I managerial-agent instruction caused the punitive verdict against Exxon in Phase III, any problem with the instruction lacks significance because it would not warrant a new trial. This is so for three independent reasons.

First, "[i]n the absence of a pertinent objection to the charge or a request for a specific interrogatory a general verdict is upheld where there is substantial evidence supporting any [permissible] ground of recovery in favor of an appellee." *Union Pac. R.R. Co. v. Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968) (quotation omitted); *accord Kossman v. Northeast Ill. Reg. Commuter R.R. Corp.*, 211 F.3d 1031, 1037 (7th Cir. 2000); *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987). Exxon never requested an interrogatory in Phase III to pinpoint whose conduct supported the punitive award against Exxon, and Exxon does not dispute (nor could it) the Ninth Circuit's conclusion that the record contains evidence sufficient to find that the corporation itself acted recklessly in placing Hazelwood in charge of the EXXON VALDEZ. *See* Pet. App. 88a-90a. Accordingly, Exxon has waived any ability to seek reversal now on the ground that "it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground." Pet. 13.

Second, it is a settled rule that when two theories of liability are submitted to a jury but one is improper, the error is harmless if "the 'entire focus' of the plaintiff's case" was on the proper theory. *Muth v. Ford Motor Co.*, 461 F.3d 557, 564-65 & n.15 (5th Cir. 2006) (collecting cases). This rule applies here. Phase III focused on Exxon's conduct, and plaintiffs never urged the jury to award punitive damages against Exxon based on Captain Hazelwood's recklessness.

Third, even when jury instructions improperly allow a jury to presume that a defendant acted with a requisite level of culpability, the error is harmless when the evidence of culpability was so strong that the jury would have found it anyway. *Carella v. California*, 491 U.S. 263, 265-66 (1989) (per curiam); *see also Neder v. United States*, 527 U.S. 1, 8-16 (1999); *Benigni v. City of Hemet*, 879 F.2d 473, 480 (9th Cir. 1989) (jury's punitive award showed that failure to require jury to find *mens rea* element of underlying claim was harmless). Though not couched in terms of harmless error, that is exactly what the Ninth Circuit concluded here, finding that "Exxon is not in the position of the owners in *The Amiable Nancy* [16 U.S. (3 Wheat.) 546 (1818)] or *Lake Shore* [*& Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893)]" because "[t]he evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence." Pet. App. 83a. Lest there be any doubt, the *de novo* due process reviews below have detailed that "[p]lacing a relapsed alcoholic in control of a supertanker" carrying tens of millions of gallons of oil through one of the Nation's most productive commercial fisheries was not only reckless but "highly reprehensible." Pet. App. 31a; *see also* Pet. App. 22a, 26a-30a, 121a-122a, 147a-157a.[9]

3. Even if this case presented the issue that Exxon postulates, that issue would not merit this Court's review because it hardly ever arises. Exxon cites only two cases over the past *one hundred fifty years* in which a court has found it necessary to decide whether a shipowner may be held liable for punitive damages based solely on the reckless actions of a "ship's master at sea." Pet. i.[10] This paucity of precedent reflects the fact that the Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. § 181 *et seq.*, limits a vessel owner's liability to the value of the owner's interest in the vessel – an amount that does not leave room for a significant punitive award – whenever the vessel causes damage "without the owner's privity or knowledge." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001). A corporate owner lacks "privity or knowledge" with respect to

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[9] A memorandum that Exxon's own attorneys authored just two months after the shipwreck confirms that remanding based on an alleged error in giving the vicarious liability instruction in Phase I would not achieve anything besides delay. The memo explains that there is "no room for reasonable doubt that Exxon Shipping will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood." App. 43a. In other words, Exxon's own lawyers understood that it could never convince a jury that it merely had "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a (Kozinski, J., dissenting from denial of rehearing).

[10] Those cases, more fully discussed *infra*, are *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), and *Pacific Packing & Nav. Co. v. Fielding*, 136 F. 577 (9th Cir. 1905). The Sixth Circuit in *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), discussed the issue, but its comments were *dicta* because the captain had a "good faith" reason to believe he had taken "the best course of action under the circumstances for the benefit of all concerned." *Id.* at 1147. *Protectus* itself involved the reckless actions of a "dock foreman," not a master. 767 F.2d at 1381.

an employee's actions unless the employee was an "executive officer, manager or superintendent" of the corporation "whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred." *Coryell v. Phipps*, 317 U.S. 406, 410 (1943); *accord Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 230-31 (7th Cir. 1993), *aff'd sub nom. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). Accordingly, for Exxon's question to arise: (1) a serious tort must occur involving a ship; (2) the damage must be solely attributable to reckless acts of the ship's master at sea; (3) the vessel must have a corporate owner; and (4) the master must be an executive officer, manager, or superintendent of the owner and be acting within his scope of authority within the meaning of the Limitation Act.

This constellation of circumstances hardly ever arises. Shipping calamities are rare, and those caused by captains' recklessness are rarer still. And in contrast to Exxon, which "enlarge[d] the responsibilities and authority of its senior fleet officers" with a "major shift of responsibility and authority from the shoreside staff to the shipboard teams," C.A. 1997 Supp. ER 257, 259; *see also* Pet. 6; Tr. 2934-36, 3866, shipowners do not typically give their captains sufficient authority to make their actions binding under the Limitation Act criteria. *See* 3 BENEDICT ON ADMIRALTY § 42, at 5-17 & n.4 (7th ed. 2005).

4. Nor do the facts of this case implicate any conflict respecting punitive liability and ship masters. Both courts outside the Ninth Circuit that have considered the issue – courts that Exxon contends correctly state the law (Pet. 12) – have held that punitive damages "may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him." *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969) (denying punitive damages because "the evidence does not show that Captain Joppich was an unfit master"); *see also CEH, Inc. v.*

F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995) (upholding punitive award because the owner "fail[ed] to supervise" the captain under circumstances the owner should have known could lead to problems).[11] That, at a minimum, is what happened here. "[T]he highest executives in Exxon Shipping knew Hazelwood . . . had fallen off the wagon." Pet. App. 64a. Exxon "knew that he was going on board to command its supertankers after drinking, yet let him continue to command the EXXON VALDEZ." Pet. App. 89a; *see also* Pet. App. 83a, 89a-91a, 121a-122a, 154a-157a, 255a-256a.

As in *CEH*, the Court "need not resolve," 70 F.3d at 705, whether *Protectus* correctly held that a shipowner may be liable for punitive damages based *solely* on the recklessness of a managerial agent. This case involved much more.

5. Even though irrelevant to this case's outcome, the Phase I instruction based on *Protectus* was correct under the circumstances. Because a corporation is inanimate, its liability for damages, whether punitive or compensatory, *must* be vicarious. *Coryell*, 317 U.S. at 410-11. The question is simply how high ranking an agent must be before a court will impute the agent's conduct or knowledge to the corporation. Thus, this Court explained in *Lake Shore* that a corporation could be held liable in punitive damages for the misconduct of "[t]he president and general manager, or, in his absence, the vice president in his place." 147 U.S. at 114.

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[11] Exxon also cites *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989), and *The State of Missouri*, 76 F. 376 (7th Cir. 1896), as pertaining to this question. But the Fifth Circuit in *P&E* considered only whether it should drop "the punitive damages hammer on the principal for the wrongful acts of the simple agent or lower echelon employee," not a ship's master. 872 F.2d at 652. Even then, the Fifth Circuit suggested that such damages might be available when, as here, the corporation failed to "formulate[] policies and direct[] its employees properly." *Id.* In *Missouri*, none of the damages were "other than compensatory," 76 F. at 380, so the Seventh Circuit did not decide what standard might have governed punitive recoveries in maritime cases during that era.

Allowing corporate liability based on the misconduct of modern managerial agents comports with *Lake Shore*, scaled to our commercial era. At least in large modern corporations, such as Exxon, managers have as much authority as did typical presidents and vice-presidents in the nineteenth century. Recognizing this development, almost every state has adopted the rule, embodied in the Restatement (Second) of Torts § 909, that corporations may be liable in punitive damages for the misconduct of their managerial employees; a majority of courts has gone further, holding corporations responsible for punitive damages based on the acts of *any* agent. *See American Soc'y of Mech. Engineers, Inc., v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 541-45 (1999) (adopting Restatement for Title VII claims subject to the defense, based on Title VII considerations, that the manager's actions were contrary to the employer's good-faith efforts to comply with the statute). As the First Circuit has observed, the Restatement test reflects an "appropriate evolution of" maritime law. *CEH*, 70 F.3d at 705.[12]

II. The Question Whether Statutory Law in 1989 Inhibited Respondents' Ability To Recover Punitive Damages Does Not Merit This Court's Attention.

Exxon long ago waived its argument that the Clean Water Act ("CWA") forecloses punitive damages here. In any event, the question does not present any conflict of authority; the court of appeals correctly resolved it; and the question does not have ongoing significance.

1. As the Ninth Circuit noted, Exxon never raised its CWA argument until October 23, 1995, thirteen months after trial had concluded. On that date, Exxon filed a so-called

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[12] Given Exxon's argument that maritime common law should reflect federal statutory policies, it is worth noting that the Oil Pollution Act of 1990 requires corporations to pay civil penalties that can run into the hundreds of millions of dollars whenever gross negligence by *any agent* causes an oil spill. 33 U.S.C. § 2704(c)(1); *see* Pet. App. 104a.

"renewed motion" "pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, for an order that the judgment to be entered on the special verdict of the jury . . . shall not include an award of punitive damages." App. 30a. Plaintiffs countered that the filing was "thrice untimely," in part because motions for judgment as a matter of law must be filed under Rule 50(b), *see* 9A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2513, at 235 (2d ed. 1995), and the stipulated deadline for filing any motion under that rule had passed many months before. App. 33a. In addition, Exxon never made a Rule 50(a)(2) motion on this ground during trial, which is a prerequisite to a post-trial motion for a judgment as a matter of law under Rule 50(b). App. 33a. The district court summarily denied Exxon leave to file its motion. Pet. App. 73a-74a; App. 35a.[13]

When Exxon advanced its CWA argument in the court of appeals, plaintiffs argued that it was waived because Exxon filed its October 23, 1995 motion beyond the deadline for post-verdict motions. Pltfs. 1997 C.A. Br. 79. Exxon responded that its motion had been timely made "under Rules 49(a) and 58(2)." App. 37a. Calling the circumstances "ambiguous," the Ninth Circuit elected to reach the issue on the ground that it presented a significant question of law and "Exxon clearly and consistently argued statutory preemption" in the district court – albeit under the Trans-Alaska Pipeline Authorization Act, *not* the CWA. Pet. App. 73a-74a.

The Ninth Circuit erred in reaching the merits of this issue. Exxon does not dispute that it filed its CWA motion beyond the deadline for filing a motion under Rule 50(b) for judgment as a matter of law. App. 37a. And Exxon's resort to Rules 49(a) and 58(2) cannot salvage its tardy filing. Rule 49(a) describes how to submit special verdicts to juries, and

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[13] Deluged by motions, the district court had imposed a stay on motion practice, requiring the parties to seek leave to file new motions. As a technical matter, therefore, the district court denied Exxon's request to lift the stay in order to file its motion. App. 35a; *see also* App. 28a.

Rule 58(2) (now recodified as Rule 58(a)(2)(B)) is purely ministerial, directing district courts to "approve the form of the judgment" right after the clerk has prepared it. *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989). No case suggests that either rule provides a platform for making an untimely substantive motion for judgment as a matter of law.

Although lower courts sometimes choose to glide over waiver problems to affirm on other grounds, this Court takes filing deadlines seriously. *See, e.g.*, *Bowles v. Russell*, 127 S. Ct. 2360 (2007); *Burton v. Stewart*, 127 S. Ct. 793 (2006) (per curiam). And, contrary to the Ninth Circuit's *sua sponte* suggestion, which even Exxon did not have the temerity to advance, a party cannot preserve a preemption-type argument by arguing that *an entirely different federal statutory scheme* precludes relief that a plaintiff seeks. *See, e.g.*, *Helvering v. Wood*, 309 U.S. 344, 348-49 (1940); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993). Exxon's CWA argument is not properly before this Court.

2. Even if Exxon had preserved this issue, it would not merit review because no conflict, or even confusion, over the issue exists. In the thirty-five years since Congress passed the CWA, no court has suggested that the statute forecloses punitive damages in private tort actions arising from oil spills. To the contrary, several circuits have recognized the availability of punitive damages for private tort claims arising from polluting water with substances regulated by the CWA, without mentioning any colorable argument standing in their way. *See, e.g.*, *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (polluting stream with acidic water); *Knabe v. National Supply Div.*, 592 F.2d 841, 844-45 (5th Cir. 1979) (dumping industrial waste); *Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716, 722-23 (2d Cir. 1977) (spilling oil). The only published opinion besides this case to consider the question explicitly agreed that the CWA imposes no barrier to recovering punitive damages

pursuant to such a tort claim. *Poe v. PPG Indus.*, 782 So.2d 1168, 1175-78 (La. Ct. App. 2001).

3. Exxon cannot avoid the absence of any authority questioning the availability of punitive damages under these circumstances by manufacturing a generalized question about whether maritime common law allows plaintiffs to recover punitive damages when federal statutes "controlling" the defendant's conduct do not provide for any such damages. Pet. i. This formulation conflates two analytically distinct lines of cases: (a) those dealing with rights, and (b) those dealing with remedies. Neither supports Exxon's claim that a conflict exists or even its position on the merits.

a. A federal statutory scheme can preclude punitive damages if the plaintiff's underlying *substantive cause of action* would "interfere[]" or be "incompatible" with the scheme's operation. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 497 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981) (CWA, which sets standards for effluent discharges, forecloses common-law nuisance action that might result in different effluent standard); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981) (same); *Conner v. Aerovox, Inc.*, 730 F.2d 835, 839-42 (1st Cir. 1984) (same).

But nothing about respondents' private tort claim risks interference with the CWA's provisions allowing the federal government to impose penalties on oil spillers to recoup its cleanup costs. Indeed, the CWA "le[aves] . . . room" for tort claims arising from water pollution. *Int'l Paper*, 479 U.S. at 492. So this case bears no resemblance to *Sea Clammers* or *Conner*. Exxon, in fact, does not even argue (nor did it ever suggest in the Ninth Circuit) that the CWA forecloses respondents' substantive cause of action.

b. A federal statutory scheme also might preclude punitive damages by providing a comprehensive set of *remedies* for a given cause of action. In general, a plaintiff who brings a legitimate cause of action may seek the full panoply of remedies. *Int'l Paper*, 479 U.S. at 498 n.19; *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). But when a plaintiff asserts a common law claim within the ambit of a congressionally-prescribed "comprehensive tort recovery regime to be uniformly applied," the plaintiff may not seek remedies beyond what that statutory scheme provides. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 (1996); *see also Dooley v. Korean Air Lines*, 524 U.S. 116, 121-24 (1998) (Death on the High Seas Act sets forth exclusive remedies for survival actions arising from deaths on high seas); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990) (Jones Act remedies for wrongful death actions govern suit for seaman's wrongful death caused by unseaworthiness); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978) (DOHSA sets forth exclusive types of recoverable damages for wrongful death actions arising from deaths on high seas); *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981) (limiting government suits for cleanup costs to governmental remedies provided for such actions in the CWA); Pet. 18 (citing federal cases precluding punitive damages in claims for wrongful death, survival, and violation of Jones Act). Accordingly, when Exxon asks in its question presented whether common law remedies beyond those provided in a "controlling statute" are available, it begs the only possible question here – namely, whether the CWA's remedies actually "control" respondents' cause of action.

As the Ninth Circuit recognized, the CWA does *not* prescribe a comprehensive recovery regime covering private tort claims arising from oil spills, so cases such as *Miles* and *Oswego* do not govern. Pet App. 75a, 78a-79a. The CWA deals with "punishing harm [that pollution causes] to the environment," while leaving untouched common law remedies to address the interests respondents assert regarding harm to "private economic and quasi-economic resources." Pet. App. 79a. Indeed, the savings clause in the CWA's section relating to oil spills preserves all legal "liability" and "obligations" of vessel owners arising from damage to private property "resulting from a discharge of any oil." 33 U.S.C. §§ 1321(*o*)(1) & (2); *see also id.* § 1365(e); *Askew v. American Waterways Opers., Inc.*, 411 U.S. 325, 329 (1973) (identically worded prior version of § 1321(*o*) allowed state regulation). Respondents thus stand in the same position as the plaintiffs in *Yamaha*, where this Court held unanimously that parents bringing a common law tort action for the wrongful death of their daughter, who had died riding a jet ski in territorial waters, could seek punitive damages because "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters." 516 U.S. at 215.

4. Even if doubt existed over whether the CWA left room for punitive damages in cases involving oil spills occurring before 1990, there would be no reason for this Court to consider the issue because no dispute over the question will ever arise again. In response to the disaster at issue here, Congress enacted the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2702 *et seq.*, establishing steep civil penalties for at least some of the harm that oil spills cause to economic and quasi-economic interests. Pet. App. 104a. Since OPA's passage, the question whether *the CWA* forecloses private plaintiffs who bring maritime tort claims based on oil spills from recovering punitive damages has been overtaken by the question (not presented here because OPA is not retroactive) whether *OPA* forecloses such claims seeking such damages.

In *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000), the First Circuit noted, consistent with the court of appeals' decision here, that "the general admiralty and maritime law that existed prior to the enactment of [OPA] . . . permitted the award of punitive damages for reckless behavior" that caused oil spills. *Id.* at 65. It then held that OPA's new remedies replace private parties' previous ability to recover such damages. *Id.* at 64-66. Regardless of whether this interpretation of OPA is correct, it makes clear that any inquiry into statutory remedies in any future tort action such as this would focus on OPA's new statutory framework, not the CWA's.

III. The Size of the Punitive Award Does Not Warrant Further Review.

Exxon challenged the size of the punitive award in the courts below primarily on due process grounds. Indeed, after eleven pages of briefing presenting exclusively constitutional arguments, Exxon told the Ninth Circuit that "*if the Court does not wish to reach the issue of constitutional excessiveness*, it should exercise its power as a common law maritime court to reduce the award to no more than the amount, if any, that is necessary to the objective of punishment and deterrence in a maritime context." Exxon 1997 C.A. Br. 81 (emphasis added). Following Exxon's suggested hierarchy, the Ninth Circuit reviewed the Phase III verdict only under the Due Process Clause. Accordingly, we shall address the Due Process Clause before responding to Exxon's attempt to change the playing field.

1. This case does not raise any due process issue meriting this Court's review. Space limitations prevent recounting the district court's extensive findings of historical fact, which are entitled to deference, *Cooper*, 532 U.S. at 440 n.14, and which the court of appeals accepted, concerning Exxon's reprehensible conduct and the harm it inflicted. Nor is there room here to detail all of Exxon's distortions of, and omissions from, the record in its attempt to recast the case. Respondents thus refer this Court to the findings of both courts below and the accompanying legal analyses. *See* Pet. App. 22a-42a, 60a-67a, 88a-90a, 120a-124a, 142a-180a. Given those opinions, a brief response to Exxon's arguments suffices.

a. *Reprehensibility.* Exxon contests the court of appeals' conclusion that Exxon's conduct was "in the higher realm of reprehensibility" and was reduced only to "a mid range" by its legally-compelled post-spill mitigation. Pet. App. 31a.

This conclusion, and Exxon's quibbles with it, Pet. 29-30, are entirely fact-bound and do not warrant further review.

Exxon suggests that it should have gotten *more* credit for its post-spill claims program than the Ninth Circuit gave because, in Exxon's words, it paid claimants (1) "voluntarily," (2) "quickly," and (3) "fairly." But this ignores that (1) Alaska law rendered Exxon strictly liable for economic harm, Pet. App. 124a & n.17, so Exxon had a legal obligation to pay claims; (2) Exxon did not pay all, or even most, claimants "quickly"; many were paid only during trial or by different entities, such as the Trans-Alaska Pipeline Liability Fund, sometimes over Exxon's objection; and (3) Exxon refused to pay anything for various types of fishing losses for which the jury awarded $168.5 million, refused to pay entire categories of claimants, and never paid anything for harm beyond the purely economic. *See* Pltfs. 2004 C.A. Br. 35-37, 47-50 (detailing payment history). Exxon's additional claim that respondents did not suffer any "non-economic" injuries also ignores the findings that this disaster, which crippled the regional economy (and for Native Alaskans, their way of life), inevitably had profound non-economic effects. *See* Pet. App. 25a-26a, 123a-124a, 150a-152a, 166a-167a. Finally, Exxon's suggestion that the Ninth Circuit improperly considered potential harm to the ship's crew ignores this Court's recent holding that courts may consider the effects of a defendant's conduct on nonparties "to determine reprehensibility." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007). That is all the Ninth Circuit did. Pet. App. 27a.

b. *Ratio.* Exxon claims that the 5 to 1 ratio of punitive damages to economic harm contravenes this Court's statement in *State Farm* that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. In addition to ignoring the words "perhaps" and "can" in this quotation, Exxon ignores three important matters specific to this case.

First, the average amount of economic harm per class member was not "substantial"; it totaled less than $15,500 per person. Pet. App. 38a, 168a-69a. Because class certification cannot "abridge, enlarge or modify any substantive right" of class members, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997), the fact that Exxon sought and obtained certification of a mandatory class cannot reduce plaintiffs' punitive recoveries by aggregating their modest individual economic harms into a large collective injury. *See Lambert v. Fulton County*, 253 F.3d 588, 598 (11th Cir. 2001) (calculating ratios separately for each plaintiff). Indeed, even if there were a colorable argument to the contrary, Exxon would be estopped from making it. When respondents questioned Exxon's certification motion, Exxon emphasized to the district court that "certification of a mandatory punitive damages class would not in any way . . . prejudice any of the parties" or "alter the substantive rights of any parties." Exxon Reply in Support of Motion to Certify Mandatory Punitive Damages Class, Dkt. 4539, at 5. At the very least, the unique mandatory class framework of this trial distinguishes it from all of the cases Exxon discusses and makes it a poor vehicle for resolving any supposed confusion over *State Farm*'s ratio discussion.[14]

Second, *State Farm*'s one-to-one suggestion (as well as its "single-digit" guidance) assumes a situation in which the monetary value of a plaintiff's noneconomic harm has been quantified, and the plaintiff "has been made whole for his injuries by compensatory damages." 538 U.S. at 419, 425. In *State Farm*, each plaintiff recovered $500,000 "for a year and a half of emotional distress" over whether an insurance claim would be covered. *Id.* at 426. Here, by contrast, respondents' noneconomic harm was never quantified, and maritime law's conception of compensatory damages prevented respondents from being made whole for that harm. *See supra* at 6-7; Pet. App. 24a-26a, 53a (Browning, J., dissenting), 166a-168a; *cf. Cooper*, 532 U.S. at 437 n.11.

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[14] Exxon suggests (Pet. 28 n.9) that the 5 to 1 ratio conflicts with the 2 to 1 and 1.4 to 1 ratios, respectively, in *Estate of Moreland v. Dieter*, 395 F.3d 747, 757-58 (7th Cir. 2005), and *Stamathis v. Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir. 2004). But in those cases, the courts *upheld* punitive damage awards, while noting that they fell comfortably within the single-digit range. *Stamathis* also emphasized that a court calculating a ratio must account not only for economic damages but also for the value of "insult, pain, and mental suffering." 389 F.3d at 443.

Third, this Court has made clear that the ratio analysis must consider not just the actual harm the tort inflicted but also the potential harm it threatened. *State Farm*, 538 U.S. at 424-25; *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). Here, the 42 million gallons of crude that the EXXON VALDEZ fortuitously did not discharge threatened "immense" additional harm. Pet. App. 167a.

c. *Penalties.* The court of appeals analyzed penalties in both of its opinions. Pet. App. 40a-41a, 101a-104a. Exxon attempts to argue the details of that analysis yet again, asserting that "[c]ombined federal and state civil penalties for this oil spill could not have exceeded about $80 million." Pet. 30. But this tells only part of the story. In fact, "Exxon was fairly on notice that reckless conduct could cause the loss of the entire cargo thereby putting it at risk for state civil penalties . . . in excess of $255 million." Pet. App. 176a-177a. Further, federal criminal penalties for the three crimes to which Exxon pleaded guilty could have exceeded $3 billion. Pet. App. 173a-175a. And federal and state legislation passed in response to this disaster – reflecting "legislative judgments concerning appropriate sanctions for the conduct at issue" *BMW*, 517 U.S. at 583 (quotation omitted) – would have subjected Exxon to $1.3 billion in civil penalties.

2. Nor should this Court entertain Exxon's request to create a new maritime law excessiveness doctrine tailored to its repeatedly rejected version of the facts of this case.

a. Exxon waived its maritime law argument. Because it told the Ninth Circuit that it need not address maritime law if it considered the due process challenge, Exxon cannot now claim (Pet. 21-23) that the absence of a freestanding common law analysis is erroneous or creates some kind of conflict. Appellate courts cannot be sandbagged in this manner.

b. Prudential considerations also make this an improper vehicle for devising a brand new legal doctrine. This Court will not consider issues neither pressed nor passed on below. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Exxon did not press a maritime excessiveness claim below; after failing to seriously urge any such claim in the district court,[15] it told the Ninth Circuit there was no need to reach the issue. And neither the district court nor the Ninth Circuit passed on the issue. *See* Pet. App. 90a-104a, 224a-228a. Worse yet, no other court has ever considered any maritime excessiveness argument resembling Exxon's here. Under such circumstances, this Court should not break new ground.

c. In any event, Exxon's substantive argument is both meritless and fact-bound. Exxon does not explain exactly what rule of law it urges, but to the extent Exxon suggests this Court should create a new excessiveness doctrine on the theory that maritime law "is concerned with . . . limitation of liability," Pet. 23 (quotation omitted), Congress already has addressed that concern in the Limitation Act. That Act protects shipowners from any tort liability beyond their interest in vessels as long as they lack privity or knowledge with respect to the tort. *See* 46 U.S.C. § 183; *supra* at 16-17.

Nothing justifies eliminating the line that Congress drew so as to bestow similar protection upon those shipowners, such as Exxon, that *do* act recklessly with privity or knowledge. The common law always has permitted imposing punitive damages with single-digit ratios, *State Farm*, 538 U.S. at 425, and this Court may not "limit the right of the injured party to a recovery" allowed by common law beyond what is "necessary to effectuate" the purpose of the Limitation Act. *The Main v. Williams*, 152 U.S. 122, 132-33 (1894). Indeed, in the only case recently to consider the size of a punitive award in a maritime case for conduct at all similar to Exxon's, the court approved a 7.5-to-1 ratio, reasoning that "the imposition of punitive damages . . . encourages shipowners to hire qualified and responsible captains and to exercise supervisory power over them. In addition, it fairly punishes [the owner] for his failure to provide any supervision over his captains." *CEH*, 70 F.3d at 705 (quotation omitted). Such awards "protect[] maritime commerce," *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004) (quotation omitted), not only by encouraging safety and accountability, but also by safeguarding the interests of other mariners – such as the commercial fishermen here.

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[15] Apart from a heading and three scattered sentences asserting that both constitutional "and maritime law" limit the size of punitive awards, Exxon's 73-page Rule 50(b) excessiveness brief in the district court contained less than one and one-half pages discussing maritime law.

Exxon's plea for this Court to craft a brand new four-pronged exception to this legal landscape tailored to the supposed facts of this case amounts to nothing more than an unfounded request for error correction. Exxon's claim that its cleanup costs and governmental payments for environmental harm provided sufficient "punishment or deterrence" (Pet. 24-25) ignores the non-environmental nature of respondents' injuries, Pet. App. 79a, as well as the fact that the criminal payment "d[id] not reflect the true extent of the harm" later revealed at this trial. Pet. App. 240a, 174a n.111. Exxon's arguments about the "substantiality" of the damages and about comparable penalties fail for the same reasons as do its identical due process arguments. And Exxon's final point (Pet. 26) ignores the fact that this Court has never cast doubt, in the context of due process or common law, upon the "well-settled" and "typical" practice of informing juries of a defendant's financial condition. *TXO*, 509 U.S. at 462 n.28; *see also State Farm*, 538 U.S. at 427-28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	No. A89-0095-CV (HRH) (Consolidated)

JURY INSTRUCTION NO. 1

MEMBERS OF THE JURY:

We have now completed Phase III of this trial.

Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions as to the law applicable to this part of the case. Copies of these instructions will be available for you in the jury room for further review. I urge you to review these instructions from time to time as you progress with your deliberations.

It is your duty as jurors to follow the law as stated in these instructions, and to apply that law to the facts as you find them from the evidence in this case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court. Similarly, it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case presented here in open court.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts only from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

JURY INSTRUCTION NO. 2

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the plaintiffs and the defendants. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion as to either party. The law requires, and both the parties and the public expect, that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

JURY INSTRUCTION NO. 3

Unless otherwise stated, the jury should consider each instruction given to apply to all of the plaintiffs and to all of the defendants in the case.

JURY INSTRUCTION NO. 4

This case should be considered and decided by you as an action between persons of equal standing in the same community, of equal worth, and holding the same or similar stations in life. In your decisions on issues of fact, a corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with by the judge and jury as equals in a court of justice.

JURY INSTRUCTION NO. 5

For purposes of this trial, the parties will refer to Exxon Shipping Company and Exxon Corporation as the Exxon defendants and you should consider all evidence, arguments, and questions submitted to you for decision as though the Exxon defendants were one party.

Any act or failure to act of Exxon Shipping Company or any knowledge or information known or available to Exxon Shipping Company shall be considered to be equally the act or knowledge of Exxon Corporation. Any act or failure to act by Exxon Corporation or any knowledge or information known or available to Exxon Corporation shall be considered the act or failure to act of or the knowledge of Exxon Shipping Company.

JURY INSTRUCTION NO. 6

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

JURY INSTRUCTION NO. 7

The evidence from which you are to decide what the facts are consists of: (1) the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; (2) the exhibits which have been received into evidence; and (3) any facts to which all the lawyers have agreed or stipulated. Plaintiffs and the defendants have agreed or stipulated to certain facts. You should treat those facts as having been proved.

JURY INSTRUCTION NO. 8

Certain things are not evidence and you may not consider these things except insofar as they are supported by the evidence. These things include:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

4. Evidence admitted for a limited purpose is not evidence for any other purpose. Thus, when I have admitted some evidence for a limited purpose, it would be improper to consider that evidence for any other purpose.

5. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received during trial.

6. Some of you have taken notes during the trial. Such notes are not evidence, and are only for the personal use of the person who took them.

JURY INSTRUCTION NO. 9

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

JURY INSTRUCTION NO. 10

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify or what appears on the face of exhibits. You are permitted to draw, from facts which you find have been proved by the evidence in this phase of the trial, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from the facts which have been established by the evidence in the case.

JURY INSTRUCTION NO. 11

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does not produce such belief in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate and otherwise trustworthy.

JURY INSTRUCTION NO. 12

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

JURY INSTRUCTION NO. 13

During this part of the trial, certain depositions were read or played to you. These consist of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case.

Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present, and had testified from the witness stand.

JURY INSTRUCTION NO. 14

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education or experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

JURY INSTRUCTION NO. 15

The burden is on the plaintiffs in a civil action, such as this, to prove every essential element of their claims by a preponderance of the evidence. If the proof should fail to establish any essential element of a claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

JURY INSTRUCTION NO. 16

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find" or "if you decide", I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

JURY INSTRUCTION NO. 17

In deciding whether plaintiffs have proved a fact or an element of a claim by a preponderance of the evidence, you must evaluate all the evidence. In doing this, you must decide which testimony to believe and which testimony not to believe. You may believe all or any part or none of any witness' testimony. In making that decision, you may take into account a number of factors including the following:

1. Was the witness able to see, or hear, or know the things about which that witness testified?

2. How well was the witness able to recall and describe those things?

3. What was the witness' manner while testifying?

4. Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?

5. How reasonable was the witness' testimony, considered in light of all the evidence in the case?

6. Was the witness' testimony contradicted by what that witness has said or done at another time, or by the testimony of other witnesses, or by other evidence?

In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider therefore whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only a small detail.

JURY INSTRUCTION NO. 18

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

JURY INSTRUCTION NO. 19

Counsel have worked with the court in preparing these jury instructions and have been provided with a copy of the same. Counsel may properly refer to some of these instructions on the law applicable to this case in their arguments. If, however, any difference appears to you between the law as stated by the court in these instructions and any law stated by counsel, either in their opening statements or closing arguments, you are of course to be governed by these instructions now given by the court.

JURY INSTRUCTION NO. 20

In Phase I of the trial, you determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless, and that such conduct was a legal cause of the oil spill. In Phase II of the trial, you awarded sums of money for actual damages to various commercial fishermen to compensate them for the losses legally caused by the oil spill.

The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them. An award of punitive damages may be made only if you find that plaintiffs have shown by a preponderance of the evidence that an award is proper, applying the instructions that I will give you.

JURY INSTRUCTION NO. 21

In your Phase III deliberations, you may consider the evidence admitted in Phases I and II, in addition to the evidence admitted in this Phase III.

JURY INSTRUCTION NO. 22

The purposes for which punitive damages are awarded are:

(1) to punish a wrongdoer for extraordinary misconduct; and

(2) to warn defendants and others and deter them from doing the same.

JURY INSTRUCTION NO. 23

It is for you to decide as to each of defendant Hazelwood and the Exxon defendants whether or not plaintiffs have established by a preponderance of the evidence that:

(1) an award of punitive damages would serve the purposes of punishment and deterrence; and

(2) if so, what amount is necessary and appropriate to achieve those purposes.

"Punishment" means to impose a penalty because of wrongful conduct of defendants.

"Deterrence" means to discourage or prevent future wrongful conduct by defendants and others.

JURY INSTRUCTION NO. 24

The amount of punitive damages that is necessary to punish a defendant is the penalty that is necessary to express society's disapproval of conduct that society condemns.

The amount of punitive damages that is necessary to deter a defendant and others is the amount of money you find will induce a defendant and others not to repeat the conduct that you have found to be wrongful.

JURY INSTRUCTION NO. 25

Punitive damages are not favored in the law, and are never awarded as a right, no matter how egregious the defendant's conduct. This means that you have discretion to award or not to award punitive damages in accordance with these instructions.

If you find that punitive damages are appropriate, the amount of punitive damages may not be determined arbitrarily. You must use reason in setting the amount.

When I say you must use reason, I mean that any punitive damages award must have a rational basis in the evidence in the case. A punitive damages award may not be larger than an amount that bears a reasonable relationship to the harm caused to members of the plaintiff class by a defendant's misconduct, including any harm to the persons set forth in the stipulation that was read to you. Also, the award may not be larger than what is reasonably necessary to achieve society's goals of punishment and deterrence. Punitive damages, if any, should not reflect dislike for, bias, prejudice, or sympathy toward any party. An award of punitive damages may not be made for the purpose of taking revenge on a defendant. Rather, in determining whether to award punitive damages, your focus should be on the amount, if any, that you find reasonably necessary to effect just punishment and deterrence considering the factors discussed in these instructions.

You may impose punitive damages against one or more of the defendants and not others, and may award different amounts against different defendants.

JURY INSTRUCTION NO. 26

An award of punitive damages is not intended to provide compensation for any loss suffered by any plaintiff. In determining whether to make an award of punitive damages you should assume that all plaintiffs have been or will be fully compensated for all damages they may have suffered as a result of the oil spill. You may not make an award of punitive damages for the purpose of compensating any plaintiff.

JURY INSTRUCTION NO. 27

In determining the amount of punitive damages to award, if any, you may consider, among other factors:

(a) the degree of reprehensibility of the defendants' conduct,

(b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and

(c) the financial condition of the defendants.

You may also consider, as mitigating factors:

(a) the existence of prior criminal sanctions or civil awards against the defendants for the same conduct, and

(b) the extent to which a defendant has taken steps to remedy the consequences of his or its conduct or prevent repetition of that conduct.

The following instructions, No. 28 through No. 38, amplify and explain the foregoing factors which you may consider.

JURY INSTRUCTION NO. 28

In determining the harm to plaintiffs, you may consider harms to all persons who suffered actual damages as a legal result of the spill. All such claims have been consolidated into this single proceeding for purposes of determining whether punitive damages should be awarded against the defendants and, if so, the amount of such damages. This includes claims of persons who are suing for their actual damages in the state courts. Because of this consolidation of claims, there will be no other claims for punitive damages in any other court.

With the exception of the claims you resolved in Phase II-A, you will not be asked to decide the true amount of the actual damages, if any, to which other claimants are entitled. In a few cases, the parties have agreed to the amount of actual damages sustained by certain claimants. As to other claimants, the parties have entered into a stipulation, which was read to you, which states the approximate amount of the actual damages claimed by other persons who contend that they were injured as a legal result of the oil spill. This information was provided to give you an idea of the amounts of additional actual damages claimed by other plaintiffs, although these claims are disputed in whole or in part by defendants.

JURY INSTRUCTION NO. 29

In determining the harm caused by the oil spill, you should not consider any damage to natural resources or to the environment generally; you may not base an award of punitive damages on such harms. Any liability for punitive damages relating to these harms has been fully resolved in proceedings involving the Exxon defendants and the Natural Resource Trustees. Although from time to time in the course of this case, you have heard evidence about the Trustees for Natural Resources and about damage to the environment generally, such evidence was admitted only to the extent it may have been of assistance to you in considering the extent of the injuries sustained by some or all of the plaintiffs.

JURY INSTRUCTION NO. 30

In evaluating the degree of reprehensibility of a defendant's conduct, you may take into account the nature of the conduct, the duration of the conduct, and defendant's awareness that the conduct was occurring. The fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made.

In considering whether an award of punitive damages is appropriate against a corporation, you may consider not just the fact that a corporation may have legal liability for the acts of its employees, but also whether corporate policy makers actually participated in or ratified the conduct that was wrongful, and whether the conduct that was wrongful was carried out by a lower-level employees [sic] and was contrary to corporate policies. If you find that corporate policy makers did not actually participate in or ratify the wrongful conduct, this is a factor that you may consider in mitigation of any award of punitive damages that you might otherwise find proper. Similarly, if you find that wrongful conduct was contrary to company policies, you may take this factor into account in mitigation of any award of punitive damages that you might otherwise find proper.

In considering whether an award of punitive damages is appropriate against a corporation, you may also consider the number of corporate employees who played some role in the conduct you are considering, the duties and responsibilities of such employees, the nature of their participation in or failure to prevent the wrongful conduct, and whether the wrongful conduct and the participation of the employees in such conduct was in conformity with corporate policies.

If you find that a number of Exxon defendants' employees participated in or failed to prevent the wrongful conduct and that those employees held positions involving significant duties and responsibilities within the corporation, then, in judging the reprehensibility of the Exxon defendants' conduct, you may take these factors into consideration in increasing any award of punitive damages that you might otherwise find proper.

In the alternative, if you find that only a limited number of corporate employees participated in or failed to prevent the wrongful conduct and that these employees had lesser duties or responsibilities within the corporation, and that the wrongful conduct was not in conformity with corporate policies, then, in judging the reprehensibility of the Exxon defendants' conduct, you may take these factors into consideration in mitigation of any award of punitive damages that you might otherwise find proper.

JURY INSTRUCTION NO. 31

To "mitigate" means to reduce, diminish, or lessen.

JURY INSTRUCTION NO. 32

In considering whether an award of punitive damages is appropriate in this case and, if so, in what amount, you may consider the financial condition of a defendant. This does not necessarily mean that you should punish one defendant more than another defendant simply because of their relative financial conditions. If you find that a defendant's financial condition affects the level of award necessary to punish the defendant and to deter future wrongful conduct by that defendant and others, you may take the defendant's financial condition into account for that purpose.

JURY INSTRUCTION NO. 33

In considering a defendant's financial condition, you may not consider the defendant's gross wealth, that is, the value of its assets without subtracting any debts or obligations that the defendant may owe, but only the defendant's net worth, that is, the difference between the defendant's assets and the defendant's liabilities. Similarly, if you consider a defendant's income in assessing its financial condition, you may not consider a defendant's gross income (that is, the total amount of money received by the defendant) but only the difference between gross income and all expenses that must be paid out of that income.

JURY INSTRUCTION NO. 34

In considering a defendant's net worth or net income, you may consider what portion of the defendant's net worth or net income is most relevant to a defendant's activities that were implicated in the defendant's wrongful conduct. You may also decide that all of a defendant's net worth and net income is relevant to determining the appropriate amount of punitive damages, if any, necessary to punish a defendant and deter a defendant and others.

JURY INSTRUCTION NO. 35

In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you should consider steps taken by a defendant to prevent recurrence of the conduct in question – in this case, another oil spill. Evidence of changes in policies, practices, and procedures by the Exxon defendants has been put before you so that you can consider this issue. The fact that changes have been made after an event does not tend to show that such changes should have been made before the event, or that the policies, practices, or procedures in place before the event were negligent or otherwise improper. Accordingly, if you find that changes were made that have reduced the likelihood of an oil spill in the future, you may consider the making of such changes as a factor tending to mitigate any punitive damages award that you might otherwise find proper.

JURY INSTRUCTION NO. 36

In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you may consider whether a defendant has paid other criminal fines or civil penalties. You may also consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures. You may also consider the extent to which a defendant has been subjected to condemnation or reproval by society as a result of other means, such as loss of standing in the community, public vilification, loss of reputation, and similar matters. These are factors which you may consider in mitigation of any award of punitive damages that you might otherwise find proper.

JURY INSTRUCTION NO. 37

In considering whether to make an award of punitive damages, and if so in what amount, you [sic] decision should not take into account or be affected in any way by the tax consequences of such an award – either to defendants who would pay such an award or to plaintiffs who would receive it.

JURY INSTRUCTION NO. 38

In determining whether an award of punitive damages should be made, and if so in what amount, you may consider whether, and if so to what extent, an award of punitive damages against the corporate Exxon defendants might be borne by the Exxon shareholders. Consideration of who may bear the ultimate financial impact of punitive damages is but one of many factors you may consider in fixing the amount of punitive damages.

JURY INSTRUCTION NO. 39

You should not speculate as to how any award of punitive damages you may make would be divided amongst the plaintiff class.

JURY INSTRUCTION NO. 40

The law forbids you to decide any question in this case by relying on chance. For example, it would be unlawful for each juror to make an individual estimate of damages and for the jury as a whole to agree in advance to use the average of these estimates as the proper measure of any damages that are to be awarded. Each juror may express views on the correct amount of damages so that all jurors may thoughtfully consider each other's views in order to determine what damages, if any, reasonably should be awarded in light of the law and the evidence.

JURY INSTRUCTION NO. 41

In your deliberations and in any verdict which you may render, you shall not consider the matters of interest, costs, or attorney's fees. These subjects are matters for the court to consider after your verdict has been rendered.

JURY INSTRUCTION NO. 42

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

JURY INSTRUCTION NO. 43

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

JURY INSTRUCTION NO. 44

Upon retiring to the jury room, the presiding juror you previously chose will preside over your deliberations, and will continue to be your spokesman here in court.

A special verdict form has been prepared for your convenience.

This special verdict form contains four interrogatories. The answer to each interrogatory must be the unanimous answer of the jury. Your presiding juror will write the unanimous answer of the jury in the space provided under each interrogatory.

When you have finished answering the interrogatories, you will have your presiding juror date and sign the form, and then return with your verdict to the courtroom.

JURY INSTRUCTION NO. 45

If you should agree upon your verdict before 2:00 p.m. this afternoon, your presiding juror should date and sign the verdict. This will indicate that all of you have agreed on the verdict. You should return your verdict immediately into open court in the presence of the entire jury, together with the exhibits and these instructions.

If you do not agree upon your verdict before 2:00 p.m. this afternoon, you may return to your homes. You must not talk about the case or your deliberations outside of the jury room. Before you go home, the presiding juror should lock the jury room so that the exhibits, instructions, and unsigned verdicts will remain undisturbed. None of these materials should be removed from the jury room until you reach a verdict. You should return to your jury room at 8:00 a.m. tomorrow to continue your deliberations. Deliberations should not be commenced until all jurors are present in the jury room.

JURY INSTRUCTION NO. 46

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your presiding juror, or by one or more members of the jury. Any note to the court should include the date and time the note was signed. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing; and the court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing, or orally here in open court.

Bailiffs, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person – not even to the court – how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re	)	No. A89-0095-CV (HRH)
	)	(Consolidated)
the EXXON VALDEZ	)	

SPECIAL VERDICT FOR PHASE III OF TRIAL

Interrogatory No. 1: Do you unanimously find from a preponderance of the evidence that an award of punitive damages against defendant Hazelwood is necessary in this case to achieve punishment and deterrence?

Answer: Yes _______ No _______

Interrogatory No. 2: If your answer to Interrogatory No. 1 is "yes", what amount of punitive damages do you find to be necessary for those purposes?

Answer: $_____________

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that an award of punitive damages against the Exxon defendants is necessary in this case to achieve punishment and deterrence?

Answer: Yes _______ No _______

Interrogatory No. 4: If your answer to Interrogatory No. 3 is "yes", what amount of punitive damages do you find to be necessary for those purposes?

Answer: $_____________

DONE at Anchorage, Alaska, this ___ day of August, 1994.

____
Presiding Juror

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re) Case No. A89-095-CV (HRH)
)
the EXXON VALDEZ) (Consolidated)

RE: ALL CASES

MOTION OF DEFENDANTS EXXON CORPORATION (D-1) AND EXXON SHIPPING COMPANY (D-2) TO LIFT STAY TO FILE MOTION AND RENEWED MOTION FOR JUDGMENT ON PUNITIVE DAMAGES CLAIMS

(Filed Oct. 23, 1995)

Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively "Exxon") respectfully move for leave to file the attached motion and renewed motion for judgment on plaintiffs' punitive damage claims. This motion is supported by the attached memorandum.

Respectfully submitted this 23d day of October, 1995 at Anchorage, Alaska.

BOGLE & GATES, P.L.L.C.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	) Case No. A89-095-CV (HRH))) (Consolidated)

RE: ALL CASES

MOTION AND RENEWED MOTION BY DEFENDANTS EXXON CORPORATION (D-1) AND EXXON SHIPPING COMPANY (D-2) FOR JUDGMENT ON PUNITIVE DAMAGES CLAIMS

Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) hereby move the Court, pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, for an order that the judgment to be entered on the special verdict of the jury in this consolidated Action shall not include an award of punitive damages in favor of plaintiffs, on the ground that recent decisions of the Ninth and Fifth Circuits make plain that punitive damages are not legally available under maritime law in the circumstances present here. In light of this recent authority, defendants also renew their previous motions concerning the legal unavailability of punitive damages. This motion is also made, to the extent they may be applicable, pursuant to Rules 50(b), 56(b), 56(d), 59(a), and 59(e) of the Federal Rules of Civil Procedure and pursuant to the constitutional requirement of due process, as set forth in the Ninth Circuit's decision in *Morgan v. Woessner,* 997 F.2d 1244 (9th Cir. 1993).

A Memorandum in support of motion is filed herewith.

Respectfully submitted this 23d day of October, 1995 at Anchorage, Alaska.

BOGLE & GATES, P.L.L.C.

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Douglas J. Serdahely
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Honorable H. Russel Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
the EXXON VALDEZ	)	
	)	Case No. A89-095-CV (HRH)
THIS DOCUMENT	)	(Consolidated)
RELATES TO ALL CASES	)	
	)	

MEMORANDUM IN OPPOSITION TO EXXON'S MOTION TO LIFT STAY TO FILE MOTION FOR JUDGMENT ON PUNITIVE DAMAGE CLAIMS

(Filed Oct. 30, 1995)

As its title itself reflects, Exxon's "Motion and Renewed Motion . . . for Judgment On Punitive Damage Claims" is nothing more than an attempt to dredge up arguments that were fully debated and decided in Order No. 158.[1] In order to prevent unconscionable further delay in entry of judgment, the Court should deny Exxon's motion for leave to file yet another round of papers in its undying effort to avoid the punitive damage verdict.

Exxon's attempt to rehash these issues is thrice untimely:

- first, under Rule 50(a)(2) because a motion was never made prior to submitting the case to the jury;
- second, under the stipulated deadline for post-trial motions under Rules 50 and 59, which expired more than one year ago (September 30, 1994);[2] and,
- third, as a request for reconsideration of Order No. 158, it is grossly out of time, having been filed more than two years after that Order was entered on October 21, 1993. *See* District of Alaska Local Rule 7.1(1) (requiring motions for reconsideration to be brought within five days of the notice of ruling).

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[1] Clerk's Docket No. 3982 dated October 21, 1993.

[2] Clerk's Docket No. 5918 dated September 26, 1994.

Not only is Exxon's motion tardy but, as we now demonstrate, Exxon's motion also does not meet the standard set by this court for revisiting such prior decisions.

* * *

MINUTES OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ — CASE NO.
THE HONORABLE — A89-095-CV (HRH)
H. RUSSEL HOLLAND — (Consolidated)

Deputy Clerk — Official Recorder

APPEARANCES: for PLAINTIFF: —
for DEFENDANT: —

PROCEEDINGS: **ORDER FROM CHAMBERS**

(Filed Nov. 2, 1995)

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (Exxon) have filed a motion to lift the stay to file a motion and renewed motion for judgment on punitive damages claims.[1] Plaintiffs oppose the motion.[2] The motion to lift the stay is denied.

DATE: November 2, 1995 INITIALS: tdm
[Rev. 06/92] cc: L. Miller Deputy Clerk
D. Serdahely
D. Ruskin

---

[1] Clerk's Docket No. 6496.

[2] Clerk's Docket No. 6516.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-35191
97-35193

In re: the EXXON VALDEZ

GRANT BAKER, et al., as representatives of the
Mandatory Punitive Damages Class

Plaintiffs-Appellees,

v.

EXXON CORPORATION, et al.,

Defendants-Appellants.

DANIEL R. CALHOUN, et al.,

Plaintiffs-Appellants,

v.

EXXON CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States
District Court for the District of Alaska

JOINT REPLY BRIEF (NO. 97-35191) AND JOINT ANSWERING BRIEF (NO. 97-35193) OF EXXON CORPORATION AND EXXON SHIPPING COMPANY

CHARLES W. BENDER PATRICK LYNCH JOHN F. DAUM CHARLES C. LIFLAND O'MELVENY & MYERS LLP 400 South Hope Street Los Angeles, California 90071 (213) 669-6000	DAVID M. HEILBRON McCUTCHEN, DOYLE, BROWN & ENERSEN LLP Three Embarcadero Center San Francisco, California 94111 (415) 393-2000
Attorneys for Exxon Corporation	Attorneys for Exxon Shipping Company

* * *

It follows that maritime law will not supplement the CWA by allowing nonstatutory recoveries of punitive damages for the same acts. OB 39-43.[40]

* * *

---

[40] Plaintiffs wrongly claim that Exxon did not argue CWA preclusion below. Exxon did so by motion under Rules 49(a) and 58(2) on Oct. 23, 1995, ER 704-13, RER 86-98; contradicting what they say now, plaintiffs told the district court that the issues raised by Exxon were "identical" to those considered and rejected by the district court in 1993. ER 718. Exxon's motion under Rules 49(a) and 58(2) was not untimely; the deadline plaintiffs refer to (but do not cite) was for motions under Rules 50 and 59. RER 84. Exxon raised the matter again March 18, 1996, ER 747-57, for the express purpose of preserving the record, ER 754, and expressly incorporated its prior memorandum raising CWA issues. ER 755-56. The district court denied leave to file the first motion; and summarily denied the second motion. ER 721, 758. The district court's failure to listen does not mean Exxon's arguments were not raised. But even if they had not been, whether the CWA precludes punitive damages under maritime law is an important, purely legal question which the Court may and should consider. *United States v. Northrop Corp.*, 59 F.3d 953, 957 n.2 (9th Cir. 1995); *People of Village of Gambell v. Hodel,* 774 F.2d 1414, 1426-27 (9th Cir. 1985).

No. 93-40252

EXXON CORPORATION	:	IN THE DISTRICT COURT OF
vs.	:	
CERTAIN UNDERWRITERS AT LLOYDS OF LONDON	:	HARRIS COUNTY, TEXAS
	:	189TH JUDICIAL DISTRICT
	:	

* * *

BE IT REMEMBERED that on the 28th day of May, 1996, before the Honorable Carolyn Marks Johnson, judge presiding, the following proceedings were had, to wit:

MARTHA C. ADAMS
OFFICIAL COURT REPORTER

* * *

[5] Q Mr. Bluestein, could you please state your full name for the record?

A Edwin Alexander Bluestein.

Q All right. You are an attorney with Fulbright & Jaworski?

A Yes.

Q And how long have you been with Fulbright & Jaworski?

A Since June of 1959.

* * *

[19] Q I have got before you what's been marked as Defendant's Exhibit 4898, and I will ask you to look at that, sir.

A Yes, sir. I'm able to identify this as a letter which I wrote to Exxon Company USA to Ken Roberts, dated June 23, 1989.

Q And this was something that you wrote to Mr. Roberts before the joint memorandum marked as 4893 was sent to ITIA?

A Yes, sir, that's correct.

Q And this letter to Mr. Roberts marked as 4898 addresses Exxon Shipping Company's ability to limit liability?

A Yes, sir, that's correct.

Q And I believe in the first paragraph of this letter you state, "Based upon our understanding of the [20] facts and the applicable law, we are of the opinion that Exxon Shipping stands virtually no chance whatever of obtaining an order granting limitation of liability in this case." Did you write that?

A That is what I wrote.

Q And that was your understanding of the facts and circumstances of the law back on June 23, 1989?

A That's correct.

Q And then you go on in this letter to describe the reasons for our opinion – or for that opinion that you just stated?

A Yes.

Q And we have a 12-page letter setting forth those reasons?

A I believe that's correct.

Q I would like for you to turn to Page 9 of the letter.

A All right.

Q And you have a heading "Negligence and Unseaworthiness of the EXXON VALDEZ." Do you see that?

A Yes, I do.

Q And in the first sentence you state, "We have no doubt but that the Exxon Shipping will be found liable for this casualty by any court which might [21] hear the case." Do you see that?

A Yes, I do.

Q And then you go on to discuss the reasons why you believe Exxon Shipping Company will be found liable?

A Yes.

Q And in the first paragraph you describe acts of negligence?

A That's correct.

Q In the second paragraph you discuss the unseaworthiness of the EXXON VALDEZ.

A That is true.

Q And you state in the first sentence, "we believe the EXXON VALDEZ additionally will be declared to have been unseaworthy." Do you see that?

A Yes.

Q And you wrote, "A ship owner has a non-delegable duty to provide a competent master and crew and unseaworthiness exists if there is an incompetent crew."

Was that your understanding of the law?

A Yes, it is.

Q And you go on to state, "We would expect a court to find the vessel was unseaworthy at the time of the casualty because the mate on watch did not possess [22] the required pilotage endorsement for Prince William Sound and accordingly was incompetent as a matter of law to navigate those waters." Do you see that?

A Yes.

Q And that was your conclusion at the time?

A That is – that is correct.

Q You go to state, sir, "We further are of the opinion that the use of alcohol by the master will result in a finding that he was incompetent to carry out the duties of a master and that the vessel was rendered unseaworthy by virtue thereof." Do you see that?

A I do.

Q And that was your conclusion at the time, wasn't it?

A Yes, it was.

Q And that – for those of us who have not spent our time working in the maritime area, when you refer to a master, you are referring to the captain of the ship?

A That's correct.

Q And the reference to the master is a reference to Captain Hazelwood?

A Yes.

[23] Q The next Page, Page 10, you discuss – you have a heading "Privity and Knowledge." Do you see that?

A I do.

Q And that's a separate issue from the issue of unseaworthiness, isn't it?

A It is.

Q And as I understand it – and correct me if I'm wrong – an unseaworthy condition is relevant if there is privity or knowledge by management?

A That's correct.

Q And what is privity or knowledge?

A It's been described as being a vessel that the size of which depends upon who the court is that's pouring the facts into it. That's a rather colorful way of saying it is a question for the maritime court to determine under all of the facts whether or not the owner of the vessel had participated and knew of and appreciated that the conditions which are found to be negligent are unseaworthy.

Q And here the question would be whether – at least one of the questions would be whether management was aware of or had knowledge of or participated in Captain Hazelwood's alcohol or incompetence due to alcohol use?

[24] Well, when we use the term "management," I want to be sure you understand that the courts have held that fleet managers, operational personnel, port engineers

and superintendents have sufficient supervisory capacity to satisfy the privity or knowledge standard as a representative of the owner.

Q And with that clarification, there would be privity if management knew of Captain Hazelwood's incompetence due to use of alcohol?

A That's my understanding, yes.

Q And if you look down in the third paragraph on Page 10, you wrote: "Our inquiries leave no room for reasonable doubt that Exxon Shipping will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood."

A Yes, sir.

Q And that was your conclusion back in 1989?

A It was.

Q In the next paragraph you state, "The following facts which claimants will establish readily cannot be denied." Do you see that.

A Yes, sir.

* * *

REPLY
BRIEF

69

FILED

OCT 12 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

16

No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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It is stunningly obvious that a judgment for $2.5 *billion*, 250 times the largest previous punitive damages judgment for unintentional conduct affirmed by a federal appellate court, which created conflicts on three different issues with five different circuits and eight decisions of this Court, is worthy of this Court's review. From the 13 amicus briefs—including briefs filed on behalf of important maritime and shipping associations in the United States and abroad, organizations representing the overwhelming majority of the nation's and the world's shipowners and tonnage, as well as other important maritime interests—it is apparent that the decision below has unsettled the entire international and domestic maritime community, wholly apart from its effect on Exxon or on oil spills.[1] Plaintiffs' objections to certiorari are meritless.

I. VICARIOUS PUNITIVE LIABILITY

Plaintiffs have no serious argument for declining review of the question whether federal maritime law allows vicarious liability for punitive damages. Contrary to plaintiffs' submission here, even the Ninth Circuit recognized both that the question is squarely presented by this case and that its decision conflicts with other circuit decisions and with a prior decision of this Court. Pet. App. 80a-86a. Plaintiffs' counter-arguments cannot withstand even minimal scrutiny.

1. Plaintiffs' primary contention is that the flawed vicarious punishment instruction in Phase I—which allowed the jury to determine that punitive damages were justified *solely on the basis of Hazelwood's own conduct*—is irrelevant because in the Phase III proceeding to determine the amount of punitive damages, the jury was entitled to "start from scratch," and the parties' arguments focused on *Exxon's* own conduct. Opp. 11-15. This argument is frivolous. The Phase I instruction is what allowed the jury to determine whether

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[1] *See Owners fear legal safety net will be cut by Valdez case*, Lloyd's List, Oct. 8, 2007 (entire maritime community in "massive show of support for ... Exxon Valdez appeal").

punitive damages were authorized at all. If that instruction allowed the jury to do so on an impermissible basis—*i.e.*, without finding that Exxon itself was reckless—then the entire Phase III proceeding, including its verdict, was impermissible. The district court, which designed the phased trial, correctly recognized that the "Phase III instructions did not permit the jury to revisit its Phase I liability determinations." Pet. App. 273a n.16. For the same reason, it is irrelevant that Exxon did not "request an interrogatory in Phase III to pinpoint whose conduct supported the punitive award against Exxon." Opp. 14-15.

2. Plaintiffs also argue that any error in the Phase I instruction was harmless because a properly instructed jury would have found Exxon liable for its own conduct anyway. This argument, too, is frivolous. Even the Ninth Circuit flatly rejected it. Pet. App. 88a-89a. And in a related case involving Exxon and its insurers obliquely referenced by plaintiffs themselves, a Texas jury was asked the question: "Was the grounding of the *Exxon Valdez* the result of Exxon Corporation's reckless conduct?" That jury answered the question "No." CD 7535, Exh. A at 4. Unlike the jury here, the Texas jury was not given the instruction that unlawfully attributed Hazelwood's conduct automatically to Exxon.[2]

3. Plaintiffs contend that the vicarious punishment issue lacks genuine significance to shippers and shipowners engaged in maritime commerce. Opp. 16-17. The outpouring of concern in the amicus briefs submitted on behalf of the domestic and international shipping community is dispositive proof to the contrary. Even the Maritime Law Association—which takes no position on the merits—recognizes that the conflict is exceedingly important and requires resolution. Arguing otherwise, plaintiffs first rely simply on the number

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[2] The Texas jury was shown the memorandum featured by plaintiffs in which an Exxon lawyer, unfamiliar with the true facts, expressed his view that Exxon could never defeat privity or prove that it lacked knowledge of Hazelwood's conduct. Opp. 16 n.9. The jury found otherwise.

of reported federal appellate decisions explicitly addressing the issue—but of course most litigants and courts would unhesitatingly apply a clearly binding decision of this Court as the law, so it is hardly surprising that relatively few appellate courts have had occasion to issue published decisions openly discussing whether to continue to follow this Court's controlling precedent. The truth is that many cases are litigated every year involving shipping accidents occurring under circumstances that directly implicate the continuing viability of the *Amiable Nancy* rule. *Intertanko Amicus Brief* 9-13.

Plaintiffs also contend that shipowners have no cause for concern because the Limitation of Shipowners' Liability Act of 1851 already limits their liability and thus gives them adequate protection even if *Amiable Nancy* is wrong and the decision below is right. Opp. 16-17. The amicus briefs of the shipowners who operate under these regimes are, again, dispositive proof that plaintiffs badly misunderstand the legal exposure shipowners face under these very different rules. Plaintiffs' errors are many. First, the Limitation Act will not limit liability for future spills under the Oil Pollution Act ("OPA"), 33 U.S.C. § 2702 *et seq.*, *see Puerto Rico v. M/V Emily S*, 132 F.3d 818 (1st Cir. 1997), just as it did not limit liability for this spill of Alaska North Slope crude oil, *see In re the Glacier Bay*, 944 F.2d 577 (9th Cir. 1991). Second, even when the Act applies, its limits do not apply in cases involving owner negligence—because negligence alone suffices to establish privity and knowledge under the Limitation Act, *see, e.g., Brister v. A.W.I., Inc.*, 946 F.2d 350, 356 (5th Cir. 1991)—leaving owners who are at most negligent exposed to vicarious punitive damages under the Ninth Circuit's rule. Third, even in cases not involving owner negligence, the Act provides shipowners no protection against vicarious punitive damages when the total claims (including vicarious punitive damages under the Ninth Circuit rule) do not exceed the value of the ship and pending freight. In short, the Limitation Act provides shipowners nowhere near the protection from vicarious punitive damages for accidents at sea that is secured by the *Amiable Nancy* rule, and cannot solve the problems created by the Ninth Circuit's decision.

4. While not denying the circuit conflict, plaintiffs suggest it is not implicated here, because the decisions rejected by the Ninth Circuit do agree that a shipowner can be liable for the acts of an agent when the shipowner itself is reckless or complicit in the agent's wrongdoing. Opp. 17-18 & n.11. Unlike those cases, plaintiffs insist, this case involved Exxon's own misconduct. But that argument of course assumes the jury *necessarily found liability on that basis*—an insupportable assumption, as discussed above, since the jury was instructed it did not need to reach that question. Pet. 13.

5. Finally, plaintiffs contend that the vicarious punitive liability instruction was correct, despite this Court's *Amiable Nancy* decision. Opp. 18. Notably, plaintiffs never deny that *Amiable Nancy* applied here by its terms; instead they contend the decision should be overruled or its rule revised to reflect "our modern commercial era." Opp. 19. This of course is a merits argument better left for merits briefing. The critical point for present purposes is that whether *Amiable Nancy* should be overruled or revised is a question that has squarely divided the circuits, and that is ultimately answerable *only* by this Court. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). That said, it bears noting that even the "modern" rule plaintiffs point to—an employer is not vicariously liable for an employee's acts when the acts violated the employer's own enforced policies, *see, e.g.*, *Kolstad v. American Dental Ass'n*, 527 U.S. 556, 541-45 (1999)—is *not* the rule adopted by the Ninth Circuit, and *is* a rule Exxon unsuccessfully sought below. Whatever else may be disputed, in other words, there seems to be general agreement that the rule of automatic vicarious liability adopted by the Ninth Circuit both conflicts with this Court's decisions and those of other circuits, and is unsound on its own terms. It is difficult to imagine a more compelling case for certiorari.

II. JUDICIALLY-IMPLIED MARITIME REMEDIES

Plaintiffs' arguments against review of the second question presented—*viz.*, whether federal courts can properly imply a federal maritime law punitive damages remedy for maritime conduct already comprehensively governed by a federal statute—are equally meritless.

1. Plaintiff's primary argument against review of this question is that Exxon waived it at the trial court. Opp. 19-21. This is another frivolous contention. The Ninth Circuit squarely held that Exxon did *not* waive the argument, Pet. App. 74a, and not even plaintiffs deny that the Ninth Circuit passed on the argument and issued a published decision—a decision that controls all maritime conduct connected to the Ninth Circuit's vast geographic maritime jurisdiction. This Court's waiver practice "precludes a grant of certiorari only when the question presented was not pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992); *see Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 530-31 (2002); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Here the issue was *both* pressed before *and* passed upon by the court of appeals.

2. Plaintiffs next assert that the judicially-implied remedies argument can be ignored because several lower courts have allowed punitive damages on *state-law* nuisance theories, as if those cases answered Exxon's claim that the Clean Water Act ("CWA"), 33 U.S.C. § 1311 *et seq.*, displaces judge-made *federal* remedies. Opp. 20-21. But the rule governing preemption of state law by federal statutes is the opposite of the rule governing displacement of federal common law. A federal statute is presumed to displace federal common law; it is presumed *not* to preempt state law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981). Plaintiffs' reference (Opp. 24) to *Askew v. American Waterways Opers., Inc.*, 411 U.S. 325 (1973), and *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), is flawed for the same reason. Those cases held, on their facts, that the state law remedies asserted were not barred by the general maritime law;

they have nothing to do with Exxon's claim here that general maritime law is displaced by a federal statute.

3. Plaintiffs also spend several pages elaborating an artificial and meaningless distinction between cases "dealing with rights" and those "dealing with remedies." Opp. 22-24. The gravamen of plaintiffs' analysis appears to be that when Congress creates statutory rights, a plaintiff asserting such rights is limited to the statutory remedies, but so long as common-law claims are allowed, plaintiffs are free to pursue any and all common-law remedies, including punitive damages. Yet again this is a merits argument with little relevance at this jurisdictional stage. In any event, there is not the slightest indication in any of the cases that the courts deciding them considered or relied on the distinction that plaintiffs attribute to them. To the contrary, the cases state and follow a much simpler principle: When Congress has provided statutory remedies for particular conduct, federal courts sail "in occupied waters," and may not impose broader remedies under federal maritime law. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). Here the operative statute is the Clean Water Act.[3] It affirmatively allows recovery for damages to property; compensatory claims are thus permitted. But although it prescribes in detail what is necessary to punish and deter oil spills, it does not create any punitive damages remedy. Federal courts must honor that statutory scheme because of the basic nature of the relationship between Congress and the federal courts. Separation of powers does not depend on the artificial distinctions plaintiffs proffer between rights and remedies.

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[3] Plaintiffs elliptically suggest that the CWA addresses only *environmental* harms, and reflects no congressional judgment about remedies for *economic* harms. Opp. 23. The premise is false: The CWA does provide penalties gauged to non-environmental harms, including fines based on losses to private persons. In this very case, the Government's Sentencing Memorandum explicitly based Exxon's fine in part on the $300-plus million in claims payments made by Exxon. ER (1997) 111-14.

4. Plaintiffs finally contend that the question raised in the petition will never arise again, because Congress enacted OPA in 1990. Opp. 24. Plaintiffs elide the fact, however, that the CWA *still governs spills of oil, hazardous substances, and other pollutants*. OPA increased potential statutory civil penalties for such spills, but it did not change the fact that CWA's pre-existing scheme of civil and criminal penalties—which, like OPA's scheme, comprehensively governed oil spills and did not include private punitive damages remedies—was *already* a comprehensive congressional scheme governing oil spills. This case thus squarely presents the question whether a court may add remedies to those provided in a comprehensive federal maritime statute governing the same conduct. OPA's increases in the statutory penalties do not affect that underlying threshold question at all.[4]

III. EXCESSIVE PUNISHMENT UNDER MARITIME LAW AND DUE PROCESS

Exxon's petition also sought certiorari on the ground that the $2.5 billion award violated principles of maritime law and due process, and that this case would be an effective vehicle for confirming and clarifying those principles.

1. Remarkably, plaintiffs' main response is yet another demonstrably frivolous waiver argument. Plaintiffs contend that Exxon waived its maritime-law arguments below because Exxon supposedly "told the Ninth Circuit it need not address maritime law if it considered the due process challenge." Opp. 28. But what Exxon actually said (as plaintiffs

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[4] The case plaintiffs cite to illustrate the supposed differences between the CWA and OPA—*South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000)—actually confirms the need for certiorari. *South Port* holds that OPA displaces private punitive damages remedies specifically because "*Miles* dictates deference to congressional judgment where … there is an overlap between statutory and decisional law." *Id.* at 66. That conclusion cannot be reconciled with the decision here; *South Port* thus illustrates the continuing division among courts over the proper operation of *Miles* and other cases strictly limiting courts' authority to add common-law remedies to those Congress authorized.

themselves quote it, Opp. 25) is transparently the *opposite* of what plaintiffs argue: "if the Court does not wish to reach the issue of constitutional excessiveness, it should exercise its power as a common law maritime court to reduce the award to no more than the amount, if any, that is necessary to the objective of punishment and deterrence in a maritime context." That statement on its face merely asserts the ordinary rule that constitutional rulings should be avoided whenever possible. No lawyer could read that language as telling the Ninth Circuit that if it *rejected* Exxon's constitutional arguments against the award, the court should then blithely ignore the maritime-law issues Exxon had raised. The court itself did not understand Exxon to be urging it to ignore maritime-law issues; and the court considered (and rejected) them on the merits. *See* Pet. App. 68a (rejecting Exxon's argument that maritime-law policies preclude punitive damages when conduct already punished and deterred); *id.* at 69a-70a (rejecting other maritime-law objections).

2. Plaintiffs also contend that Exxon's excessiveness arguments are factbound. Not so. This Court has already held that whether a punitive damages award is constitutionally excessive is a pure question of law, *see Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *Cooper*'s reasoning would apply equally to review of a punitive damages award under maritime law.

Exxon's maritime-law excessiveness arguments implicate no disputed facts. The arguments are: whether the (undisputed) massive civil and criminal sanctions and other payments have already imposed adequate punishment and deterrence; whether the (undisputed) size of the compensatory award should limit the punitive damages; whether the (undisputed) fact that the award wildly exceeds all civil penalties prescribed for the same conduct renders it unlawful; and whether the (undisputed) fact that the jury was allowed to consider the net worth of the defendant renders it unlawful. Pet. 24-27. And the basic question whether maritime law should include those standards as limits on punitive damages is a pure question of law—one this Court can and must answer as the final arbiter of the general federal maritime law.

The same is true for Exxon's constitutional arguments. On reprehensibility, it is a pure issue of law whether the Ninth Circuit improperly considered alleged non-economic injuries plaintiffs did not litigate (and which Exxon was thus denied the opportunity to contest), as well as unrealized harm to non-plaintiffs to whom maritime law would have denied punitive damages even if they were injured. On ratio, it is a pure issue of law whether a multiplier for at most "mid range" conduct is permissible when compensatory damages are substantial. On comparable penalties, it is a pure issue of law whether punitive damages may exceed substantial and analogous legislative penalties by billions of dollars.

3. Plaintiffs contend that this Court should not address maritime-law limits on punitive damages because "no other court" has done so. Opp. 29. Plaintiffs have things backwards. The Ninth Circuit was unwilling to impose any limits, despite the "force of Exxon's arguments as logic and policy," Pet. App. 68a, precisely because this Court had not yet spoken. The lower courts' failure to address these important issues underscores the need for this Court's leadership.

4. Plaintiffs' substantive objections to Exxon's maritime-law arguments are merits arguments that warrant little attention here. Plaintiffs primarily argue that Congress has already addressed these issues through the Limitation Act, Opp. 29, an erroneous argument addressed above. They also falsely contend that the CWA fines punished only environmental harms. *See* n.3 *supra*. Beyond that, plaintiffs cannot explain why $2.5 billion in punishment—*on top of* the $3.4 billion Exxon already paid—is necessary to punish and deter Exxon's actions, especially when, as here, nobody contends that Exxon sought to achieve some corporate savings or advantage by putting its multimillion-dollar cargo at risk.

5. Plaintiffs' merits objections to Exxon's constitutional arguments deserve equally little attention at this stage.

Reprehensibility. Plaintiffs mainly argue that the award is justified because of unlitigated claims of noneconomic harm (which Exxon was deprived of the opportunity to refute), and alleged risk of injury to non-parties, such as the ship's crew. Opp. 26. But that argument only begs the question whether consideration of such unlitigated or unrealized harms is proper, especially when they would have been vigorously contested had they been litigated. The problem is most salient for the alleged safety risks to non-party crew members, who would have had no legal claims *at all* for punitive damages, even if they had *actually* been injured. Pet. 29.

Ratio. Plaintiffs focus on the fact that plaintiffs' case was certified as a class action, Opp. 27, but that makes no difference for due process analysis—the proper *total* amount for punishment and deterrence cannot vary depending on whether plaintiffs bring one suit or 32,677 suits. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991); *see* Pet. 24. Nor could 32,677 plaintiffs have sued individually and each recovered a multiple of their compensatory damages. Opp. 27. Payment of prior punitive awards must be considered in mitigation of later awards, *Haslip*, 499 U.S. at 22; *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993), and at some point they serve to reduce later recoveries. That is why a class was certified here.

Comparable penalties. Plaintiffs concede that the maximum total amount in state and federal civil penalties was $80 million. Opp. 28. They contend that the penalty *could have* been $255 million if *all* the oil had spilled, but they do not explain how even their inflated $255 million figure justifies an award *two billion dollars higher*. This guidepost reflects the deference courts owe to legislatures, and is a fundamentally important part of the due process analysis, which the Ninth Circuit and other courts have trivialized—a problem only this Court can correct. *API Amicus Brief* 10-11, 17-20.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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In The

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN COMMERCIAL LINES INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?

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Robert Force & Martin J. Norris, *The Law of Seamen* (5th ed. 2003). 5

David V. Grier, *Locks and Dams*, *Proceedings of the Marine Safety & Security Council, the Coast Guard Journal of Safety at Sea, Summer 2007* 2

Informa Economics, Inc., *Barge Fleet Profile, Inland River Barges for the Mississippi River System and Connecting Waterways* (March 2007) 19

C.T. McCormick, *Handbook on the Law of Damages* (1935) 11

Subcommittee on Coast Guard and Maritime Transportation, *Hearing on Implementation of the Maritime Transportation Security Act* 15, 16

Thomas J. Schoenbaum, *Admiralty and Maritime Law* (4th ed. 2004) 8, 12

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U.S. Coast Guard Eighth District, *Port Security Bulletin* (May 28, 2004) 16

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INTEREST OF THE *AMICUS* CURIAE

American Commercial Lines Inc. ("ACL") is one of the largest and most diversified marine transportation and service companies in the United States.[1] ACL and its subsidiaries provide barge transportation and related services under the provisions of the Jones Act (current version at 46 U.S.C. § 55102 *et seq.*, previously 46 U.S.C. app. § 883) and manufacture barges, towboats and other vessels, including ocean-going liquid tank barges. ACL is regulated by general maritime rules and regulations, federal, state and local laws. Decisions relating to punitive damages under statutes affecting water trade and commerce, such as the Clean Water Act, or under the principles of maritime law, have a direct impact on ACL. As a result, ACL is submitting this brief to assist the Court in understanding the position of marine operators within the inland marine industry.

The inland marine industry operates on approximately 11,000 miles of commercially significant navigable waterways in the United States. U.S. Department of Commerce, International Trade Administration, *Transportation Services in U.S. Industrial Outlook '92* at 40-20 (1992). More than 4,000 towing vessels, pushing a collection of 27,000 unmanned and unpowered barges carrying cargoes, operate on these waterways. *See* American Waterways Operators, *Value to the Nation*, *available at* http://www.americanwaterways.com/about_industry/value.pdf. These barges carry 617 million tons of materials and products that power the American economy, including coal, grain, petroleum products, petrochemicals, fertilizers, sand, gravel, metallurgic products, and much more. David V. Grier, *Locks and Dams, Proceedings of the Marine Safety & Security Council, the Coast Guard Journal of Safety at Sea, Summer 2007 at 56 (citing U.S. Army Corps of Engineers, Institute for Water Resources, Inland Navigation, Value to the Nation (2000, unpublished update 2005)).* The inland marine industry transports approximately 300 billion ton-miles of cargo annually. *Id.* These ton miles comprise up to 20 percent of all domestic waterborne cargo movements. *U.S. Industrial Outlook '92* at 40-20.

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[1] Pursuant to Rule 37.6, no counsel for a party to this case authored any part of this brief, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this *amicus curiae* brief, and their consent letters are on file with the Clerk of the Court.

In contrast to the facts of the present case, in which the oil spill at issue occurred in a remote and sparsely populated area, inland marine companies operate through a number of major metropolitan areas along the inland and intracoastal waterways, including St. Louis, Missouri; Minneapolis/St. Paul, Minnesota; Chicago, Illinois; Cincinnati, Ohio; Louisville, Kentucky; Memphis, Tennessee; New Orleans, Louisiana; and Houston, Texas. The inland river industry works with federal, state and local regulators to ensure that its operations have the safety of life and limb and the protection of the marine environment as top priorities.

Transportation by barge is environmentally advantageous when compared to other modes of transportation, such as truck or rail car. For example, one large inland towing vessel can push 40 barges that have the same cargo capacity as approximately 2,400 trucks that burn one gallon of fuel to transport the equivalent of 70 ton miles, as compared to 530 ton miles by barge. Grier, *supra* at 56.

No company dominates or controls the inland river industry. The inland river industry consists of approximately 750 companies. Forty-five percent of the total capacity is spread amongst nine different operators. U.S. Department of Commerce, International Trade Administration, *Transportation Services in U.S. Industrial Outlook 1993* at 40-19 (1993). In recent years, the inland river industry has weathered economic downturns that have hurt the profitability and development of some smaller operators. None could withstand the imposition of punitive damages approaching the scale assessed in this case. Moreover, to expose the industry to vicarious punitive damages in circumstances similar to this case would mean the financial ruin of the alleged wrongdoer, would do nothing to prevent any "reckless" conduct of its employees, and would negatively impact the vital security role newly assigned to the industry by the Marine Transportation Security Act of 2002 ("MTSA") and the regulations implementing that statute. *See* Marine Transportation Security Act of 2002, 46 U.S.C.A. § 70101 *et seq.*, as implemented by the provisions of the Maritime Security regulations, 33 C.F.R. § 101.100 *et seq.* Additionally, this decision is openly contrary to this Court's longstanding precedent precluding the imposition of vicarious punitive damages against vessel owners, and this Court's more recent decisions limiting the reach of judicially-created remedies beyond those provided by statute.

ARGUMENT

1. The Extension Of Punitive Damages To The Clean Water Act Raises The Significant Likelihood That Other Courts Will Impose Punitive Damages Under Other Statutes Which By Their Terms Do Not Provide For Such Damages

The maritime industry, including the inland river industry, is subject to numerous regulatory statutes, both those specifically directed at the maritime industry and those with a broader reach, such as the Clean Water Act ("CWA"), 33 U.S.C. § 1311 *et seq.* Many of those statutes impose penalties for their violation. Although the CWA has express criminal and civil penalties for the violation of its provisions — and no provision allows the award of punitive damages — the Ninth Circuit decided that punitive damages could be awarded under the Act as a "supplement" to the statutory remedies. The notion that courts may expand upon express statutory remedies by creating punitive damage liability — where Congress has not — exposes the inland river industry to the potential for substantial additional liabilities.

It is chilling to consider the detrimental impact if this principle is extended to other statutes affecting ACL and other operators in the inland river industry. It would create an exposure to punitive damages that would be inconsistent with the Court's prior decisions — decisions on which the industry has relied for nearly two centuries. A particularly troubling aspect of the Ninth Circuit's decision, from the standpoint of an inland river towing company like ACL, is the possibility that punitive damages could be imposed under the Jones Act, 46 U.S.C. § 30104 *et seq.*, by a court or jury when such damages are not permitted by long-standing precedent.

Under that Act, "seamen" (the vast majority of ACL's workforce) are not subject to state workers' compensation statutes. Rather, their exclusive remedy for a job-related injury is an action for negligence under the Jones Act, which incorporates by reference the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq*. Unlike workers' compensation statutes that have scheduled amounts of recovery for particular classes of injuries, there is no limit on the amount of damages which may be awarded by the finder of fact under the Jones Act. Damages for pain and suffering often constitute a significant part of such claims. For serious injuries, it is not unusual for verdicts in Jones Act cases to exceed a million dollars.[2]

Unlike cases under the FELA, a seaman's personal injury action typically includes not only a negligence count under the Jones Act, but also a count under the general maritime law for "unseaworthiness" and a count for "maintenance and cure." Both of the latter claims are essentially forms of strict liability for an accident or illness. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 207-08 (1996); *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs, U. S. Dept. of Labor*, 540 F.2d 629, 636 (3d Cir. 1976).

At least to this point, defendants in actions by seamen were not thought to be subject to punitive damages. Indeed, that issue appeared to have been settled in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). This Court in *Miles* explained that only pecuniary damages could be awarded under the Jones Act and therefore, there could be no recovery for loss of society in a seaman death case under the general maritime law. The Court concluded that it "would be inconsistent with [its] place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33.

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[2] Among the damages which a seaman may recover under the Jones Act are past and future lost wages, past and future medical expenses, pain and suffering damages, and damages for loss of life's enjoyments. *See generally* Robert Force & Martin J. Norris, *The Law of Seamen* §§ 30:53-60 (5th ed. 2003).

Although *Miles* did not expressly deal with punitive damages, a number of the lower courts have concluded that such damages are not available under the Jones Act. For the same reasons articulated in *Miles*, these courts also held that punitive damages were not recoverable in actions for unseaworthiness or maintenance and cure. *See, e.g., Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1454-59 (6th Cir. 1993) (punitive damages may not be awarded to survivors of Jones Act seamen in maritime wrongful death claim); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (punitive damages may not be awarded under unseaworthiness claim); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1500-13 (5th Cir. 1995) (*en banc*) (punitive damages may not be awarded for failure to pay maintenance and cure).

The Ninth Circuit's decision in this case is inconsistent with this line of cases. This is not idle speculation or a false jeremiad. Scarcely a month ago, the Eleventh Circuit held that punitive damages *could* be awarded in connection with a seaman's maintenance and cure claim. *See Atlantic Sounding Co., Inc. v. Townsend*, No. 06-13204, 2007 WL 2385928, *3 (11th Cir. Aug. 23, 2007). In so holding, the court concluded that its prior decision in *Hines v. J.L. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), which had permitted an award of punitive damages in connection with maintenance and cure, was not abrogated by *Miles*. *Atlantic Sounding* at **1-3.

The appellant argued that, under *Miles*, the seaman could not "recover punitive damages for a general maritime maintenance and cure cause of action because he would not be able to recover punitive damages--which are non-pecuniary in nature--under the Jones Act." *Id.* at *3. "But this argument," according to the court, "can only be based on the *reasoning* of the *Miles opinion*, not on the *Miles* decision: its holding. *Miles* says and--more important--decides nothing about maintenance and cure actions or punitive damages." *Id.* (emphasis added).

The rationale of the Ninth and Eleventh Circuits invites courts to expand on existing remedies provided by statute to include punitive damages. The Ninth Circuit's opinion relies on the proposition that the law governing the maritime industry needs to be "updated" so that companies that carry on maritime activities have the same exposure as "modern" corporations. But "modern" corporations' exposure to their employees' claims for injuries is limited by workers' compensation acts which do not provide for punitive damages under their statutory schemes. *See* 6 Arthur Larson & Lex. K. Larson, *Larson's Workers' Compensation Law* § 100.03[8] (2007). The inland river industry has no such protection. Indeed, in this area a Jones Act employer is already exposed to a compensatory damages liability that far exceeds any claim that might be made by an employee in other industries. To further expose Jones Act employers to claims for punitive damages, under the Jones Act or the general maritime law doctrines of unseaworthiness or maintenance and cure, could have a devastating impact on the industry.

2. The Imposition Of Vicarious Punitive Damages Under Maritime Law Is A Matter Of Vital Interest To The Nation's Maritime Shippers And The Nation's Commerce Which Relies On Those Maritime Shippers

In permitting the imposition of vicarious punitive damages, the Ninth Circuit has acted contrary to nearly two centuries of well-settled law. As noted in Judge Kozinski's dissent, this Court addressed this very issue in 1818 in *The Amiable Nancy*, 16 U.S. 546 (1818), reaching the opposite result. The Ninth Circuit's decision also conflicts with decisions of other circuits that continue to rely on *The Amiable Nancy*, in holding that, under maritime law, vicarious punitive damages may not be awarded. *See, e.g.*, *In re P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989); *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969). There is little doubt that this decision creates a conflict among the circuits. Judge Kozinski noted that the decision below puts the Ninth Circuit "at loggerheads with every other circuit that has considered this issue." Pet. App. 289a. *See also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-17 (4th ed. 2004) ("admiralty cases deny punitive damages in cases of imputed fault, holding that a principal or master cannot be liable for an agent or servant's wanton or willful misconduct unless it participated in or ratified the wrongful conduct").

"Because the shipping industry is vitally important both to our national commerce and national defense, the Federal Government has maintained a special interest in trying to promote its growth and stability." *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 297 (1968) (Douglas, J., dissenting in part). The Court also observed in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 270 (1972) that the "long experience [of] the law of the sea . . . is concerned with . . . limitation of liability

. . . ." Numerous federal statutes implement that policy by directly limiting the liability of vessel operators, in various contexts, including the carriage of goods (Carriage of Goods by Sea Act, Ch. 229, 49 Stat. 1207 (1936), *reprinted in* note following 46 U.S.C. § 30701, previously codified at 46 U.S.C. app. § 1300 *et seq.*); (Harter Act, 46 U.S.C. § 30701 *et seq.*) and pollution (Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*).

The broadest, and perhaps the most important statute in this regard is the Limitation of Shipowners' Liability Act, 46 U.S.C. § 30501 *et seq.* The Limitation Act "allows a vessel owner to limit liability for damage or injury, occasioned *without the owner's privity or knowledge*, to the value of the vessel or the owner's interest in the vessel." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001) (emphasis added). Numerous cases under the Act make clear that "'[p]rivity or knowledge' *implies some sort of 'complicity* in the fault that caused the accident.'" *See Brister v. A.W.I., Inc.*, 946 F.2d 350, 355 (5th Cir. 1991) (emphasis added). In other words, the vessel owner lacks privity or knowledge when it is not complicit in the conduct that caused the accident, and thus it may limit its liability under the Act to the value of its interest in the vessel plus the value of the pending freight in the transportation movement. *See* 46 U.S.C. § 30505.

The federal courts have not imputed privity or knowledge to a shipowner under the Limitation Act simply because the captain made errors in navigation resulting in a particular loss when the ship owner had no reason to know of the impending error in judgment. As explained in *Tittle v. Aldacosta*, 544 F.2d 752, 756 (5th Cir. 1977), "[i]n the typical situation of a corporate owned ocean vessel the privity and knowledge scrutiny focuses in on whether the shore-based high-level[]

management is aware (or should have been) of the likelihood of the occurrence happening after the ship is underweigh." *See also Coryell v. Phipps*, 317 U.S. 406, 412 (1943) ("One who selects competent men . . . and who is not on notice . . . cannot be denied the benefit of . . . limitation . . . ."). Thus, this Court long ago held that, when the owner is a corporation, "the privity or knowledge must be that of the managing officers of the corporation." *Craig v. Cont'l*, 141 U.S. 638, 646 (1891). Further, a managing officer is "anyone to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business . . . ." *Cont'l Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983) (quoting *The Erie Lighter 108*, 250 F. 490, 494 (D.N.J. 1918)). As one treatise notes, "[i]n general, the men who actually go to sea in the ships, and the shore staff who are of less than managerial ranks, are persons whose knowledge or privity does not affect a corporate shipowner" for the purposes of the Limitation Act. 3 Benedict on Admiralty § 42 (2005).

Moreover, it is difficult, indeed impossible, to justify the imposition of vicarious punitive damages in circumstances such as in this case. The dual purposes of punitive damages are to punish the conduct of the wrongdoer and to deter others from engaging in such conduct. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' . . . By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution."). The imposition of vicarious punitive damages in this case serves neither purpose.

By definition, when *vicarious* punitive damages are imposed, as in this matter, a vessel owner is punished not for its own wrongful conduct, but instead for the wrongful conduct of its agent, even though such conduct was directly contrary to the policies of the vessel owner. As the Fifth Circuit explained in *P & E Boat Rentals*, "[t]here would seem to be little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty." 872 F.2d at 652 (quoting C.T. McCormick, *Handbook on the Law of Damages* § 80 at 282 (1935)). As a number of the decisions addressing this issue have noted, the situation is obviously different when the vessel owner had some complicity in the wrongful act, *i.e.*, it was also to blame for the harm which resulted, such as when "the acts complained of were those of an unfit master and the owner was reckless in employing him." *U.S. Steel Corp.*, 407 F.2d at 1148.

But when the vessel owner took no part in, and had no reason to expect, the reckless or other wrongful acts complained of, the assessment of punitive damages would be little more than an arbitrary rule. Certainly, it offends traditional notions of fairness that require the punishment to be relative to fault. In the circumstances of this case, the vessel owner did nothing to warrant such punishment. Indeed, it took steps to prevent just such conduct that violated its specific rules. Moreover, awarding of vicarious punitive damages can hardly have any effect as a deterrent because the acts giving rise to the award were not those of the vessel owner in the first place. If the captain failed to follow the owner's express directives, exactly what conduct of this or other vessel owners would be deterred?

The Ninth Circuit's decision has further serious implications for vessel owners in planning their business operations because it casts doubt on an owner's ability to effectively insure against the risk of vicarious punitive damages. As one admiralty treatise explains, "[i]n the modern world of insurance reimbursement for losses, open ended liability would make the efficient administration of a system of third party liability insurance virtually impossible." Schoenbaum, *supra* at § 14-7. Whether punitive damages may even be insured against is governed by state law because there is no general maritime rule addressing this issue. *See Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 668 (5th Cir. 1992) (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)). To be sure there is considerable variation among the states as to whether punitive damages are even insurable and under what circumstances. A number of states prohibit insurance against punitive damages as against public policy. *See* 7 Couch on Insurance 3d at § 101:28 (2006). Thus, the Ninth Circuit's decision presents vessel owners with a dilemma. On the one hand, they may be held liable for punitive damages for the wrongful conduct of an employee undertaken without the vessel owner's complicity and even contrary to the vessel owner's well-enforced policies (at least in the Ninth Circuit). On the other hand, the vessel owner, which likely operates in multiple jurisdictions, may not be able to obtain insurance for such losses.

Even if public policy in a particular state allowed insurance coverage for vicarious punitive damages, it may be difficult, if not impossible, to obtain such coverage at a reasonable price. Given the open-ended nature of such liability, the only standard that one can say with assurance applies in each state is the limit imposed by the Due Process Clause. That provision is hardly subject to informed underwriting. It is doubtful that insurers would have any rational basis on which to set a fair premium.

There may be public policy reasons to say that vessel owners should not be allowed to insure against their own wrongful conduct, and must instead face the consequences of such actions, even bankruptcy. But those policy reasons clearly do not apply in the context of vicarious punitive damages.

The Ninth Circuit's decision approving the imposition of vicarious punitive damages under maritime law raises serious issues for ACL and other companies that operate vessels in commerce on the nation's inland waterways. The Ninth Circuit itself acknowledged that its ruling is contrary to decisions of the other circuits to address the issue of vicarious punitive damages.

One of the hallmarks of this Court's admiralty jurisprudence is to establish a uniform body of admiralty law. *See, e.g.*, *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Obviously, there is no uniformity if the imposition of vicarious punitive damages depends on where the accident happened, with a vessel sailing into and out of jurisdictions where vicarious punitive damages are allowed. Even more troubling, the broad venue provisions applicable to claims in admiralty means that the availability of vicarious punitive damages may depend more on where the plaintiff chooses to file suit than where the events giving rise to the claim occurred. The imposition of vicarious punitive damages should not turn on the fortuities of geography.

3. Allowing Punitive Damages To Be Assessed Against The Inland Marine Transportation Industry Would Violate Public Policy By Threatening To Weaken The Role Of That Industry In Matters Of National Security

Historically, Congress and the Court have adopted measures designed to encourage maritime commerce for both economic and national security reasons. Thus, legislation such as the Limitation of Shipowners' Liability Act and decisions such as *Miles* have treated the maritime industry in a manner distinct from other industries, imposing both burdens and benefits unique to the maritime industry. The Ninth Circuit's decision suggests that these considerations are quaint relics of the nineteenth century that are no longer appropriate for "modern" corporations engaged in maritime commerce.

But Congress has not seen fit to withdraw its support of the industry for national defense reasons. Indeed, as part of the legislative response to the war on terror, Congress has imposed *new* duties on the maritime industry. The unfettered ability of courts to "supplement" statutory remedies by imposing vicarious liability for punitive damages threatens the ability of the maritime industry to meet these national security responsibilities.

The Marine Transportation Security Act of 2002 ("MTSA"), 46 U.S.C.A. § 70101 *et seq.*, as implemented by the provisions of the Maritime Security regulations, 33 C.F.R. § 101.100 *et seq.*, requires ACL and other inland marine transportation operators to assist the U.S. Coast Guard in national maritime security and the protection of the country's inland waterways, marine terminals, barge fleeting facilities, and vessels, including towboats and barges, from the threat of terrorism. The overall objective of the U.S. Marine Transportation System, of which these inland facilities and vessels comprise a large part, is the "safe, secure, environmentally sound movement of goods, people, and military assets in the most efficient and economically effective manner possible." Subcommittee on Coast Guard and Maritime Transportation, *Hearing on Implementation of the Maritime Transportation Security Act*, http:www.house/gov/transportation/cgmt/06-09-04/06-09-04memo.html (last visited June 25, 2004).

The provisions of the Act support this objective in connection with the U.S. Coast Guard's security mission, which is "to protect the U.S. maritime domain and the U.S. Marine Transportation System and deny their use and exploitation by terrorists as a means for attacks on U.S. territory, population, and critical infrastructure." *Id.* Toward the accomplishment of this mission, the Act requires, *inter alia*, that owners and operators who are subject to the Act give notice of suspicious activity,[3] breaches of security and the occurrence of transportation security incidents, which are defined as those "resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area." 33 C.F.R. § 101.105. Specifically, these owners and operators, which include ACL and other inland marine transportation operators, are required "without delay" to report even "activities that *may* result in a transportation security incident." 33 C.F.R. § 101.305(a) (emphasis added). These obligations to be vigilant with regard to suspicious activities, breaches of security and transportation security incidents place ACL and other inland marine transportation operators in the position of being the "eyes and ears" of the U.S. Coast Guard and this country.[4]

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[3] Through its America's Waterway Watch program, the Coast Guard requests that all who use our country's waterways, specifically including towboat operators, watch for and report suspicious activity. Activities which the Coast Guard specifies as being suspicious include, but are not limited to, the following: People who appear to be engaged in surveillance of any kind, such as taking photos or asking questions; lights flashing between boats; unusual night operations; unattended vessels or vehicles in unusual locations; transfer of people or things between boats or between boat and shore; unusual number of people on board a vessel. *See* www.americaswaterwaywatch.org (last visited Sept. 16, 2007).

In general, the Act, through its regulations, requires certain segments of the maritime industry "to take significant measures to increase the security of vessels [and] shore-side facilities . . . ." Subcommittee on Coast Guard and Maritime Transportation, *supra*. In particular, those regulations impose specific requirements, such as designating and using security personnel; implementing drill and exercise procedures; maintaining certain records; conducting security training of personnel; employing security measures applying to MARSEC levels; using certain security systems and equipment; devising plans for responding to transportation security incidents; implementing security protocols for controlling access, handling cargo and monitoring security procedures; and preparing and implementing vessel and facility security plans. *See generally* 33 C.F.R. § 104.100 *et seq*. (Maritime Security: Vessels) and § 105.100 *et seq*. (Maritime Security: Facilities).

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[4] In acknowledging this important role of the maritime industry, Rear Admiral R.F. Duncan of the Coast Guard has requested members of the industry to remain vigilant and to let their employees know "they are leading the fight in hardening our ports and the United States against terrorist activities." U.S. Coast Guard Eighth District, *Port Security Bulletin* (May 28, 2004).

Barge fleeting facilities, which form an integral part of the inland marine transportation industry, are subject to these security measures and are singled out in the regulations as, at their own expense, having to meet additional security requirements, depending upon the particular MARSEC level. For example, at MARSEC Level 1,[5] a barge fleeting facility must designate one or more restricted areas for segregating barges containing certain dangerous cargoes from all other barges at the facility, maintain a list of vessels and cargoes within the designated area, and ensure that a minimum of one towing vessel for every 100 barges is available to service the fleeting facility. 33 C.F.R. § 105.296(a)(1)-(3). At MARSEC Level 2, all Level 1 requirements must be met, plus security personnel must be assigned to monitor or patrol the designated restricted area within the barge fleeting facility. 33 C.F.R. § 105.296(b). At MARSEC Level 3, the requirements for Levels 1 and 2 must be met, plus the facility must ensure that both land and waterside perimeters of the designated restricted area within the barge fleeting facility are continuously monitored or patrolled. 33 C.F.R. § 105.296(c).

In addition, the Department of Homeland Security, in connection with the U.S. Coast Guard, has now promulgated in final form the Guidance and Implementation Measures for the new Transportation Worker Identification Credential ("TWIC") Program. Once implemented, anticipated to be no later than September 25, 2008, the maritime industry will have to absorb even more exacting duties and higher costs. The specific purpose of the TWIC rule is to "reduce risk and mitigate the effects of a transportation security incident

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[5] Unless otherwise directed, each facility and vessel subject to the Act is required to operate at MARSEC Level 1. 33 C.F.R. § 101.200(b).

(TSI)." United States Coast Guard Navigation and Vessel Inspection Circular No. 03-07 at § 4b (July 2007), *available at* http://www.americanwaterways.com/security/finaltwicnvic07-02-07.pdf.

Marine employers will be required to have all vessel personnel and employees needing unescorted access screened for compliance with the standards imposed by the new regulations. Then, the marine industry will have to be certain that all of its employees, as well as third party entrants, who need unescorted access to secured areas, have the proper credentials. If not, the Act requires a personal escort with the means to respond if the allowed individual is observed to be engaged in unauthorized activities. Finally, the maritime industry will have to be certain that all of its employees are trained and knowledgeable about each aspect of this new process. ACL presently estimates that it will incur costs in excess of $1.2 million to comply with these requirements at the outset. Once again, this is a vital link in the Homeland Security Plan and one that has expensive and expansive requirements placed on the maritime community.

By complying with the Act, inland marine transportation owners and operators become valuable participants in homeland security in furtherance of the Coast Guard's security mission. This comes at a great burden to each of the companies in this industry. Time and money has to be expended every year to comply with not only the security measures themselves, but also on the training of every single maritime employee regarding the requirements. Without the involvement of this industry, a significant measure of U.S. population and environmental interests all along the inland waterways of this country would be more vulnerable to terrorist attack.

The effective participation of the inland marine transportation industry in the security of the nation's inland waterways could be seriously limited, however, by the imposition, or even the threat, of vicarious punitive damages being awarded by courts or juries in maritime cases. The inland marine industry, which, as noted above, is generally comprised of relatively small operators with limited resources, is financially vulnerable to large assessments.

For example, the two largest liquid cargo barge operators in the inland marine industry are ACL and Kirby Corporation. Informa Economics, Inc., *Barge Fleet Profile, Inland River Barges for the Mississippi River System and Connecting Waterways* 12 (March 2007). Punitive damages such as those being challenged here by Exxon in the amount of $2.5 billion would exceed the market capitalization of either of these two operators.[6] And, because insurance to cover punitive damages is likely not available (*see supra* at 10), even the assessment of punitive damages with a cap would financially harm industry owners or operators, perhaps driving those affected into bankruptcy or out of business.

The unpredictable nature of punitive damages could discourage the participation of new businesses in the industry or discourage current participants from investing in the growth of their own businesses. When the number of inland marine transportation owners and operators could be reduced through financial devastation, the harm which punitive damages would impose on the inland river industry would limit the industry's involvement, and therefore its effectiveness, in being the "eyes and ears" of the Coast Guard in support of U.S. inland maritime security. Consequently, allowing vicarious punitive damages to be assessed against the inland marine transportation industry would be out of step with both historic and present public policy by threatening to weaken the role of that industry in matters of national security.

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[6] According to the most recent 10-Q filed by ACL (for the period ended June 30, 2007) the company had 54,373,252 shares issued and outstanding as of July 20, 2007, when its stock closed at $23.19 per share, for a market capitalization of $1.26 billion. Kirby Corporation's most recent 10-Q (also for the period ended June 30, 2007) states that it had 53,380,000 shares outstanding as of August 2, 2007 when its stock closed at $41.52 per share, for a market capitalization of $2.21 billion.

CONCLUSION

The Ninth Circuit's decision raises issues of national significance to companies operating in the inland marine industry, such as ACL. Allowing judicially created "supplemental" remedies for statutory violations and the imposition of vicarious punitive damages in this maritime context is directly at odds with prior decisions of this Court, as well as the Ninth Circuit's sister courts. ACL respectfully requests that, given the significance of these issues and the need for uniformity in the maritime law, the Court grant the petition for a writ of certiorari.

Dated September 20, 2007

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EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

—v.—

GRANT BAKER, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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AMERICAN INSTITUTE OF MARINE UNDERWRITERS' BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The American Institute of Marine Underwriters ("AIMU") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Exxon Shipping Company (now known as SeaRiver Maritime, Inc.) and Exxon Mobil Corporation (collectively, "Exxon").

INTEREST OF *AMICUS CURIAE*[1]

AIMU is a non-profit trade association representing the ocean marine insurance industry in the United States as an advocate, promoter, source of information and center for education. (*see* www.aimu.org). AIMU represents 49 marine insurance companies in the United States. Those companies underwrite the vast majority of the ocean marine risks insured in the United States.

The risks insured by AIMU's members include physical damage to vessels, liabilities of shipowners including pollution liabilities[2] and, where permitted by public policy[3] and not excluded by policy wording, punitive damages and penalties. In 2006, AIMU's members underwrote marine insurance policies with collective total premiums of approximately $2.5 billion.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* declares that this brief was not authored in whole or in part by counsel for a party and certify that no one other than *amicus curiae* or counsel contributed monetarily to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), the Parties have consented to the filing of this brief. This consent, in the form of a blanket consent from counsel for petitioner and a letter from counsel for respondents, has been filed with the Clerk of this Court.

[2] While AIMU understands that Petitioners' liability for any punitive damages in this case will be uninsured, and no AIMU member has a pecuniary interest in the outcome of this litigation, AIMU and its members have a strong interest in the impact this decision will have on future cases.

AIMU works in conjunction with the United States government and international groups to monitor and ameliorate the legal environment for the marine insurance industry and the broader maritime industry generally. AIMU is the forum for action on the important and timely issues that affect United States marine insurers, reinsurers and the maritime community at large.

This brief focuses on the key issue presented in the petition for a writ of certiorari: whether the punitive damages award imposed on Exxon was permissible and proper under federal maritime law. The resolution of this question is of major significance not only to Exxon but to all participants in maritime commerce, including marine insurers. Those insurers (the members of AIMU) provide critical support for the maritime industry; without marine insurance, most carriers and shippers of cargoes would simply be unable to operate.

AIMU supports Exxon's petition for a writ of certiorari because the resolution of this litigation will directly impact AIMU's members. The Court has the opportunity in this case to resolve a conflict among the Circuits and to clarify the standards for the assessment of punitive damages in the maritime context. AIMU's members can operate efficiently and provide the maritime industry with vital insurance products only if the rules imposing liability are clear and predictable, allowing the parties to rationally decide whether and how to insure carriers' potential liabilities.

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[3] In most United States jurisdictions, courts have determined that insurance coverage of punitive damages is not contrary to public policy. Lorelie S. Masters, *Punitive Damages: Covered or Not?*, 55 Bus. Law 283, 294 (1999).

AIMU therefore has a keen interest in the resolution by this Court of the essential issue in this case, and AIMU urges the Court to grant Exxon's petition.

STATEMENT

The underlying facts are set forth in Exxon's Petition and are therefore only briefly summarized here. In 1989, the *Exxon Valdez* ran aground on a reef in Prince William Sound, Alaska, resulting in a spill of 32 Kilotons of crude oil. Exxon engaged in prompt and extensive cleanup efforts to remove oil from the water and restore natural resources, years before the commencement of the trial in this case. Moreover, Exxon compensated the victims of the spill and paid substantial state and federal penalties. Nonetheless, under the jury instructions given by the trial court in this case, the jury was allowed to assess punitive damages based solely on the reckless conduct of the master of the vessel.

The question presented here is whether punitive damage awards are permissible under federal maritime law and, if so, what limitations are there on such awards. The First, Fifth, Sixth and Seventh Circuits have all held that punitive damages may not be imposed against the owner of a vessel for the tortious acts of the master or crew unless the owner "directed," "countenanced," or "participated in" the wrong. *See CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995); *In re P&E Boat Rentals*, 872 F.2d 642, 652 (5th Cir. 1989) (*en banc*); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896); *see also The Amiable Nancy*, 16 U.S. 546, 559 (1818). The Ninth Circuit, however, departed from this tenet of federal maritime law, first enunciated almost 200 years ago and upheld by every other circuit confronting this issue, and instead allowed the imposition of vicarious liability for punitive damages based on the misconduct of a vessel's master or "managerial employee." *Protectus Alpha Nav. Co. v. North Pac. Grain Growers*, 767 F.2d 1379, 1386 (9th Cir. 1979). The Ninth Circuit also departed from decisions of this Court and other Circuits when it held that punitive damages may be awarded in the context of an oil spill even though Congress made no provision for such punitive damages in the Clean Water Act or in any other federal law. *See Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998); *Miles v. Apex Marine Corp.*, 451 U.S. 304 (1981); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618 (1978). Finally, the Ninth Circuit failed to perform its duty as a maritime court by refusing to articulate the standards of maritime law which should govern and limit the size of punitive damages awards, independently of the due process limitations imposed by the Constitution. *See BMW of North America v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

ARGUMENT

The current conflict between the Ninth Circuit's decision below and the decisions of the other circuits that have addressed the issue of punitive damages under federal maritime law has resulted in a significant erosion of the clarity and predictability on which the members of AIMU depend to provide insurance that is vital to maritime commerce. It is therefore critical to marine insurers that the Court resolve this conflict.

I. The Decision Below Will Result In Uncertainty As To Punitive Damage Awards In The Maritime Context And Consequent Undue Burdens On Marine Insurers And Their Insureds.

The potential for massive, unpredictable punitive damage awards imposes an unreasonable and excessive burden on the maritime industry and its insurers. From the perspective of AIMU's members, there are two potential consequences of the Ninth Circuit's decision in this case: marine insurers will be compelled to increase premiums that will consequently be passed on to their insured's customers, or marine insurers will explicitly exclude coverage of punitive damages altogether. Both of these consequences could have a severely adverse effect on maritime commerce.

The marine insurance industry relies on effective risk management in order to set premiums and terms of coverage. Although waterborne shipping entails risks, these risks can be managed when they are predictable. However, when potential punitive damages awards are arbitrary and unpredictable, the ability to effectively engage in risk management becomes extremely difficult, if not impossible. And the insurers of such risks cannot efficiently or effectively underwrite liability coverages without clear standards for punitive damages awards.

The Court below has ignored fundamental objectives of federal maritime law: uniformity, predictability and avoidance of undue burdens on maritime commerce. Federal maritime law provides limited liability for shipowners and fair and reasonable compensation for maritime injuries, and it promotes settlement and judicial economy. Each of these goals is undermined by massive, unpredictable punitive damages awards. Such awards punish maritime commerce rather than protect it. Such awards expand shipowners' potential liability rather than limit it. They have nothing to do with compensation for injury and they hinder rather than encourage settlement and judicial economy. Moreover, the Court below has ignored the historic aversion to the imposition of punitive damages under federal maritime law.

If the standards for the assessment of punitive damages in the maritime context are not clarified by this Court, marine insurers will be unable to calculate premiums for polices that include coverage for punitive damages. As a result, such coverage is likely to become prohibitively expensive or unavailable. Thus, the decision below not only directly impacts the members of AIMU, but it will have an impact on the cost and availability of marine insurance coverages in the United States. Those coverages may be required by the participants in the maritime industry at large, or by their financiers, and thus the decision below, if not reversed, will have a chilling effect on maritime commerce.

Even when claims for punitive damages are not successful, without clear limitations on such awards, those claims will create unnecessary difficulties with risk management, defense and the settlement process. Litigation costs will increase for both the insurers and insureds as well as the courts. *Cf. In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1287-88 (2nd Cir. 1991) (explaining the policy considerations that support denial of punitive damages under the Warsaw Convention).

II. Separate And Apart From Insurability, Marine Insurers Have A Direct Interest In Clarifying Standards For Punitive Damage Awards.

The uncertainty and unpredictability that would result from the Ninth Circuit's decision also impacts AIMU's members directly, as in many cases, marine insurers are themselves subject to claims for punitive damages. In two of the eight cases in which this Court has addressed punitive damages during the last twenty years, the defendant who was facing a massive punitive damages award was an insurer. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Marine insurers therefore share the same interest in this case as Exxon and other participants in the maritime industry—to clarify the standards for awarding punitive damages. *See* Exxon's Petition for a Writ of Certiorari, dated August 20, 2007, at III-A.

Punitive damages should not be awarded in an irrational and arbitrary manner. Rather, there should be clear guideposts delineating how such damages should be awarded in order to avoid grossly excessive verdicts. *See State Farm Mut. Auto Ins. Co.*, 538 U.S. at 416. Punitive damages should be awarded only if the defendant's conduct is so reprehensible as to necessitate the imposition of further sanctions to achieve punishment or deterrence. *Id.* at 419.

Ocean marine insurers provide vital insurance coverage for participants in the maritime industry. Without such insurance, maritime commerce would suffer immeasurably. A marine insurer faced with a grossly excessive punitive damages award could, as a result, cease underwriting a particular class of business, or cease underwriting marine insurance altogether.

The ocean marine insurance industry, like the maritime industry as a whole, requires a standard and uniform rule as to punitive damages. AIMU therefore implores this Court to grant Exxon's petition for a writ of certiorari and clarify federal maritime law in the area of punitive damages. The petition should be granted so that this Court can articulate uniform standards for punitive damages awards under federal maritime law. Like Exxon and other maritime industry participants, marine insurers need clear, simple, rational standards to avoid unlimited and arbitrary discretion in the award of punitive damages.

This case provides the Court with the opportunity to provide uniformity, certainty and predictability of risk for the marine insurance industry and the maritime industry at large.

CONCLUSION

For the foregoing reasons and as set forth in Exxon's petition, the petition for a writ of certiorari should be granted.

Dated: September 20, 2007

Respectfully submitted,

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AMICUS
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BRIEF

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Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN TORT REFORM ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE WESTERN STATES PETROLEUM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The American Petroleum Institute ("API") is a nationwide, non-profit, trade association headquartered in Washington, DC, that represents over 400 members engaged in all aspects of the petroleum and natural gas industry. API members are both owners and charterers of vessels for transporting oil and oil products. As such, they are impacted by, and thus have a strong interest in, the law applying to punitive damages awards in the maritime context. Moreover, as businesses engaged in the exploration, production, refining, and distribution of petroleum products, API members are impacted by punitive damages beyond the maritime context.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a $635 billion enterprise and accounts for ten cents of every dollar in U.S. exports. ACC members are frequently the subjects of suits seeking massive amounts of punitive damages. Accordingly, they have a strong interest in the fair administration of such damages.

The American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has filed numerous amicus curiae briefs in cases before this Court concerning important issues of liability, including the constitutional restrictions on punitive damages awards. ATRA's members have a substantial interest in the development of sound legal principles governing the power of juries to mete out punishment in civil litigation.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioners have given blanket consent to any person seeking to file an *amicus* brief. Respondents' letter consenting to the filing of this brief has been filed contemporaneously with this brief.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. NAM has filed numerous amicus curiae briefs addressing the constitutional restrictions on punitive damages awards. Because NAM's members have frequently been the subject of suits seeking large amounts of punitive damages, NAM has a significant interest in the sound administration of such damages.

The Western States Petroleum Association ("WSPA") is a non-profit trade association that represents approximately two dozen companies that explore for, develop, produce, refine, market and transport petroleum and petroleum products in the six western States of Arizona, California, Hawaii, Nevada, Oregon and Washington. WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically and environmentally responsible. On occasion, WSPA members are named as defendants in suits seeking punitive damage awards, sometimes in the maritime context. Accordingly, WSPA members have a strong interest in the legal principles governing punitive damages and the issues presented in the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici fully support Exxon's request for review and reversal on the liability issues presented in the petition. Because *amici*'s interests transcend the maritime context, however, we focus in this brief on why the Court should grant review of the excessiveness issue. The Ninth Circuit's treatment of that issue is emblematic of a growing misperception among reviewing courts that the Constitution—and, in this case, maritime law—never requires a punitive award to be less than the compensatory damages no matter how fully the compensatory damages satisfy the State's interests in deterrence and punishment.[2] That misperception grows out of a failure to recognize that large compensatory damages (and other costs borne by the defendant as a result of its tort) can and often do punish and deter in their own right and that the ultimate question in any constitutional (or maritime law) inquiry must be whether the *absolute* amount of the penalty is excessive in relation to the State's objectives.

The present case perfectly demonstrates this principle. As the Ninth Circuit acknowledged, Exxon's "conduct was not intentional and [Exxon] promptly took steps to ameliorate the harm it caused." Pet. App. 40a. Moreover, as the Ninth Circuit observed in its first opinion but seems to have forgotten in its subsequent opinion, "[d]epending on the circumstances, a firm might reasonably, were there no punishment, be deterred, in some cases but not all, by its actual expenses." *Id.* at 99a. Because Exxon gained *nothing* from its tort yet lost its valuable cargo and had to pay over $3.4 *billion* in damages, fines, and remediation expenses—not to mention suffering a public relations disaster of vast magnitude—it is hard to imagine a case in which punitive damages were less necessary to deter the defendant and others from committing similar lapses of judgment in the future. See *id.* at 100a (observing that "if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him 'only'

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[2] Throughout this brief, we use the word "State" as a short-hand for "governmental"; as in other cases that arise under federal law, there technically are no "State" interests in a case that arises under maritime law.

$10,005 and he was not otherwise punished" and noting that "[t]his case is like the ink on the rug example").

Yet on the basis of its belief that the degree of reprehensibility of Exxon's conduct was in the "mid range" (*id.* at 31a)—itself a highly questionable proposition—the Ninth Circuit concluded that a punishment in the mid range of single-digit ratios was constitutionally permissible (*id.* at 40a). That this formula yielded a record-smashing $2.5 billion exaction for non-intentional, non-profit-motivated conduct seems to have been entirely lost on the Ninth Circuit. This case is thus an ideal one in which to refocus the lower courts on the central mission of determining whether the *absolute* size of the punitive award is excessive in relation to the State's legitimate interests in deterrence and retribution.

That mission is not always just a constitutional one; for example, in this case maritime law also places substantive limits on the permissible amount of punitive damages. Because the excessiveness inquiry under maritime law is likely to involve many of the same considerations as the due process analysis, we do not separately discuss maritime law in this brief. However, we do join Exxon in urging the Court to review whether the $2.5 billion punitive award is excessive under *both* maritime law *and* the Due Process Clause.

ARGUMENT

Over the past decade and a half, this Court repeatedly has expressed concern about punitive damages awards that, "today, may be many times the size of such awards in the 18th and 19th centuries." *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064 (2007). Alarmed by the increasingly large exactions being imposed by juries, the Court has found itself compelled to remind bench and bar that a $2 million punitive award is "tantamount to a severe criminal penalty" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996)) and to explain that such a substantial exaction "cannot be justified on the ground that it [is] necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal" (*id.* at 584). See also *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419-20 (2003) ("a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further").

To assist courts in determining when a punitive award is unconstitutionally excessive, the Court identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of the punitive to the compensatory damages (or potential harm in the unusual circumstance of a thwarted attempt); and (iii) the difference between the punitive damages and the legislative and/or administrative penalties [illegible] comparable misconduct. *BMW*, 517 U.S. at 574-85.

Ironically, in many cases the guideposts have actually led reviewing courts astray. In applying (or, more accurately, misapplying) the guideposts, the Ninth Circuit and other lower courts have completely lost sight of the concerns that caused the Court to articulate and then refine the guideposts in the first place. Failing to recognize that the ultimate inquiry is whether the *absolute* amount of punishment is excessive, these courts have (i) viewed reprehensibility in the abstract, making no effort to determine whether the conduct was egregious enough to warrant the specific amount of punishment at issue; (ii) treated the ratio guidepost as a safe harbor that shields from invalidation punitive awards that are single-digit multiples of compensatory damages—without regard to whether the compensatory damages and other costs borne by the defendant as a result of its conduct already effect significant deterrence and punishment; and (iii) turned the third guidepost into a virtual nullity by allowing punitive awards that are millions (or, in this case, billions) of dollars greater than the amount that an expert regulator could or would impose as a fine after conducting a thorough investigation.

In short, although civil trials lack the safeguards of criminal proceedings, and civil juries lack the expertise, investigative resources, time, and perspective of regulatory agencies, courts now are routinely upholding punitive awards that far exceed the fines that could or would be imposed in a criminal trial or administrative proceeding. Review is urgently needed to correct this anomaly and to remind the lower courts that the guideposts are meant to assist in determining whether the *absolute* amount of a punitive award is excessive in relation to the State's interests in retribution and deterrence.

A. This Court Has Repeatedly Expressed Concerns About Large Punitive Awards And Identified Several Risks That Require Caution In The Imposition Of Punitive Damages.

This Court has long cautioned that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). In recent years, the Court has either struck down or articulated doubts about large punitive awards on several occasions.

In *BMW*, the Court held that a $2 million punitive award was unconstitutionally excessive, explaining that "a lesser deterrent" would adequately advance the State's interests in deterring misconduct. 517 U.S. at 584. Five years later, the Court expressed grave doubts about the sustainability of a $4.5 million punitive award, observing that the court of appeals' ruling upholding the exaction was based on "a series of questionable conclusions by the District Court" that "likely" could not be sustained on a "thorough, independent review" of the record. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). And just two years later, the Court held a $145 million punitive award unconstitutionally excessive, stating that "a more modest punishment for this reprehensible [fraudulent] conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *State Farm*, 538 U.S. at

419-20. In all, the Court suggested that "a punitive damages award at or near the amount of compensatory damages"—$1 million—was likely the constitutional maximum. *Id.* at 429.[3]

In each of these cases—as well as several of their predecessors—the Court articulated a range of concerns about punitive damages.

First, although punitive damages "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417.

Second, civil juries are typically subject to few constraints, lack the expertise of regulators, and may even harbor "'biases against big businesses.'" *Ibid.* (citation omitted). This creates a severe risk that the jury will choose an amount of punitive damages that bears little relation to the "circumstances of the defendant's conduct and the harm to the plaintiff" (*id.* at 425), that is "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585), and that dwarfs "the size of such awards in the 18th and 19th centuries," even after adjusting for inflation (*Philip Morris*, 127 S. Ct. at 1064).

Third, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose[,] constitutes an arbitrary deprivation of property," and violates "'elementary notions of fairness.'" *State Farm*, 538 U.S. at 417 (quoting *BMW*, 517 U.S. at 574); see also *Philip Morris*, 127 S. Ct. at 1062 (emphasizing the risk that a State's punitive damages system "may deprive a defendant of fair notice of the severity of the penalty that a State may impose" and "threaten arbitrary punishments, *i.e.*, punishments that reflect not an application of law but a decisionmaker's caprice") (internal quotation marks, ellipses, and citations omitted).

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[3] More recently, the Court granted certiorari in *Philip Morris USA v. Williams* to consider whether: (i) the Due Process Clause prohibits juries in individual cases from punishing defendants for injuries suffered by non-parties; and (ii) the $79.5 million punitive award in that case was unconstitutionally excessive. 127 S. Ct. at 1062. Because the Court ruled for Philip Morris on the first issue, it did not need to reach the excessiveness issue. *Id.* at 1065.

Fourth, if a punitive award is "sufficiently large," it may, in practical effect, "impose one State's (or one jury's) policy choice * * * upon neighboring States with different public policies." *Philip Morris*, 127 S. Ct. at 1062 (internal quotation marks and citation omitted).

Because of these concerns, the Court "has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Ibid.* Most important for present purposes, the Court has held that the Due Process Clause prohibits the imposition of punitive damages in amounts that are excessive in relation to the State's interests in retribution and deterrence. More particularly, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.[4] And even when it is determined that *some* amount of punitive damages is necessary, the question then becomes "whether a lesser deterrent would have adequately" served the State's interests. *BMW*, 517 U.S. at 584; see also *State Farm*, 538 U.S. at 419-20 ("a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further").

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[4] As this Court has explained, "[p]unitive damages aside," "[d]eterrence * * * operates through the mechanism of damages that are *compensatory*." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-07 (1986); see also 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) ("if the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages").

This required inquiry perforce necessitates careful scrutiny of the absolute amount of the punitive damages. To assist courts in conducting that scrutiny, the Court identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of the punitive damages to the harm to the plaintiff (typically measured by the compensatory damages); and (iii) the civil fines authorized or imposed for similar conduct. *BMW*, 517 U.S. at 574-85.

The first guidepost requires courts to ask whether the conduct is heinous enough to warrant the amount of punishment imposed. In other words, the "punishment should fit the crime." *Id.* at 575 n.24. It therefore is not sufficient to ask "Is the conduct bad?"; the conduct has to be egregious to warrant any punitive damages in the first place. Moreover, while necessary, it does not suffice to ask "How does this conduct compare to other punishable conduct?"[5] Instead, for this guidepost to serve as a constraining force, courts must also ask whether "the extraordinary size of the award * * * is explained by the extraordinary wrongfulness of the defendant's behavior" (*id.* at 595 (Breyer, J., concurring)).

The second guidepost is designed to ferret out punitive awards that are disproportionate to the harm caused by the misconduct. Whether a punitive award will be deemed disproportionate is a function of the amount of compensatory damages and the degree of reprehensibility of the conduct. While "few awards exceeding a single-digit ratio between punitive and compensatory damages * * * will satisfy due process," *the converse is not necessarily true*: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

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[5] Many courts do not do even this much. See, *e.g.*, *Action Marine, Inc.* v. *Cont'l Carbon Inc.*, 481 F.3d 1302, 1320 (11th Cir.), petition for cert. filed (U.S. Aug. 24, 2007) (No. 07-257).

Of course, in many cases "the ratio [of punitive damages to harm] will be within a constitutionally acceptable range, and remittitur will not be justified *on this basis*." *BMW*, 517 U.S. at 583 (emphasis added). But that in no way means that punitive awards that are modest multiples of the compensatory damages are immune from invalidation. As this Court has emphasized, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426. An award that is a low single-digit multiple of the compensatory damages might not be disproportionate, but it still could be unreasonable in light of the facts and circumstances, which include the extent to which the compensatory damages and other financial and reputational consequences incurred by the defendant as a result of its conduct already serve to punish and deter.

The third guidepost addresses three significant concerns. First, principles of comparative institutional competence warrant giving "substantial deference" to "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (internal quotation marks omitted). Second, the magnitude of applicable civil penalties bears on whether the defendant had "fair notice" of the size of the punishment to which it could be subjected. *Id.* at 584. Finally, this guidepost accounts for the fact that juries lack the expertise, perspective, and resources of expert regulatory agencies. When exercising their sanctioning powers, regulatory agencies have the time, expertise, and resources to conduct a full and impartial investigation. They also have knowledge of the regulatory backdrop and of the spectrum of punishable conduct, which enables them to "assure the uniform general treatment of similarly situated persons that is the essence of law itself" (*Cooper Indus.*, 524 U.S. at 436 (internal quotation marks and citation omitted)). Consideration of the penalties provided by statute and, even more importantly, the expert agency's actual fining practice, is therefore essential in determining whether the punitive damages exceed the amount reasonably necessary to punish and deter. As Justice Breyer has aptly put it in an analogous context, it is "anomalous" to "grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring).

Used properly, the three guideposts are well suited to their assigned task of assisting courts in determining whether a punitive award is excessive in relation to the State's legitimate interests in retribution and deterrence. Regrettably, this case and others reflect that many lower courts have lost the forest by focusing too much on the trees and need further guidance on the purpose and proper application of the guideposts.

B. In Applying The Guideposts, The Ninth Circuit And Other Courts Have Lost Sight Of The Concerns Underlying This Court's Punitive Damages Cases.

If any case is a poster child for gratuitous punitive damages, it is this one. The Ninth Circuit never once considered whether a $2.5 *billion* exaction—over twice the highest punitive award ever upheld anywhere[6]—is necessary to deter Exxon and others from making the misguided decision to allow a supposedly recovered alcoholic to captain a tanker. Had it asked that question, the court would have had to conclude (as it appeared to conclude five years earlier) that the more than $3.4 *billion* that Exxon already had paid in damages, settlements, fines, and remediation costs more than sufficed to punish it for its bad judgment and deter it and others from taking similar risks in the future. See Pet. App. 100a ("Whether cost of cleanup and compensatory damages, damage to the vessel, and lost oil deters bad future acts depends on whether it greatly exceeds the expense of avoiding such accidents, not whether the amounts are compensatory or punitive. * * * Because the costs and settlements in this case are so large, a lesser amount is necessary to deter future acts.").

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[6] The previous record was the $1.2 billion in punitive damages awarded under Philippine law to a class of approximately 10,000 Philippine nationals whose relatives were "tortured, summarily executed or 'disappeared'" by the Marcos regime. See *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 771-72, 780-82 (9th Cir. 1996).

Instead, the Ninth Circuit came up with the $2.5 billion figure by reasoning that (i) Exxon's conduct was in the "mid range" of the spectrum of reprehensibility (*id.* at 31a); (ii) conduct in the "mid range" of the spectrum supports a punitive/compensatory ratio in the mid-single digits (*id.* at 38a-40a); and (iii) the only role of the third guidepost is to determine whether the conduct is "dealt with seriously under state civil or criminal laws"—ignoring that the punishment was *billions* of dollars greater than the fines actually imposed on Exxon (*id.* at 41a). In so doing, the Ninth Circuit misapplied each of the three guideposts in ways that are becoming increasingly common among reviewing courts.

1. Reprehensibility

After analyzing each of the five reprehensibility factors identified in *State Farm* and considering Exxon's substantial post-grounding efforts to mitigate the harm, the Ninth Circuit concluded that the degree of reprehensibility of Exxon's conduct was in a "mid range." Pet. App. 22a-31a. But a conclusion that conduct is in the middle of the spectrum of reprehensibility, even if correct,[7] is only the beginning, not the end, of the exercise. The question is and must be whether the conduct is bad enough to warrant the severity of the penalty imposed. See *BMW*, 517 U.S. at 574. The Ninth Circuit never asked that question, which can reasonably be answered only in the negative: As the Ninth Circuit itself recognized, Exxon's conduct "was not intentional" (Pet. App. 40a); Exxon's tort was the product of poor judgment rather than greed (see *id.* at 100a); and Exxon "promptly took steps to ameliorate the harm it caused" (*id.* at 40a). Under these circumstances, the notion that Exxon's conduct warrants the highest punitive award ever imposed is utterly untenable.

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[7] We strongly disagree with the Ninth Circuit's assessment of the *State Farm* reprehensibility factors. If the Court grants the petition, we expect that both Exxon and *amici* will explain why the conclusion that Exxon's non-malicious conduct was in the mid range of the reprehensibility spectrum is manifestly misguided.

Unfortunately, the Ninth Circuit is hardly alone in failing to ask whether the conduct at issue is bad enough to warrant the absolute amount of punitive damages imposed. Indeed, the overwhelming majority of courts have overlooked this key question, and many do nothing more than run through the list of *State Farm* factors and then declare the conduct "reprehensible."[8] The courts plainly need reminding that the entire point of the reprehensibility inquiry is to determine whether the conduct was "*especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed (*BMW*, 517 U.S. at 590 (Breyer, J., concurring)).

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[8] See, *e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005); *Winkler* v. *Petersilie*, 124 F. App'x 925, 937 (6th Cir. Feb. 25, 2005); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-71 (Fed. Cir. 2003); *Bogle* v. *McClure*, 332 F.3d 1347, 1361 (11th Cir. 2003); *Lopez* v. *Aramark Uniform & Career Apparel, Inc.*, 426 F. Supp. 2d 914, 969-70 (N.D. Iowa 2006); *Jurinko* v. *Med. Protective Co.*, 2006 WL 785234, at *6-*7 (E.D. Pa. Mar. 29, 2006) (unpublished); *Hussein* v. *Universal Dev. Mgmt., Inc.*, 2006 U.S. Dist. LEXIS 49, at*29-*31 (W.D. Pa. Jan. 3, 2006); *Shiv-Ram, Inc.* v. *McCaleb*, 892 So. 2d 299, 316 (Ala. 2003); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 360-61 (Ark. 2003); *Superior Fed. Bank* v. *Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 651 (Ark. Ct. App. 2005); *Wrysinski* v. *Agilent Techs., Inc.*, 2006 WL 2742475, at *25 (Cal. Ct. App. Sept. 27, 2006) (unpublished); *Century Surety Co.* v. *Polisso*, 43 Cal. Rptr. 3d 468, 498-99 (Cal. Ct. App. 2006); *Craig* v. *Holsey*, 590 S.E.2d 742, 747-48 (Ga. Ct. App. 2003); *Hayes*

2. *Ratio*

The Ninth Circuit held that conduct in the middle of the reprehensibility spectrum warrants a punitive/compensatory ratio in the middle of the single-digit range. Pet. App. 39a-40a. That holding misunderstands the ratio guidepost in two respects.

First, the Ninth Circuit disregarded this Court's admonition that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" (*State Farm*, 538 U.S. at 425). The compensatory damages and settlement payments in this case exceeded $500 million. That is "substantial" under any definition of the term. If the Court's statement applies to any case, it applies to this one.

Second, although the Ninth Circuit recognized that "the costs that Exxon incurred in compensating the plaintiffs and cleaning the oil spill have already substantially served the purposes of deterrence, lessening the need for a high punitive damages award," it treated this fact only as an additional rea-

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Sight & Sound, Inc. v. *ONEOK, Inc.*, 136 P.3d 428, 446-47 (Kan. 2006); *Grefer* v. *Alpha Technical*, 901 So. 2d 1117, 1148-49 (La. Ct. App. 2005), vacated sub nom. *Exxon Mobil Corp.* v. *Grefer*, 127 S. Ct. 1371 (2007), aff'd, 2007 WL 2473250 (La. Ct. App. Aug. 8, 2007); *Bright* v. *Addison*, 171 S.W.3d 588, 603-04 (Tex. Ct. App. 2005, pet dism'd); *Mission Res., Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301, 318 (Tex. Ct. App. 2005, pet. granted); *Haggar Clothing Co.* v. *Hernandez*, 164 S.W.3d 407, 418-19 (Tex. Ct. App. 2003), rev'd per curiam on other grounds, 164 S.W.3d 386 (Tex. 2005); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 414-17 (Utah 2004).

son why a 5:1 ratio was more appropriate than a 9:1 ratio. Pet. App. 40a. It never set forth any "basis for assuming that a more modest sanction would not have been sufficient" to accomplish the State's interests in retribution and deterrence (*BMW*, 517 U.S. at 585). Nor could it have. As the same panel recognized five years earlier, "if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him 'only' $10,005 and he was not otherwise punished. * * * This case is like the ink on the rug example * * *." Pet. App. 100a. Giving this consideration the weight it is due compels the conclusion that a ratio of even 1:1, and *a fortiori* a ratio in the mid-single-digit range, "furthers no legitimate purpose and constitutes an arbitrary deprivation of property" (*State Farm*, 538 U.S. at 417).

Once again, the Ninth Circuit's errors are by no means unique. Numerous lower courts have ignored this Court's admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are "substantial," instead treating any single-digit ratio as immune from scrutiny.[9] And only a few courts have conducted the broader inquiry into whether and to what extent the compensatory damages and other costs borne by the defendant as a consequence of its conduct serve the State's interests in retribution and deterrence, rendering even a 1:1 ratio excessive.[10]

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[9] See, *e.g.*, *Cambio Health Solutions, LLC* v. *Reardon*, 2007 WL 627834, at *7 (6th Cir. Feb. 27, 2007) (upholding $5 million punitive award that was 5.65 times the compensatory damages and prejudgment interest of $884,291.18 because it was "well within the Supreme Court's single-digit prescription"); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (holding that $2 million punitive award was permissible, even though "the compensatory damages award [of $500,000] is substantial * * * and the punitive damages award is many times [the defendant's] net worth" because this Court approved a 4:1 ratio in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991)); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. Jan. 12, 2004) (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Rhone-Poulenc*, 345 F.3d at

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1372 (taking no account of the absolute amount of the punitive award ($15 million) and reasoning that the 3.33:1 ratio of punitive to compensatory damages "does not even approach the possible threshold of constitutional impropriety"); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding $2.6 million punitive award where compensatory damages were $260,000 because the ratio was "slightly more than seven to one" and "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages"); *Bogle*, 332 F.3d at 1362 (upholding approximately $2 million in punitive damages to each of seven defendants despite "substantial" compensatory damages of $500,000 because the ratio "in this case is in the neighborhood of 4:1, a range which the Supreme Court has found to be 'instructive'"); *Barber*, 149 S.W.3d at 348 (upholding $25 million punitive award, even though compensatory damages were $5.1 million, because 5:1 ratio was not "breathtaking"); *Seltzer* v. *Morton*, 154 P.3d 561, 611 (Mont. 2007) (permitting $9.9 million in punitive damages where compensatory damages were $1.1 million because "substantial compensatory damages do not always require low single-digit ratios"); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court" and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Campbell*, 98 P.3d at 418 (upholding $9,018,780.75 in punitive damages on remand—a 9:1 ratio—even though this Court suggested that the constitutional maximum was around $1 million).

[10] See, *e.g.*, *Inter Med. Supplies, Ltd.* v. *EBI Med. Sys., Inc.*, 181 F.3d 446, 468-70 (3d Cir. 1999) (reducing $50 million punitive award for breach of contract and fraud to $1 million because "large compensatory damages [$48 million] have been awarded" and the

3. *Comparable Penalties*

The punitive award in this case is $2.375 *billion* greater than the record-setting $125 million in criminal penalties imposed against Exxon (Pet. 4) and $2.42 *billion* greater than the $80 million maximum civil penalty that could have been imposed (*id.* at 30). Nevertheless, the Ninth Circuit held that the third guidepost "support[ed]" its record-breaking punitive award. It explained that in some prior cases it had "looked only to whether or not the misconduct was dealt with seriously under state civil or criminal laws" and in the other cases "ha[d] not discussed this factor at all." Pet. App. 41a. Thus, as far as the Ninth Circuit was concerned, the fact that "spilling oil in navigable water has clearly been taken quite seriously by" Congress and the State of Alaska was the end of the matter. *Ibid.*

This reasoning converts the third guidepost from an important check on the absolute amount of punitive damages into a nullity in all cases in which legislatures have authorized significant fines for comparable conduct. Indeed, under the Ninth Circuit's approach, the third guidepost would have been no more a safeguard against the jury's $5 billion punitive award or the $4.5 billion punitive award endorsed by the

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harm was economic "and hence 'less worthy of large punitive damages awards than torts inflicting injuries to health or safety'"); *Pichler* v. *UNITE*, 457 F. Supp. 2d 524, 530-32 (E.D. Pa. 2006) (disallowing punitive damages against union for willful and reckless violation of the Driver's Privacy Protection Act, 18 U.S.C. § 2724, because statutory damages of over $4 million and other fees and costs would provide "ampl[e]" punishment and deterrence "without imposing punitive damages"); *United States* v. *Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (vacating $3 million punitive award for civil theft and conversion "in its entirety" because the plaintiff received $2 million in compensatory damages and the defendant's conduct did "not warrant the imposition of further sanctions to achieve punishment or deterrence"), aff'd, 419 F.3d 1208 (11th Cir. 2005).

district court than it was against the $2.5 billion exaction endorsed by the panel.

More broadly, the Ninth Circuit entirely ignored the purposes served by the third guidepost. A punitive award that is billions (or even, as in most cases, millions) of dollars greater than the applicable criminal and civil penalties is surely one that grossly exceeds the amount reasonably necessary to punish and deter. Indeed, when, as here, federal and state regulatory authorities scrutinized the conduct and agreed upon an appropriate penalty, it is questionable whether any significant amount of punitive damages is necessary to advance the State's interests in punishment and retribution. Instead, the third guidepost confirms that a large punitive award serves no legitimate function and is nothing more than a windfall to the plaintiffs and their lawyers.

Again, the Ninth Circuit does not stand alone in refusing to employ the third guidepost as a meaningful constraint on outsized punitive awards. To the contrary, the overwhelming majority of courts have treated the third guidepost as nothing more than an inconvenience.[11]

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[11] See, *e.g.*, *Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005) (disregarding disparity between $135,000 punitive award and maximum comparable penalty of $10,000 because the court was "reluctant to overturn the punitive damages award on this basis [of the third guidepost]"); *Kemp* v. *AT&T Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004) (the third guidepost "is accorded less weight in the reasonableness analysis than the first two guideposts"); *James* v. *Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006) (stating that legislative penalties have little relevance when they "are set at 'such a low level, there is little basis for comparing it with any meaningful punitive damage award'"); *Campbell*, 98 P.3d at 419 (holding on remand that a wide disparity between $9,018,780.75 punitive award and $10,000 maximum legislative penalty for comparable conduct was irrelevant because "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties af-

C. Review Is Necessary To Ensure That The Ninth Circuit's Misapplication Of This Court's Precedents Does Not Infect Future Cases.

Given the magnitude of the compensatory damages in this case, the Ninth Circuit's decision approving a 5:1 ratio can only be understood as holding that compensatory damages can never be substantial enough to require a ratio of 1:1 or below. "If the Ninth Circuit would uphold a 5:1 ratio in *Exxon*," the argument would go, "surely a 5:1 ratio must be okay in this case in which the compensatory damages are only $10 million." Indeed, the Eleventh Circuit already has done essentially that. In a recent case involving the failure to prevent the escape of carbon black dust from a manufactur-

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fixed by a legislature can be quixotic"); see also *Winkler*, 124 F. App'x at 938 (upholding $200,000 punitive award against four defendants for malicious destruction of property even though criminal fine for vandalism was only $10,000); *Steel Techs., Inc.* v. *Congleton*, __ S.W.3d __, 2007 WL 1790599, at *10 (Ky. June 21, 2007) (concluding that the third guidepost supported $1 million punitive award even though maximum fine was $10,000 because the "difference [between the punitive award and maximum fine] is significantly less than that encountered in *Gore* and *Campbell*"); *Seltzer*, 154 P.3d at 613 (noting that "a 100:1 ratio between an appropriate punitive sanction and the most relevant legislatively established civil penalty was not inappropriate" and disregarding wide discrepancy between $9.9 million punitive award and $50,000 maximum criminal fine); *Boyd* v. *Goffoli*, 608 S.E.2d 169, 184 (W. Va. 2004) (disregarding disparity between $1 million punitive award and $10,000 maximum civil penalty because it is "[a]pparent * * * that the Supreme Court did not believe that a punitive damages award one hundred times greater than the civil penalty that could be imposed for such conduct was excessive"); *Schwigel* v. *Kohlmann*, 694 N.W.2d 467, 475 (Wis. Ct. App. 2005) (upholding $375,000 punitive award in conversion case even though most comparable legislative fine was $25,000, because "the conduct exhibited here 'could scarcely have been contemplated by the legislature when it enacted these statutes'").

ing facility, that court upheld a $17.5 million punitive award that was 5.5 times the compensatory damages and attorneys' fees. In so doing, the court explained that the Ninth Circuit had concluded in this case that "a ratio of approximately 5:1 ($2.5 billion:$504 million) was constitutionally sound despite finding that the conduct at issue was neither intentional nor malicious and that previous efforts to correct the damage mitigated reprehensibility." *Action Marine*, 481 F.3d at 1322. And the court cited the decision here for the proposition that the defendant's conduct warranted "[a] substantial penalty beyond the compensatory damages," noting that the Ninth Circuit allowed $2.5 billion in punitive damages even though Exxon had already paid $504.1 million in compensatory damages. *Id.* at 1320.

Moreover, though this Court has stated countless times that denials of certiorari do not indicate agreement on the merits, some lower courts have invoked the denial of certiorari in the *State Farm* remand as an indication that the Court's suggestion that 1:1 was the maximum permissible ratio in that case was merely hortatory. See, *e.g.*, *Seltzer*, 154 P.3d at 611-12. Other courts can be sure to follow if the Court denies review here.

The same is true of the Ninth Circuit's evisceration of the third guidepost. If courts follow the decision here and assert that the mere availability of significant penalties shows that legislatures take the misconduct "seriously" and therefore justifies a massive punitive award—even one that dwarfs the size of those penalties—then a significant constraint on the amount of punitive damages will be lost.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF *AMICUS CURIAE* THE AMERICAN WATERWAYS OPERATORS, GULF INTRACOASTAL CANAL ASSOCIATION, TEXAS WATERWAY OPERATORS ASSOCIATION, AND LOUISIANA ASSOCIATION OF WATERWAY OPERATORS AND SHIPYARDS IN SUPPORT OF PETITIONERS

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The American Waterways Operators, together with the Gulf Intracoastal Canal Association, the Texas Waterway Operators Association, and the Louisiana Association of Waterway Operators and Shipyards, submits this brief as *amicus curiae* in support of the position of Petitioner Exxon Shipping Company, *et al.*, with the written consent of all parties pursuant to Sup. Ct. R. 37.2(a).[1]

INTEREST OF *AMICUS CURIAE*

The American Waterways Operators (AWO) is the national trade association for the nation's inland and coastal tugboat, towboat, and barge industry. AWO's 400 member companies employ more than 30,000 American mariners. The industry owns and operates nearly 4,000 tugboats and towboats and more than 27,000 barges throughout the country. AWO represents the largest segment of the U.S.-flag domestic fleet; its members' vessels operate on the nation's inland rivers; on the Atlantic, Pacific, and Gulf coasts; on the Great Lakes; and in ports and harbors around the country.

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[1] Petitioners have submitted a blanket consent to the filing of *amicus* briefs. Respondents' consent to the filing of this *amicus* brief has been filed with the Clerk of the Court. Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* AWO states that it authored this brief in its entirety and that no other person or entity other than AWO provided monetary support for the preparation or submission of this brief.

Each year, the tugboat, towboat, and barge industry moves more than 800 million tons of cargo and generates more than 350 billion ton-miles of freight transportation. Its vessels make nearly one million voyages annually from over 2,000 bulk cargo docks and terminals and serve 87 percent of all major U.S. cities. AWO's members account for 79 percent of all domestic waterborne freight. Their vessels carry 20 percent of the nation's coal, enough to produce 10 percent of all U.S. electricity used annually, move over 60 percent ($8.5 billion worth) of America's grain exports, and transport approximately 70 billion gallons of petroleum and petroleum products each year.

In short, the tugboat, towboat and barge industry allows the U.S. to take advantage of one of its greatest natural resources – its 25,000 mile waterway system. For over 60 years, AWO has worked to promote a better understanding of the domestic waterborne transportation industry and its contribution to the U.S. economy. To that end, AWO acts as the industry's principal advocate with policymakers and federal officials in Washington D.C., pursuing responsible legislation, regulations, and safety procedures to ensure that the nation's waterway system remains a shared economic resource and national transportation asset for all.

AWO is joined in this *amicus* brief by the Gulf Intracoastal Canal Association (GICA), the Texas Waterway Operators Association (TWOA), and the Louisiana Association of Waterway Operators and

Shipyards (LAWS). GICA is the trade association promoting inland waterways navigation on the Gulf Intracoastal Waterway and its tributaries. Its members include towboat and barge companies, shippers, waterways service providers and others with an interest in inland waterways transportation on the Gulf Coast. TWOA is the Texas trade association for the inland tugboat, towboat and barge industry. Its members provide inland waterways transportation and ship docking assistance in Texas. LAWS is the trade association of the tugboat, towboat, barge and shipyard industries in Louisiana. The members of these regional associations share AWO's paramount interest in maintaining the uniformity and predictability of the federal maritime law principles at issue in this case. For ease of reference, this brief will refer to all of the *amicus* trade associations represented herein collectively as "AWO."

As *amicus curiae*, AWO supports the petition for certiorari of the largest punitive damages award affirmed on appeal in our nation's history. Because of the Ninth Circuit's decision in this case, the owner of a tug and barge company who is blameless now faces the risk of a punitive damages award sufficient to sink his business, based solely on the reckless actions of one of his masters. A significant portion of this country's maritime commerce takes place along the coastline and waterways of the Ninth Circuit. The specter of unpredictable punitive damages awards against non-culpable vessel owners operating within this geographic expanse threatens the economic stability of the tugboat, towboat, and barge industry. This, in turn, decreases the industry's ability to provide the safe, efficient, and environmentally responsible waterborne transportation on which the country relies. AWO's members therefore have much at stake in this case.

SUMMARY OF THE ARGUMENT

The decision below raises issues of national importance because it exposes vessel owners within a vast geographic area to punitive damages for a master's reckless conduct on proof of vicarious liability alone. By legitimizing a rule of law that conflicts with the law of every other circuit that has considered the issue and departs from 200 years of Supreme Court precedent, the Ninth Circuit's decision undermines the hallmarks of federal maritime law – uniformity and predictability. If the decision is allowed to stand, a non-culpable vessel owner who operates within the Ninth Circuit will face a threat of punitive damages that it will find nowhere else in the United States and that it never faced before in the history of maritime law. Further bolstering the need for review is the fact that the decision was based on prior Ninth Circuit dictum, which itself conflicted with prior Ninth Circuit law. AWO respectfully requests that this Court grant certiorari to resolve the clear circuit conflict and confirm the well-established maritime rule prohibiting vicarious liability for punitive damages.

In addition, the Ninth Circuit's decision presents an important separation of powers issue requiring review by this Court: whether the comprehensive remedial scheme enacted by Congress in the Clean Water Act precludes the Ninth Circuit from adding a judge-made remedy – punitive damages – to those allowed under the statute. In finding that the Clean Water Act did not preempt punitive damages in this case, the Ninth Circuit ignored well-established federal maritime principles of statutory preemption. The court's interpretation of the applicable Supreme Court jurisprudence is contrary to the interpretation of other circuits on this issue and raises important separation of powers concerns. Like the issue of vicarious liability for punitive damages, this issue reaches far beyond marine pollution cases and has enormous impact on the maritime industry.

ARGUMENT

I. The Ninth Circuit's Decision Raises Issues of National Importance Regarding Important Questions of Federal Law.

Judge Kozinski has aptly highlighted the national importance of the issue presented for certiorari:

> The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction – a staggeringly huge area – to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious liability, ship owners won't be able to protect themselves against

> our newfangled interpretation of maritime law through careful hiring practices. Accidents at sea happen – ships sink, collide and run aground – often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the understanding that they won't be subject to punitive damages if they "[n]either directed it, nor countenanced it, nor participated in" the wrong; the panel opinion has thrown this protection overboard.

Pet. App. 290a-291a (citation omitted).[2]

The Ninth Circuit's decision undermines national maritime policies of uniformity and predictability. Maritime courts have long recognized "that maritime law traditionally resists doctrinal change that might balkanize its uniformity and generality." *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983). Indeed, maritime law is "a conceptual body whose cardinal mark is uniformity." *Id.* This uniformity, "with [its] companion quality of predictability, [is] a prized value in the extensive underwriting of marine risks, [and is] best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit." *Id.* Maritime courts have also acknowledged that "the need for predictability in the commercial maritime arena is arguably greater than in other areas of law and commerce." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137 (5th Cir. 1995). As stated by the Fifth Circuit,

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[2] "Pet. App." refers to Exxon's Appendix to its Petition for a Writ of Certiorari which contains the Ninth Circuit decisions in this case that are referenced herein.

> This is true because there are already numerous and inherently unpredictable factors stemming from the perils of the sea and the continual – and frequently fortuitous – interaction with enterprises of other nations. It is axiomatic that when the rules of law are clear, parties may contract within or around their boundaries, and the commercial system is facilitated in many ways, including reduced litigation, more favorable insurance coverage, and overall ease of application.

Id.

The members of AWO rely upon the predictability and uniformity of the maritime law in order to properly assess and protect against the risks inherent in the marine transportation business. They work to avoid accidents by, among other things, employing careful hiring practices and stringent safety policies. As Judge Kozinski noted, however, accidents and mistakes happen, and vessel owners must be able to evaluate and manage such risks in order to maintain sound businesses. They enter contracts, invest in new equipment, buy insurance, and make countless other decisions based upon time-honored principles of federal maritime law. The uniformity and predictability of federal maritime law is enormously important to the vessel owner's ability to operate in the national and international world of maritime commerce.

By ignoring 200 years of maritime precedent and placing itself at loggerheads with the First, Fifth, and Sixth Circuits, the Ninth Circuit has upset these twin aims of maritime law. Under the rule announced by the Ninth Circuit, every accident and mistake is now fraught with the possibility that the vessel owner will face unpredictable punitive damages for the actions of its captain or other shipboard officer, even if the vessel owner is blameless. For AWO members, many of whom are family-owned businesses, and most of whom do not have the substantial coffers of a Fortune 500 company, the potential liability for vicarious punitive damages poses a serious economic threat. This threat to maritime commerce is of national importance and should be addressed by this Court. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982) (recognizing that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce").

The Ninth Circuit's decision also undermines the traditional maritime principle that vessel owners should not be subject to unlimited damages when they are not culpable. The Limitation of Liability Act best exemplifies this principle. 46 U.S.C. §§ 30501-11. The Act allows a vessel owner to limit liability for damages to the value of the vessel and its freight, unless the negligence or unseaworthiness that caused the damage was within the vessel owner's privity or knowledge. *Carr v. PMS Fishing Corp.*, 191 F.3d 1, 4

(1st Cir. 1999). Privity and knowledge require "some degree of culpable participation" from the vessel owner. *Id.* For example, there is no privity or knowledge attributed to a corporation for a captain's navigational errors. *In re Hellenic, Inc.*, 252 F.3d 391, 396 (5th Cir. 2001). Further, in situations where "the owner is so far removed from the vessel that he can exert no control over the master's conduct, he should not be held to the master's negligence." *Id.* In those situations, "the owner may rely on the master's skill and expertise." *Id.*

In contrast, the Ninth Circuit's decision allows for vicarious punitive damages without any proof that the vessel owner was at fault. It turns maritime law on its head to say that a court can subject a vessel owner to vicarious punitive damages, yet limit liability under the Limitation of Liability Act if the vessel owner lacked privity or knowledge – *i.e.*, lacked "some degree of culpable participation." The Ninth Circuit's decision is clearly at odds with the purposes behind this important and longstanding maritime statute.

The Ninth Circuit's decision threatens maritime commerce and undermines the uniformity and predictability of maritime law, thus raising issues of national importance. The decision's effect ripples far beyond the limited facts of this case, and affects every vessel owner and operator in the maritime community. As Judge Kozinski pointed out, if maritime law is to be upset, it should only be done by the final arbiter of maritime disputes:

> Shippers everywhere will be put on notice: If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

Pet. App. 291a.

II. The Ninth Circuit's Decision Conflicts with the Decisions of the Other Circuits, Departs from Supreme Court Precedent, and Rests on Dictum.

When the Ninth Circuit held that a vessel owner is subject to punitive damages for a master's reckless conduct on proof of vicarious liability alone, it departed from Supreme Court maritime precedent, effectively overruled prior Ninth Circuit maritime law, and confirmed the existence of a genuine conflict of law with the other circuits. *See The Amiable Nancy*, 16 U.S. 546, 559 (1818) (holding no punitive damages against vessel owner when principal is "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree"); *Pac. Packing & Nav. Co. v. Fielding*, 136 F. 577, 579-80 (9th Cir. 1905) (reversing an award of punitive damages against a steamship owner for captain's malice when "no evidence was given tending to show that the defendant corporation ever authorized the master to commit any of the acts complained of, or ever in any manner ratified them"); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969) ("We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident."); *In re P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (en banc) (following *Fuhrman* and holding that in maritime cases "punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct"); *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995) (holding that in maritime cases there must at least be "some level of culpability" before a principal can be subject to punitive damages for an agent's reckless acts).

In affirming the district court's issuance of a jury instruction that allowed the jury to impose punitive damages on Exxon solely for vicarious liability, the Ninth Circuit concluded that it was "bound" by *Protectus Alpha Nav. Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), a decision that was complete dictum. Pet. App. 86a. In *Protectus Alpha*, a dock foreman's gross negligence destroyed a plaintiff's ship and cargo at defendant's grain facility on the Columbia River. At trial, plaintiff's argument for punitive damages was that the dock foreman (and another employee) had acted pursuant to the grain facility's company policy:

> Protectus contends that punitive damages should also be assessed against North Pacific because Anderson and Van Skike acted in accordance with company policy. North Pacific insists that Anderson and Van Skike were correct in casting off the ship because of the extreme hazard of an explosion and has commended them. Protectus asserts that a company policy that requires casting off of all burning ships regardless of the circumstances constitutes "deliberate and wanton disregard of the property of the shipowner and the lives of the crew and firemen."

Protectus Alpha Co. v. N. Pac. Grain Growers, Inc., 585 F. Supp. 1062, 1068 (D. Ore. 1984).

Relying on *The Amiable Nancy*, *Pacific Packing* and *Fuhrman* – the three governing cases on punitive damages awards against maritime companies – the district court in *Protectus Alpha* found that the grain facility's "approval of such conduct was unconscionable and merits the imposition of punitive damages." *Id.* at 1069. Thus, the defendant's own culpability, not that of its employees, subjected it to punitive damages, and the Ninth Circuit should have affirmed the punitive damages award on that basis.

Inexplicably, the Ninth Circuit in *Protectus Alpha* affirmed on a wholly different basis, creating a maritime rule on punitive damages without precedent. The court held that an award of punitive damages against the grain facility was proper on the basis of vicarious liability alone because the foreman was a managerial employee acting within the scope of employment. 767 F.2d at 1386-87. No one had argued for this rule nor presented briefing on the wisdom of adopting it, because the grain facility did not challenge the finding that its company policy authorized the foreman's actions. *Id.* at 1385; Pet. App. 85a. In light of this undisputed finding of fact, there was no need for the court to consider, much less adopt, a rule that vicarious liability was alone sufficient to justify the award of punitive damages.

In creating this new maritime rule of vicarious liability for punitive damages, the court in *Protectus Alpha* relied solely on the Restatement (Second) of Torts § 909 (1979). It ignored this Court's holding in *The Amiable Nancy* and the Sixth Circuit's decision in *Fuhrman*. Although it admitted that its decision conflicted with its own decision in *Pacific Packing*, it justified this result by hypothesizing that the *Restatement* better reflects modern day corporate America. 767 F.2d at 1386. The court reasoned that its new rule imposed "a reasonable burden on the employer to know its management personnel and choose them wisely." *Id.* But this "reasonable burden" was already in place under traditional maritime law. *See, e.g., Fuhrman*, 407 F.2d at 1148 (6th Cir. 1969) ("Punitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him."). The Ninth Circuit also reasoned that "no corporate executive or director would approve the egregious acts to which punitive damages would attach and, therefore, no recovery for more than compensatory damages could ever be had against a corporation if express authorization or ratification were always required." 767 F.2d at 1386. However, this argument was illogical given that this is exactly what the grain facility in *Protectus Alpha* had done.

Thus, the *Protectus Alpha* court's adoption of a strict vicarious liability rule for punitive damages was unnecessary to the decision, and therefore dictum. *See Best Life Assurance Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002) (defining dictum as "a statement 'made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . '") (quoting *Black's Law Dictionary* 1100 (7th ed. 1999)). Dictum is not precedent. *See Fed. Deposit Ins. Corp. v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992) ("Judicial assumptions concerning . . . issues that are not contested are not holdings.") (quoting *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990)). Because dictum is not precedent, the Ninth Circuit should not have concluded that it was "bound" by *Protectus Alpha*. *See Williams v. United States*, 289 U.S. 553, 568 (1933) (noting that "obiter dicta . . . ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

In the decision below, the Ninth Circuit conceded the possibility – if not its implications – that *Protectus Alpha* was dictum:

> Arguably *Protectus Alpha*, in relevant part, could have been dictum. Although it was not mentioned in the panel opinion,[3] there was an express company policy that required the foreman to do exactly what he did, and the company expressly ratified what the foreman had done. The district judge held the company liable for punitive damages on that basis, not on the basis that the foreman was a managerial employee. With this finding of fact, which was not challenged on appeal, there was no need to reach the question of whether the company would be vicariously liable for a managerial employee's conduct in the absence of a corporate policy authorizing and ratifying his conduct.

Pet. App. 85a (citations omitted).

Despite this concession, the Ninth Circuit claimed its hands were tied and that any challenge to *Protectus Alpha* had to be left for an en banc hearing "or to a higher court." *Id.* at 85a-86a. The court did not find that the required "irreconcilable conflict" for an en banc hearing existed between *Protectus Alpha* and *Pacific Packing*, although it was a "close" question. *Id.* Failing to find an "irreconcilable conflict," the Ninth Circuit said "[w]e cannot hold that the district court abused its discretion by following our decision in *Protectus Alpha.*" *Id.* However, the question was whether a jury instruction correctly stated the law, and the district court's decision was therefore not entitled to deference. *See Navellier v. Sletten*, 262 F.3d 923, 944 (9th Cir. 2001) ("In civil cases, we generally review de novo the question whether a jury instruction misstates the applicable law.").

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[3] Contrary to this statement, the panel opinion stated that the damages award against the grain facility was based on the district court's "finding that the grossly negligent actions of [the employees] were done pursuant to North Pacific's policy, and approved by North Pacific after the fact." 767 F.2d at 1385.

The Ninth Circuit admitted that there is a genuine inter-circuit conflict with respect to the issue of vicarious liability for punitive damages:

> *Protectus Alpha* was specifically rejected by the Fifth Circuit, and accepted only in part by the First Circuit. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995); *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (en banc). The Sixth Circuit followed *The Amiable Nancy*, *Lake Shore*, and this circuit's opinion in *Pacific Packing* to hold that "punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969).

Pet. App. 85a.

Indeed, the cases subsequent to *Protectus Alpha* have rejected it in favor of traditional maritime law. The First Circuit rejected *Protectus Alpha* to the extent that it does not require any culpability on the part of the principal. 70 F.3d at 704-05. The Fifth Circuit rejected it in favor of the Sixth Circuit's rule that only authorization or ratification of an agent's reckless conduct will justify an award of punitive damages against the principal. *In re P&E Boat Rentals, Inc.*, 872 F.2d at 652. In recognizing the conflict among the circuits and explicitly rejecting *Protectus Alpha*, the Fifth Circuit focused on Supreme Court precedent:

> For reasons that follow, we agree with the position adopted by the Sixth Circuit in *U.S. Steel v. Fuhrman* which is more restrictive than the views on this question expressed by the Ninth Circuit in *Protectus Alpha Navigation Co.* First, the Sixth Circuit view is more faithful to the teaching of the Supreme Court in *THE AMIABLE NANCY* and *Lake Shore & Michigan Southern Railway Co. v. Prentice*. Second, we relied on these Supreme Court cases in *The Complaint of Merry Shipping* in determining that punitive damages are recoverable under the general maritime law. It is appropriate that we look to these same authorities to define the scope of the punitive damage relief that should be accorded under the general maritime law.

Id. (citations omitted).

The Fifth Circuit also noted that the policies behind punitive damages – punishment and deterrence – do not support a rule allowing vicarious punitive damages awards against non-culpable parties. These policy considerations are particularly applicable in the maritime industry where, unlike shore-side businesses, a vessel owner has limited ability to supervise the master while the vessel is in navigation. The best a vessel owner can do to guard against human error is to implement careful hiring practices and vigilant safety policies. Prior to the decision at issue, if a vessel owner acted reasonably in this regard, it was not subject to punitive damages. Now, the vessel owner who follows careful hiring and safety policies, and does not direct, ratify or participate in culpable conduct, may be punished for the reckless conduct of its master. As Judge Kozinski noted, "nothing has changed in the relationship between ship owner and captain that would justify" the Ninth Circuit's decision. Pet. App. 288a. "The captain has always borne the responsibility for safeguarding his crew and third parties, and this hasn't changed in modern times." *Id.*

Despite the contrary rulings in the First, Fifth, and Sixth Circuits, and the sound policy reasons for distinguishing between maritime commerce and "the reality of modern corporate America," 767 F.2d at 1386, the Ninth Circuit insisted on following *Protectus Alpha*. Pet. App. 86a. In doing so, it also departed from *The Amiable Nancy*, where Justice Story held that it was improper to award punitive damages against a vessel owner when the principal is "innocent of the demerit of th[e] transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree." 16 U.S. at 559. In an effort to justify its decision, the Ninth Circuit concluded that *The Amiable Nancy* had been effectively overruled by

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991). Pet. App. 86a. *Haslip*, however, was a non-maritime case in which the Court addressed the constitutionality of an award of vicarious punitive damages under state common law. The issue in the instant case is whether *federal maritime law* permits the imposition of vicarious punitive damages. Pet. App. 289a. On this issue, the Ninth Circuit should have relied upon *The Amiable Nancy*, not *Haslip*.

In sum, this case presents an important issue of federal maritime law and a clear circuit conflict that must be resolved by this Court. The decision below directly departs from this Court's decision in *The Amiable Nancy* and contradicts the Ninth Circuit's own decision in *Pacific Packing*. The only precedent for the decision below is complete dictum, and therefore is not precedent at all. The issue presented is appropriate for review and this Court should grant the request for certiorari.

III. The Ninth Circuit's Decision Raises a Separation of Powers Issue as to Whether the Comprehensive Remedial Scheme Enacted in the Clean Water Act Preempts a Punitive Damages Award in This Case.

In its decision below, the Ninth Circuit held "that the Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights." Pet. App. 78a-79a. This decision raises important and interrelated separation of powers concerns as to (1) whether federal courts may supplement maritime remedies when Congress has legislated in a particular sphere, and (2) the preemptive scope of the Clean Water Act.

First, in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), the Court held that federal courts "are not free to expand remedies at will" in maritime cases where Congress has spoken. *See also* Pet. App. 75a (Ninth Circuit acknowledged that in *Miles* "Congressional limitations were held to prevent an inference of broader remedies in the general maritime law"). Because the Jones Act only allowed for recovery of pecuniary damages in actions for the death of a seaman, it precluded a plaintiff from seeking remedies in a general maritime action beyond those provided by Congress. 498 U.S. at 36-37. Separation of powers concerns led the Court to refuse to create remedies that go "well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id.* at 36.

The Court's decision in *Miles* rested in part on a similar decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). In *Higginbotham*, the Court held that a plaintiff may not recover damages for loss of society under a general maritime claim for wrongful death, because Congress had not provided for the recovery of such nonpecuniary loss in the Death on the High Seas Act. Invoking the doctrine of separation of powers, the Court reasoned "that we have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Id.* at 626.

Because Congress had directly spoken on the issue of damages in maritime wrongful death cases, "it would [have been] no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.*

The decision below raises a similar separation of powers issue regarding the propriety of the Ninth Circuit's conclusion that punitive damages are allowed in a general maritime negligence claim for harm caused by marine pollution when the Clean Water Act ("Act") does not provide for them. Similar to the statutes in *Miles* and *Higginbotham*, the Act provides an "ordered system" for the recovery of damages caused by water pollution. To punish and deter polluters and to assure compensation for harm they cause, the Act subjects vessel owners to civil penalties, criminal fines, clean-up costs, and natural resource damages. 33 U.S.C. § 1319(c)-(d); 33 U.S.C. § 1321(b)(6) & (7); 33 U.S.C. § 1321(f). The Act allows a citizen who has "an interest which is or may be adversely affected" to "commence a civil action" for the recovery of "any appropriate civil penalties under section 1319(d) of this title." 33 U.S.C. § 1365(a) & (g). However, the Act does not provide for the recovery of punitive damages against those found liable for marine pollution. Under *Miles* and *Higginbotham*, a federal court cannot supplement a comprehensive remedial scheme with judge-made remedies.

Second, in *Milwaukee v. Illinois*, 451 U.S. 304, 332 (1981), this Court specifically addressed the preemptive effect of the Clean Water Act. In *Milwaukee*, Illinois tried to enjoin certain Wisconsin municipalities from emitting sewage into Lake Michigan. In finding that the Act foreclosed such a remedy, the Court applied *Higginbotham*, noting that where Congress "spoke directly to a question," federal courts may not provide their own answer. *Id.* at 315 (quoting *Higginbotham*, 436 U.S. at 625). The Court reasoned that its "'commitment to the separation of powers is too fundamental' to continue to rely on federal common law by judicially decreeing what accords with 'common sense and the public weal' when Congress has addressed the problem." *Id.* (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)). Thus, federal courts were not free to apply "often vague and indeterminate nuisance concepts" when Congress had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.* at 317.

The case at bar presented a similar question regarding the preemptive effect of the Clean Water Act, as interpreted in *Milwaukee* and its progeny, with respect to punitive damages. *See Middlesex County Sewerage Auth. v. Nat. Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (dismissing plaintiff's damages claim under nuisance law, because under *Milwaukee* "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the" Act); *Conner v. Aerovox, Inc.*, 730 F.2d 835, 842 (1st Cir. 1984) (dismissing plaintiff's maritime law claim for nuisance under

Milwaukee and *Sea Clammers* because those cases "would appear to encompass all federal *judge-made* law of nuisance whether maritime or general federal law") (emphasis in original); *see also Illinois v. Illinois Outboard Marine*, 680 F.2d 473, 478 (7th Cir. 1982) ("The lesson of [*Milwaukee*] is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the Congressional solution.").

The Ninth Circuit answered this question in the negative, concluding that "[t]hough the question is not without doubt . . . the better reading of the Clean Water Act is that it does not preclude a private remedy for punitive damages." Pet. App. 75a. In holding that the Act does not preempt a claim for punitive damages, the court attempted to distinguish *Milwaukee* and its progeny on the ground that allowing a nuisance claim to go forward would have allowed the courts in those cases to impose effluent limitations that conflicted with those set forth by an administrative agency responsible for enforcement of the Act. *Id.* at 76a-78a.

The First Circuit has expressly disavowed this narrow interpretation of *Milwaukee*:

> *Milwaukee II* might have been read to hold no more than that [the Clean Water Act] preempts the authority of a district court to impose under federal common law of nuisance more stringent limitations on effluents than those promulgated by EPA under the Act. But the

> Supreme Court made clear in *Sea Clammers* that this is too narrow a reading of the *Milwaukee II* decision.

Conner, 730 F.2d at 837.

Although the First Circuit decision in *Conner* did not specifically address "whether a negligence action for injuries due to water pollution still sounds in maritime tort after [the Act's] enactment," *Id.* at 838 n. 6, its broader interpretation of the preemptive effect of the Act conflicts with the Ninth Circuit's narrow stance. If *Milwaukee* and its progeny hold that the Act preempts all nuisance claims, then consistency requires a similar result with respect to the Act's preemption of negligence claims for punitive damages. This conflict between the circuits raises a significant federal question implicating separation of powers concerns.

The Ninth Circuit decision ignores important maritime principles and precedent regarding statutory preemption that reach far beyond the limited facts and parties in this case. This Court should grant certiorari to confirm the application of the principle set forth in *Miles* and *Higginbotham*: that the Ninth Circuit was not free to expand the remedies provided by Congress in the Clean Water Act by allowing the imposition of punitive damages.

CONCLUSION

For the reasons set forth above, AWO respectfully requests that the petition for a writ of certiorari be granted.[4]

Respectfully submitted,

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September 19, 2007

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[4] With respect to Petitioner's request that the Court grant certiorari to clarify the extent to which substantive maritime law shapes the standards for determining the appropriate size of punitive damage awards, AWO also joins that request. *See* Exxon's Petition for a Writ of Certiorari at 21-27.

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CURIAE
BRIEF

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In The
Supreme Court of the United States

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EXXON SHIPPING COMPANY, et al.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF PROFESSORS DAVID J. BEDERMAN, MARTIN DAVIES, JONATHAN GUTOFF, STEVEN F. FRIEDELL, JOHN PAUL JONES, DAVID J. SHARPE AND STEVEN RICHARD SWANSON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors engaged in study of the admiralty and maritime law of the United States. They have published extensively about it, and currently teach or have spent their professional careers teaching, about it.

The only interest of *amici* is in optimal development of the body of U.S. law that governs in cases of admiralty and maritime jurisdiction. Indeed, we differ on how various questions concerning the maritime law of punitive damages in this case should be answered in general and how those answers should be applied to the award in this case.

We agree, however, that answers of some kind are overdue. Moreover, we agree on the approach that a court should take in formulating the maritime law of the United States and on the sources to which such a court might look in the process. We therefore file this *amicus* brief to assist the Court in its resolution of this significant case.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the Maritime Law Institute of Tulane University, which paid for the printing of this brief, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

ARGUMENT

The petition should be granted to resolve critical questions of national importance regarding whether and under what circumstances federal maritime law allows punitive damages.

In this case, the Ninth Circuit has reviewed at length the award of punitive damages for conformity with this Court's interpretation of the Constitution's guarantee of due process, but its attention to this constitutional question appears to have distracted it from pronouncing federal maritime law. More attention to questions about the general maritime law of punitive damages might have made constitutional review unnecessary.

A. This is a maritime case governed by federal maritime law.

This is a case of harm to the livelihoods of commercial and subsistence fishermen caused by a spill of crude oil from a tank vessel stranded on a reef in Prince William Sound, part of the "navigable waters of the United States" opening to the Gulf of Alaska. A federal jury found that the stranding was caused by negligent navigation and that Exxon, the shipowner, was liable for income unrealized as a consequence of days lost to fishing and distress to the fish stocks of the Sound. Compensatory damages were awarded. Other cases, brought on behalf of the State of Alaska and the United States, raised issues of Exxon's liability for damages to the environment and natural resources; they were settled. This case was not settled but tried, and because Exxon has not appealed from the judgment that it was liable to these plaintiffs for compensatory damages, the most important matters still in dispute are whether punitive damages are also appropriate, and if so, how much. These are matters to be governed by federal maritime law.

The casualty that gives rise to this case, a vessel's stranding, was maritime, as are the alleged torts, so this case is subject to federal judicial power pursuant to Article III, Section 2, as a case "of admiralty and maritime jurisdiction." (Contrary to the general preference for an interpretation of the words of the Constitution that leaves none of them redundant, it is well settled that "admiralty and maritime jurisdiction" does not describe two sets of cases, but one. In this brief, "admiralty" will ordinarily be used with reference to a federal court with the power to hear cases of this sort, and "maritime" will be used with reference to the body of law applied in such cases.) *See generally Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) (clarifying the requirements for admiralty tort jurisdiction); *Sisson v. Ruby*, 497 U.S. 358 (1990) (same).

In section 9 of the Judiciary Act of 1789, Congress vested the federal district courts with jurisdiction to hear "cases of admiralty and maritime jurisdiction." 1 Stat. 73, 76-77 (1789). At the same time, under the so-called Saving to Suitors Clause, Congress authorized state courts[2] to continue hearing some of the cases, that is, those for which the common law (as distinct from maritime law) also provided a remedy. *Id.* at 77. This scheme, by which federal district courts are authorized to hear any case within admiralty jurisdiction and to implement certain remedies exclusive to maritime law, while state courts are authorized to hear those cases otherwise within admiralty jurisdiction that are suited for ordinary remedies, is preserved in 28 U.S.C. § 1333 (2000).

Because this case is within admiralty jurisdiction, it is presumptively governed by federal law, not state law. *Yamaha Motor Corp. USA v. Calhoun*, 516 U.S. 199, 206 (1996); *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986). As the parties have acknowledged and the courts below agreed, the governing federal law is maritime law, which is made not only in treaties, Acts of Congress, and federal regulations, but also in the decisions of courts, both state and federal. *See Norfolk S. Ry. Co. v. James N. Kirby Pty, Ltd.*, 543 U.S. 14, 23 (2004) ("Because the grant of admiralty jurisdiction and the power to make admiralty law are mutually dependent, the two are often intertwined in our cases.") When maritime law is made by judges in case decisions, it is made in a manner similar to that for making common law, and such judge-made law is commonly referred to as "general" maritime law (to distinguish it from law made otherwise, that is, in treaties, statutes, and regulations). *East River S.S. Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 864-65 (1986) ("Drawn from state and federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules."). *See* Robert Force, *Admiralty and Maritime Law* 21 (2004); Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-1 (4th ed. 2004); David J. Sharpe, *Admiralty Jurisdiction: The Power over Cases,* 79 Tul. L. Rev. 1149 (2005). As substantive law made sometimes by federal judges, general maritime law survived *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

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[2] Under the same theory that permits state courts sitting at common law to hear maritime cases, the Saving to Suitors Clause also permits federal courts sitting on "the law side" (i.e., exercising jurisdiction on some basis other than admiralty) to hear maritime cases. *See, e.g., Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 376-77 (1959) (explaining that federal courts exercising diversity jurisdiction could hear maritime cases under the Saving to Suitors Clause in the same way that state courts did). Indeed, the district court in this case was sitting on "the law side," which explains why there was a jury verdict in a maritime case when admiralty courts do not generally have juries.

B. The Ninth Circuit neglected its obligation to articulate the federal maritime law requirements for punitive damages.

The body of our maritime law falls short of a comprehensive code. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 216 (1986). Certain aspects of the general maritime law have been greatly refined by Congress and the courts, while others have not – at least not yet. The law of punitive damages is one of those aspects that have yet to be refined, and this case is pregnant with such unresolved issues.

That the general maritime law of the United States empowers courts to award punitive damages in maritime cases was suggested by this Court as early as 1818, in *The Amiable Nancy*, 3 Wheat. (16 U.S.) 546, and confirmed in dicta in 1893, in *Lake Shore & M. S. R. Co. v. Prentice*, 147 U.S. 101, 108-09. Lower courts have generally proceeded on the basis that they are so empowered. *See, e.g., CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995); *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1387 (9th Cir. 1985); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972). *See generally* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997).

Nevertheless, as the Fifth Circuit has observed, that the general maritime law empowers courts to award punitive damages has not yet formed the basis for a holding by this Court. *See Galveston County Navigation Dist. No. 1 v. Hopson Towing Co.*, 92 F.3d 353, 359 n.11 (5th Cir. 1996); *see also In re Diamond B Marine Serv., Inc.*, Nos. 99-951 & 99-984, 2000 WL 222847 (E.D. La. Feb. 23, 2000). In certain maritime cases permitted by the Saving to Suitors Clause, 28 U.S.C. § 1333, state courts also apply federal maritime law. Courts of Louisiana have expressed doubt lately that federal maritime law authorizes punitive damages in any case. *See, e.g., Boucvalt v. Sea Trac Offshore Serv., Inc.*, 943 So. 2d 1204, 1207-08 (La. App. 2006). We think it therefore fair to say that a rule of federal maritime law allowing punitive damages has yet to be "judicially established as part of the body of federal admiralty law in this country." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316 (1955).

Even in those federal circuits where it has been assumed that federal maritime law allows for punitive damages in some cases, it is not agreed that a shipowner-employer can be liable vicariously for punitive damages when those misbehaving are employed as a vessel's crew or her captain. Borrowing from the , the First and Ninth Circuits appear to agree that punitive damages against a shipowner are warranted by federal maritime law for qualifying misbehavior on the part of a ship's captain because of the managerial nature of that position. *See Seafarer*, 70 F.3d at 704-05; *Protectus Alpha*, 767 F.2d at 1385-87. Citing to an American treatise, the Seventh Circuit in 1896 found the general rule of maritime law to be that "the owners of a vessel are liable for all injuries caused by the misconduct, negligence, or unskillfulness of the master, provided the act be done while acting within the scope of his authority as master." *The State of Missouri*, 76 F. 376, 379 (7th Cir. 1896) (citing 2 Theophilus Parsons, *A Treatise on the Law of Shipping* 26 (1869)). On the other hand, the Fifth and Sixth Circuits enforce a strict complicity rule traceable to *The Amiable Nancy*, 3 Wheat. at 558-59, and *Lake Shore*, 147 U.S. at 108-09. *See In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 650-52 (5th Cir. 1989); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969).

Regarding at least two other unsettled but pertinent issues of the general maritime law of punitive damages, the Ninth Circuit neglected in this case even to say what the law is. To Exxon's argument that federal maritime law should not allow punitive damages when punishment and deterrence are otherwise assured, the Ninth Circuit replied only that:

> Exxon's argument has some force as logic and policy. But it has no force, in the absence of precedent, to establish that the law, or the Constitution, bars punitive damages in these circumstances. Because we have not been made aware of a principle of law pursuant to which we should strike a punitive damages award on the ground that the conduct had already been sufficiently punished and deterred, we reject the argument.

In re Exxon Valdez, 270 F.3d 1215, 1226 (9th Cir. 2001), *reprinted at* Pet. App. 68a.

The proposition that federal maritime law could be drawn from a principle that limits punitive damages when sufficient deterrence and punishment is otherwise assured is at least suggested in *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57 (1985), where the Second Circuit, per Judge Friendly, reversed an award of punitive damages against the time charterer of a vessel for improper stowage ("deviation") said to be by order of the master or the chief mate in part because

> the deterring effect of punitive damages is severely diluted when the actors are employees not of the person held liable but of another whom he has hired to perform his tasks. And, as pointed out above, the argument for straining to award punitive damages is particularly weak in the case of deviation where heavy sanctions exist in any event."

Id. at 68.

Likewise, to Exxon's argument that the maritime law should require evidence of recklessness that is clear and convincing, the Ninth Circuit answered only that a lower standard was constitutionally permissible and, in the absence of established precedent particular to maritime law, the standard of proof generally applied in federal civil cases should apply. *Exxon Valdez*, 270 F.3d at 1232-33, *reprinted at* Pet. App. 79a-80a. In Alaska, state law calls for clear and convincing evidence of misconduct qualifying for punitive damages. Alaska Stat. Ann. § 09.17.020 (2006). The Ninth Circuit appears to have begged the question about maritime law by defaulting to what it describes as the standard generally applied in federal civil cases.

A bedrock assumption underpinning federal maritime law is that the constitutional grant of jurisdiction and law making was intended to foster uniformity and consistency for the benefit of maritime commerce. *Norfolk S. Ry. Co. v. James N. Kirby Pty, Ltd.*, 543 U.S. 14, 28-29 (2004); *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna*, 21 Wall. (88 U.S.) 558, 575 (1875)); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 738-39 (1961); *see* Schoenbaum, *supra*, § 4-1.[3]

C. In formulating the general maritime law, this Court can look to a wide variety of different sources.

As *amici* we do not suggest the proper source from which to draw the maritime law for punitive damages. In the past, this Court has tapped various sources for a rule that best serves the policy that ought to control under the circumstances. Rules prevailing in the codes of the maritime nations of

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[3] But this Court has observed that the requirement for uniform maritime law is not absolute, *American Dredging*, 510 U.S. at 451, and, under certain circumstances, has allowed resort to state law when no rule of federal maritime law has been established, so long as it would not "work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 447; *see also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) (damages available for the wrongful death of a non-seafarer is an issue maritime but local so that state law could be applied); *see generally* Schoenbaum, *supra*, § 4-2. Here, the pressing question however is not whether state law will suffice, but where to turn for content when making federal maritime law instead.

Europe and approved by that continent's leading jurists have long proved persuasive. *See, e.g., Insurance Co. v. Dunham,* 11 Wall. (78 U.S.) 1, 23-24 (1870) *aff'g De Lovio v. Boit,* 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.); *Columbian Ins. Co. of Alexandria v. Ashby & Stribling,* 13 Pet. (38 U.S.) 331, 342 (1839).

More recently, this Court has derived one rule of general maritime law with reference to a consensus among the world's maritime nations and the views of respected scholars and judges. *See McDermott, Inc. v. Amclyde,* 511 U.S. 202, 208 (1994) (recalling *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975)). Persuaded by considerations of judicial economy, the promotion of settlement, and consistency with existing federal maritime law, in *Amclyde* it drew another from the Restatement (Second) of Torts. *Id.* at 211. It has chosen a third consistent with the law in other common law countries, scholarly advice, and the Restatement of the Conflict of Laws.

Wherever it has looked for inspiration when fashioning maritime law in rules of decision, this Court has taken care to harmonize its work with that of Congress. *See Miles v. Apex Marine Corp.,* 498 U.S. 19, 31-32 (1990); *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625-26 (1978); *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 11 (1972); *Moragne v. Central Gulf Lines,* 398 U.S. 375, 397-99 (1970). *See generally* Force, *supra,* 20-21; Schoenbaum, *supra,* §§ 4-1, 4-2.

With due regard therefore for the manifest interest of Congress, this Court enjoys a range of sources and broad discretion in fashioning as general maritime law the rules of punitive damages that best serve the policy that ought to control under the circumstances.

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CONCLUSION

The petition should be granted to resolve uncertainty about critical aspects of the federal maritime law of punitive damages.

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Amicus Martin Davies is the Admiralty Law Institute Professor of Maritime Law at Tulane University and Co-Director of the university's Maritime Law Center. He is author (or co-author) of books on shipping law, international trade law, conflict of laws, and the law of torts. He also has extensive practical experience in maritime matters and international litigation, having worked as a consultant to maritime law firms for over twelve years. In that time, he has advised on cargo claims, arrest and admiralty matters, drafting bills of lading, sea waybills and charterparties, collisions and limitation of liability, oil pollution, salvage, marine insurance, maritime arbitrations, and international sale of goods.

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Amicus John Paul Jones is a professor of law at the University of Richmond, where he has taught maritime law for twenty-five years. From 2001 to 2006, he served as Editor of the *Journal of Maritime Law and Commerce* and continues to serve as the *Journal*'s Associate Editor. He is the author of the chapter on Collision in Volume 8 (Deskbook) of *Benedict on Admiralty*. He chairs the New York Forum of Maritime Law Professors and has chaired the Maritime Law Section of the Association of American Law Schools.

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Amicus Steven Richard Swanson is Professor of Law at Hamline University in Saint Paul, Minnesota. He has taught maritime law for twenty-three years. Professor Swanson's primary research areas are admiralty (in particular, maritime oil pollution claims) and international civil litigation. He has written a number of articles on admiralty issues, co-authored *Admiralty Cases and Materials* (2004) and wrote the *Personal Injury* chapter of Volume Eight of Benedict on Admiralty. Professor Swanson has chaired the Maritime Law Section of the Association of American Law Schools.

AMICUS CURIAE BRIEF

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IN THE

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v.

GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of businesses and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region. One important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business. The courts' fair, consistent and predictable administration of punitive damages awards is of profound concern to the Chamber's members.

Accordingly, the Chamber regularly files *amicus* briefs in significant punitive damages cases, including every case in which this Court has addressed that issue during the past two decades. Petitioners here (hereafter "Exxon") present critically important questions related to the power of federal courts to establish common law with respect to punitive damages awards in the context of federal maritime law – issues on which the federal courts are in acknowledged conflict. In addition, the decision below exacerbates the courts of appeals' disarray with respect to the application of the constitutional guideposts for punitive damages awards established in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Auto Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). The divisions among the courts of appeals on the issues presented here result in fundamental unfairness, as massive differences in punitive damages awards turn on the fortuity of where a case happens to be filed. Moreover, the absence of uniformity in maritime law not only contravenes maritime policy and congressional intent, but also creates damaging uncertainty for businesses in this sector. These entities do not know whether they are subject to imputed liability for the tortious acts of a ship master or crew, when conduct governed by the Clean Water Act might also be subject to punitive damages, or what legal standards govern punitive damages in maritime cases.

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

The Chamber believes that its knowledge of the practical implications for the business community of the legal principles embodied in the decision below can assist the Court in assessing the merits of Exxon's petition.

BACKGROUND AND INTRODUCTION

Although the Chamber fully supports review of all three questions presented, this brief does not address the first issue of imputed liability under maritime law, *viz.*, whether punitive damages may be imposed on the owner of a vessel for the tortious acts of the master and crew when the owner has not authorized, ratified, or controlled such actions. That issue is amply addressed by Exxon and by other *amici*. This brief supports Exxon's arguments that the remaining issues in the petition are independently worthy of review.

First, this Court should review the question whether the comprehensive remedial scheme of the Clean Water Act ("CWA") has displaced federal common law remedies, a recurring and important question on which the lower courts are in conflict. As this Court and others have made clear, where Congress enacts a comprehensive remedial design that does not expressly include a specific remedy, courts are not free to supplement that scheme with an additional remedy under federal common law. This is true not simply under maritime law, but as a general principle: A federal statute with a comprehensive remedial scheme displaces federal common law remedies – particularly punitive damages. This case provides an excellent example, because Exxon was assessed $125 million in fines under the CWA alone. The continuing lack of consistency concerning the CWA's effect on federal common law remedies treats litigants unfairly, encourages forum shopping, and undermines maritime laws and policies that recognize the critical importance of national uniformity and minimize burdens on maritime commerce. The resulting uncertainty is harmful to affected businesses making decisions in this unpredictable legal environment.

Second, this Court should grant the petition to delineate the common law principles that the federal courts should apply when reviewing punitive damages awards in maritime cases. In maritime and other common law cases, before addressing the question whether a punitive damages award is constitutional, the federal court must review the award under the relevant principles of federal common law. The court below wholly failed to do so, and thus affirmed an award that contravenes maritime policies in numerous respects. Moreover, as noted above, it is essential to maritime law and policies that federal courts apply uniform, consistent principles to maritime law questions – including the question whether a punitive damages award in a maritime case is excessive under federal common law. Yet, this Court has never addressed the federal common law principles that govern judicial review of punitive damages in maritime cases. This Court should grant the petition to end the damaging uncertainty about both the process and substance of judicial review in this important area of commerce.

Third, the decision below adds to the confusing and inconsistent array of lower court decisions applying two of the *Gore* guideposts for constitutional review of punitive damages awards. Specifically, the Ninth Circuit joined other courts that simply do not take seriously this Court's instruction that when "substantial" compensatory damages have been awarded, punitive damages should yield at most a 4-to-1 ratio – in cases of highly reprehensible conduct – and a 1-to-1 ratio in all other circumstances. In addition, the court of appeals noted *Gore*'s instruction that a reviewing court must consider the disparity between the punitive damages award and available civil sanctions, but read *State Farm* to make consideration of this guidepost essentially optional. In both respects, the decision badly misreads this Court's punitive damages holdings and exemplifies the unfair inconsistency currently permeating this area of law. The broadening uncertainty and division on these recurring legal questions is harmful to the legal system and American business. This Court's review is thus fully warranted.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER THE CLEAN WATER ACT DISPLACES COMMON LAW REMEDIES.

The Ninth Circuit acknowledged that "[b]efore and after the *Exxon Valdez* oil spill, the Clean Water Act's section on 'Oil and hazardous substance liability' provided a carefully calibrated set of civil penalties for oil spills, generally with ceilings on penalties, even if the spills were grossly negligent or willful." App. 74a. That remedial regime has never included punitive damages. The court of appeals nonetheless held that a punitive damages award "does not conflict with the statutory scheme," and therefore that the CWA "does not preclude a private remedy for punitive damages." *Id.* at 75a, 77a. See also *id.* at 77a ("a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy").

As Exxon makes clear (Pet. 17-18), the decision below conflicts with decisions of other federal courts of appeals. It is also utterly inconsistent with this Court's enduring teaching that federal common law is displaced where Congress has directly spoken to a particular subject matter.

Where, as here, "Congress addresses [a] problem formerly governed by federal common law," courts must construe the federal statute at issue with a "willingness to find congressional displacement of federal common law." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 & n.9, 315 n.8 (1981) ("*Milwaukee II*") (emphasis omitted). This is because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 317. As other courts of appeals have recognized, "once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution" or "holding that the solution Congress chose is not adequate." *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982); see *Milwaukee II*, 451 U.S. at 324. See also *United States* v. *Oswego Barge Corp.* (*In re Oswego Barge Corp.*), 664 F.2d 327, 335 (2d Cir. 1981) ("separation of powers concerns create a presumption in favor of [displacement] of federal common law whenever it can be said that Congress has legislated on the subject").

Federal common law claims and remedies are displaced by direct congressional treatment of an issue even if Congress does not expressly state that it is displacing common law. See *Resolution Trust Corp.* v. *Frates*, 52 F.3d 295, 297 (10th Cir. 1995) (to "supersede authority previously established by federal judicial ruling, Congress need not affirmatively proscribe that authority, but may do so simply by speaking directly to the issue"); *Milwaukee II*, 451 U.S. at 313-15; *Resolution Trust Corp.* v. *Miramon*, 22 F.3d 1357, 1360 (5th Cir. 1994).[2] Indeed, this Court has repeatedly observed that

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[2] The threshold for finding displacement of federal common law is lower than that for finding preemption of state law by federal common law. *See Frates*, 52 F.3d at 297. And, although the Second Circuit has suggested that "the presumption of statutory preemption [applies] somewhat less forcefully to judge-made maritime law than to non-maritime federal common law," *In re Oswego Barge Corp.*, 664 F.2d at 336, that court too acknowledged that "preemption of maritime law has occurred both as to prior judge-made law and the authority to fashion new

"'[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979)). Moreover, "'[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Id.* at 147 (quoting *Nw. Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981)); see also *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"); *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 406, 417 n.18 (1981) (under parts of § 301 of the Labor Management Relations Act, the availability of a "significant array of other remedies" counsels against the imposition of punitive damages as a matter of federal common law).

This Court has already made clear that these principles govern in the maritime context, as described in detail by Exxon. See Pet. 15-19 (citing cases). They also govern federal statutory interpretation as a general rule.

For example, the Employee Retirement Income Security Act of 1974 ("ERISA") has a comprehensive remedial scheme. Civil remedies for ERISA violations are set forth in § 502, 29 U.S.C. § 1132, which "provides 'a panoply of remedial devices' for participants and beneficiaries of benefit plans." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101,

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law," *id.* at 337. And, in admiralty law, this Court has "decline[d] to fashion new remedies if there is a possibility that they may interfere with a legislative program." *Nw. Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 97 n.40 (1981); *see id.* at 96 ("[e]ven in admiralty, however, where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress").

108 (1989) (quoting *Russell*, 473 U.S. at 146).[3] This Court has declined to supplement ERISA's remedial regime for violations of benefit plans with extracontractual compensatory and punitive damages remedies under common law, declaring itself "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 147. In addition, the Court noted, "there is a stark absence – in the statute itself and in its legislative history – of any reference to an intention to authorize the recovery of extracontractual damages." *Id.* at 148. Thus, the Court concluded, "Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." *Id.*[4]

Federal courts of appeals have taken a similar approach in evaluating the effect of the comprehensive remedial scheme of the Family Medical Leave Act ("FMLA"). Under 29 U.S.C. § 2617(a)(1)(A), any employer who violates the statute is liable "for damages equal to . . . the amount of": (1) "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation"; (2) interest on that amount; and (3) "an additional amount as liquidated damages equal to the sum of the amount described [in number one]." Courts have declined to supplement this detailed plan, uniformly concluding that only compensatory damages are available under the FMLA. See *Brumbalough* v. *Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1007-08 (6th Cir. 2005) (denying recovery for emotional distress under the statute); *Xin Liu* v. *Amway Corp.*, 347 F.3d 1125, 1133 n.6 (9th Cir. 2003) ("FMLA only provides for compensatory damages and not punitive damages"); *Walker* v. *UPS, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001) ("courts have consistently refused to award FMLA recovery for such other claims as consequential damages and emotional distress damages") (citations omitted); *Nero* v. *Indus. Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999) (same).[5]

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[3] Under ERISA § 502(a)(1)(B), a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3)(B) authorizes civil actions "to obtain other appropriate equitable relief (i) to redress . . . violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." *Id.* § 1132(a)(3)(B).

[4] *See also Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255-56 (1993) (suggesting that neither § 502(a)(2) nor § 502(a)(3) permits a participant or beneficiary to recover punitive damages); *Sommers Drug Stores Co.* v. *Corrigan Enters., Inc.*, 793 F.2d 1456, 1462-65 (5th Cir. 1986) (same).

Like these other federal statutes, the CWA enacts a comprehensive legislative scheme that precludes courts from inferring that additional remedies such as punitive damages may be available and that displaces any preexisting federal common law right to such an award. Pet. 15. The CWA authorizes substantial civil and criminal penalties. Under 33 U.S.C. § 1319(c), those who negligently or knowingly violate the Act are subject to fines of not less than $2,500 or $5,000 nor more than $25,000 or $50,000 per day of violation, respectively, and/or by imprisonment of not more than 1 or 3 years, respectively."[6]

On the civil side, an entity who violates the statute is subject to a civil penalty "not to exceed $25,000 per day for each violation." *Id.* § 1319(d). Under § 1321(b)(6)(B), if an "owner, operator, or person in charge of any vessel ... from which . . . a hazardous substance is discharged in violation of the statute, that individual or entity may be assessed up to" either $10,000 per violation (up to $25,000) or $10,000 per day for each day for which the violation continues (up to $125,000), depending on the kind of civil penalty assessed. 33 U.S.C. § 1321(b)(6)(A)-(B). Additionally, as the Ninth Circuit noted, 18 U.S.C. § 3571, "the federal measure for fines in this case," could result in a $200,000 civil fine, as well as a potential $1.03 billion criminal fine, which is "'not more than the greater of twice the gross gain or twice the gross loss'" suffered by another person as a result of the offense. App. 101a, 102a.

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[5] *Cf. Snapp* v. *Unlimited Concepts, Inc.*, 208 F.3d 928, 930, 933-35 (11th Cir. 2000) (holding that §§ 216(a) & (b) of the Fair Labor Standards Act establish "a comprehensive remedial scheme for violations of the FLSA's substantive provisions that covers the whole terrain of punitive sanctions, compensatory relief, private rights of action, and actions brought by the Secretary of Labor," and declining to authorize awards of punitive damages under the private cause of action).

[6] Repeat offenders are subject to maximum penalties of $50,000 or $100,000 per day of violation, depending upon whether the violation occurred negligently or knowingly. 33 U.S.C. § 1319(c)(1)-(2).

"The judiciary may not, in the face of such [a] comprehensive legislative scheme[], fashion new remedies that might upset carefully considered legislative programs." *Nw. Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981). The court of appeals decision violates this standard.

The Ninth Circuit's ultimate conclusion[7] that – despite its comprehensive remedial provisions – other CWA provisions *preserve* a plaintiff's right to pursue punitive damages is meritless. Section 1321(o)(1) preserves only actions to remedy "'damages to ... *property*'" (emphasis supplied) (omission in original), and § 1365(e) limits only the reach of the citizen suit provision. Pet. 20 n.7. Neither provision preserves the common law remedy of punitive damages for conduct comprehensively addressed by the CWA.[8]

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[7] In analyzing the question whether the CWA displaced the punitive-damages remedy, the Ninth Circuit acknowledged that "the question is not without doubt," App. 75a, and that "[t]he issue is close," *id.* at 77a.

[8] The Ninth Circuit also maintained that "a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy." App. 77a. A statute imposing only "public remedies" might not displace or preempt *compensatory* damages through which aggrieved private parties recoup their losses. But like other public remedies, punitive damages serve the goals of

For numerous reasons, the conflict and uncertainty concerning this issue should not be permitted to continue. First, "'[t]he need for a body of [maritime] law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention.'" *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (alteration in original). This Court, too, has remarked on the necessity for "uniformity and consistency" in maritime law in light of its interstate and international character. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). Second, allowing the conflict to endure is fundamentally unfair to litigants whose entitlement to punitive damages will turn on the geographic location in which the case is filed, and will serve to encourage unseemly forum shopping. Third, uncertainty about the scope of a federal statute has harmful consequences for any national business whose conduct is regulated by that statute.

This Court should grant the petition to decide whether the CWA displaces the federal common law remedy of punitive damages for conduct regulated by the Act.

II. THE COURT SHOULD GRANT THE PETITION TO DELINEATE THE FEDERAL COMMON LAW PRINCIPLES GOVERNING REVIEW OF PUNITIVE DAMAGES IN MARITIME CASES.

The court of appeals failed to review the punitive damages award in this case to determine whether it was consistent with governing federal common law principles. This omission cannot be reconciled with this Court's decision in *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), or with the longstanding principles of common law that apply to appellate review of punitive damages awards. Moreover, had it been reviewed, the award could not have survived scrutiny under the applicable common law principles. Granting

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punishment and deterrence, *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062 (2007), and thus a comprehensive scheme of public remedies presumptively preempts punitive damages.

review would allow this Court first, to make clear that in federal common law cases, including maritime cases, a court must review a punitive damages award under both federal common law principles and the Constitution, and second, to articulate uniform standards for review of such awards in maritime cases illuminated by maritime laws and policies.

"Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Id.* at 421; see also *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15 (1991). Long before this Court addressed federal constitutional limits on punitive damages awards, federal and state courts routinely reviewed those awards under common law principles. *Oberg*, 512 U.S. at 424-25; Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 995, 1014 (2001) ("[o]n the common-law side, courts have reviewed punitive damages verdicts for excessiveness since 1763"). But despite Exxon's repeated requests for review under federal common law, the court of appeals addressed only constitutional limits on the punitive damages award. App. 68a-70a, 90a-91a. The court thus abdicated its responsibility as a federal common law court.

Honda Motor Corp. v. *Oberg* involved an amendment to the Oregon Constitution that precluded judicial review of punitive damages awards except in certain very narrow circumstances. 512 U.S. at 418. As the Court explained, "if the defendant's only basis for relief [was] the *amount* of punitive damages the jury awarded, Oregon provide[d] no procedure for reducing or setting aside that award." *Id.* at 426-27. This Court rejected this scheme, holding that "the Due Process Clause requires judicial review of the amount of punitive damage awards." *Id.* at 420.

The Court observed that "[j]udicial review of the amount awarded was one of the few procedural safeguards which *the common law* provided against that danger," *id.* at 432 (emphasis added), and that "Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts," *id.* at 429. The Court held that, by "remov[ing] that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time," Oregon violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 432.

The Court's decision in *Oberg*, accordingly, makes clear that common law courts must conduct *some form* of review of punitive damages awards sufficient to ensure that "those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 429. Although some form of judicial review (or some equally effective safeguard against excessiveness and arbitrariness) is required, it is for the common law court – be it state or federal – to determine the precise content of that mandatory common law review. And, *Oberg* shows that this common law review is independent of, and precedes, the application of constitutional limits on punitive damages awards. (Indeed, the Court did not mandate the application of substantive constitutional limits on such awards until two years later in *Gore*.) Thus, a common law court (either state or federal) must review a punitive damages award for compliance with applicable common law *and* the Constitution.

Many state common law courts conduct this two-phase review as a matter of course, first applying the pertinent excessiveness standard under common law and then considering the constitutional limits. See, *e.g.*, *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d 473, 484 (Or. 2001) ("the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the . . . rational juror review"); *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 307 n.33 (Tex. 2006); *Dardinger* v. *Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143-44 (Ohio 2002); *Sweet* v. *Roy*, 801 A.2d 694, 714-15 (Vt. 2002);

Bowden v. *Caldor, Inc.*, 710 A.2d 267, 277-78 (Md. 1998); see also *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996) ("[f]or rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy").

In cases involving federal common law, a federal appellate court reviewing a punitive damages award should assume the same role as state appellate courts and conduct the same two-tier analysis. In reviewing the punitive damages award here, the court of appeals thus should have started by reviewing the punitive damages award under the applicable principles of federal common law. Its failure to do so was legal error.

Moreover, had the court of appeals reviewed the award under federal common law principles, it would have been required to give content to those principles. In maritime law, as in other areas governed by federal common law, the federal courts create the applicable federal common law. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953); *E. River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("[w]ith admiralty jurisdiction comes the application of substantive admiralty law"); *In re Oswego Barge Corp.*, 664 F.2d at 336 (citing the "substantial law-creating function for federal courts in maritime law"). This entails, *inter alia*, establishing the *remedies available for each cause of action*. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) ("the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime").

Exxon has already described in detail the maritime law and policies that should inform courts in reviewing the punitive damages award in this case, Pet. 22-25. Briefly, the maritime policies of uniform and consistent laws, appropriate and fair compensation for injury, avoidance of undue burdens on commerce, the encouragement of settlement of claims, and judicial economy all militate against the massive and unprecedented punitive damages awarded below in this case.

Id. The Court's review is of particular importance in this instance, where the $2.5 billion punitive damages award is *in addition to* the nearly $3.5 billion Exxon has already expended – in fines, settlements, and affirmative mitigation costs – as a result of the oil spill. *Id.* at 3-4.

Indeed, Exxon was not asking the court of appeals to do anything other than to fulfill its responsibilities as a federal common law court – *i.e.*, to determine the appropriate procedural and substantive standards for reviewing punitive damages awards in light of the federal policies and interests at stake. That is precisely what the federal courts have done in the closely analogous context of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), a statute that instructs the courts to create a federal common law interpreting, enforcing, and remedying violations of collective bargaining agreements and agreements between labor unions and their members. See *Nw. Airlines*, 451 U.S. at 95, 96 n.35. Pursuant to that statutory command, federal courts have not only developed the general contours of the law governing labor agreements, but also have crafted the law governing the remedies for violations of such agreements. In doing so, their decisions are informed by the relevant federal labor policy. See *Int'l B'hood of Elec. Workers* v. *Foust*, 442 U.S. 42, 50-52 (1979) (barring awards of punitive damages for breach of a union's duty of fair representation); *Merck* v. *Jewel Food Stores*, 734 F. Supp. 330, 331 (N.D. Ill. 1990) (Posner, J.) (agreeing with the majority of federal courts that refuse to allow punitive damages for violations of collective bargaining agreements under § 301), *rev'd in part on other grounds*, 945 F.2d 889 (7th Cir. 1991).[9]

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[9] *See also Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455-58 (1957) (enforcement of arbitration agreements); *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 36-45 (1987) (limited review of arbitration awards).

The same approach should have been utilized here. The Ninth Circuit abjured its obligation to review the punitive damages award under common law standards, and thus necessarily failed to fulfill its responsibility to craft common law principles of review informed by maritime laws and policies. The court's failure to determine and apply the applicable common law principles was clear legal error, and led directly to the excessive award in this case.[10] Moreover, the decision creates uncertainty about the nature of review of punitive damages awards in maritime law – uncertainty with the damaging consequences set forth *supra*. And, because the federal court must determine the applicable common law standards in this context, this Court has a unique opportunity to demonstrate to other common law courts how punitive damages standards ought to operate – not at their outermost constitutional limits, but in fulfilling punitive damages' basic function of deterring and punishing wrongful acts. For these reasons, too, the Court should grant the petition.

III. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE DISARRAY IN THE COURTS OVER APPLICATION OF *GORE*'S GUIDEPOSTS.

1. In *State Farm*, this Court sought, *inter alia*, to provide guidance to the lower courts on the proper application of *Gore*'s guideposts for assessing punitive damages. Relevant here, this Court stated in describing the second *Gore* guidepost that "few awards exceeding a single-digit ratio

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[10] In *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc*, this Court refused to find a punitive damages award based on a state-law cause of action "excessive as a matter of federal common law," holding that "[i]n a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." 492 U.S. 257, 277, 278 (1989). Here, in contrast, the underlying claim arises under a form of federal common law and thus review under judge-made common law principles is mandatory.

between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. Critically, moreover, the Court added that a ratio exceeding double-digits may be permissible when "'a particularly egregious act has resulted in only a small amount of economic damages,'" but that "*[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.*" *Id.* (emphasis supplied). This is because when compensatory damages are substantial, "further sanctions" generally are not required "to achieve punishment or deterrence." *Id.* at 419.

Despite this facially clear guidance, many lower courts have failed to comply, which has resulted in the persistent, inconsistent treatment of punitive damages in the lower courts. The instant case exemplifies this disturbing state of affairs. Although compensatory damages in this case were $20.3 million, the court of appeals first held that the actual harm suffered was $500 million. This award was "'substantial,'" App. 293a, and thus the same amount of punitive damages should have been at the "outermost limit of the due process guarantee." The court of appeals instead followed the path marked out in its decision in *Planned Parenthood* v. *Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006), which authorized a ratio of up to 4-to-1 for cases involving significant economic damages *without* egregious behavior and a higher ratio when behavior is egregious. Accordingly, the court affirmed an award that imposed punitive damages at a ratio of 5-to-1 to the court's estimate of harm (many times higher than actual damages). App. 41a-42a.[11]

This award directly contravenes *State Farm*. It also highlights a disturbing trend among courts that undermines this Court's intent to ensure due process by achieving greater uniformity, predictability and reasonableness in the punitive damages arena. The Ninth Circuit and many other courts have failed to heed this Court's instructions about the appropriate relationship between compensatory and punitive damages awards. For example, in *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), the court upheld a $2.6 million punitive damages award in relation to a $360,000 compensatory damage award (a ratio exceeding seven to one). The court did not discuss the impact of the substantial nature of the compensatory award, but simply declared that it was "aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages." *Id.* at 1044.

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[11] For the reasons set forth in the Petition at 28-29, the court of appeals also erred by labeling Exxon's conduct egregious.

Similarly, the Federal Circuit noted that a $50 million punitive damages award did "not even approach the possible threshold of constitutional impropriety," as it was "barely above three times the compensatory award of $15 million in this case." *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003). The court held that because the 3-to-1 ratio "remains within the '[s]ingle-digit multipliers [which] are more likely to comport with due process,' not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect[,] . . . . this low ratio of punitive to compensatory damages award lies well within the bounds of constitutional propriety." *Id.* (first two alterations in original) (quoting *State Farm*, 538 U.S. at 425). The court simply ignored this Court's instructions concerning awards in cases involving substantial compensatory damages despite its clear application to an award of $15 million. See also Pet. 28 n.9 (citing cases disregarding this Court's instructions).

Other courts, however, have heeded this Court's clear call for restraint, as the citations in Exxon's petition (*id.*) again reveal. As the Sixth Circuit recently explained, "the general principle [is] that a plaintiff who receives a considerable compensatory damages award ought not also receive a

sizeable punitive damages award absent special circumstances." *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007). In addition, the Eighth Circuit has generally reduced exorbitant punitive damages awards when measured against substantial compensatory ones. See *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing $15 million punitive damages award to $5 million to achieve a 1-to-1 ratio); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (remitting the punitive damages award to an amount equal to the compensatory damages award of $600,000 because "[s]ix hundred thousand dollars is a lot of money"). But see *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (finding $500,000 in compensatory damages "substantial," but only reducing the 10-to-1 ratio to 4-to-1).[12]

Clearly, the goals of uniformity and predictability that motivated this Court's due process standards for punitive awards have continued to elude the lower courts, in significant part due to their failure faithfully to apply *Gore* and *State Farm*. This failure – and the resulting uncertainty – continues to have an outsized effect on American businesses by distorting how business and litigation are conducted.

2. As the petition observes, the decision below does not apply *Gore*'s teaching that courts should consider "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *State Farm*, 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). The court justified this omission by relying on the *State Farm* Court's statement that it "need not dwell long on this guidepost," *id.* The court of appeals took this statement to

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[12] The *Stogsdill* approach was also utilized in *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), where the court held that "[a]lthough the [plaintiffs] received substantial compensatory damages, given the facts of this case, the [four-to-one] ratio of punitive damages to compensatory damages does not indicate that the punitive damages award violates due process."

mean that a disparity between punitive damages and potentially analogous civil penalties was unimportant. See App. 41a ("[i]n our own circuit's more recent post-*BMW v. Gore* and *State Farm* cases, we have generally not attempted to quantify legislative penalties" but "have looked only to whether or not the misconduct was dealt with seriously under state civil or criminal laws. In several recent discussions we have not discussed the factor at all") (citation omitted).

This attitude, which is not confined to the Ninth Circuit, is based on a misinterpretation of *State Farm*, and sabotages this Court's efforts to guide the lower courts to consistency and uniformity. First, as the context makes clear, the court below completely misread *State Farm*. This Court stated:

> Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

538 U.S. at 428 (citation omitted). As this language makes plain, *State Farm* duly considered the disparity between the punitive damages award and comparable civil sanctions. This Court simply found that its application in that instance was uncomplicated, because the comparable penalties were "dwarfed" by the Utah Supreme Court's award.

That is hardly a license to adopt the Ninth Circuit's utterly cavalier approach to this disparity question, which unfortunately is not limited to the Ninth Circuit. Some courts have plainly indicated that the this guidepost should be "'accorded less weight in the reasonableness analysis than the first two guideposts.'" *Action Marine, Inc.* v. *Cont'l Carbon, Inc.*, 481 F.3d 1302, 1322 (11th Cir. 2007) (quoting *Kemp* v. *AT&T*, 393 F.3d 1354, 1364 (11th Cir. 2004)), *petition for cert. filed*, No. 07-257 (Aug. 24, 2007). Others claim that the third guidepost "has been criticized as ineffective and very difficult to employ." *Aken* v. *Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 671 (N.M. 2002). Still others, including the Ninth Circuit, have fashioned alternative approaches. See, *e.g.*, App. 41a (assessing only whether or not the legislature "dealt with [the issue] seriously").

Since establishing *Gore*'s third guidepost, the Court has not elaborated further. Here, the combined civil penalties imposed on Exxon could not have exceeded $80 million, and the court below acknowledged that this case is "'unusually rich in comparable[]'" civil penalties. Pet. 30 (quoting App. 101a). This case is, accordingly, also an excellent vehicle for the rehabilitation of this *Gore* guidepost which has often received short shrift from the lower courts, although it is an integral part of the due process equation.

CONCLUSION

The petition for certiorari should be granted.

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In The

Supreme Court of the United States

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EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

◆

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INTEREST OF THE *AMICUS CURIAE*[1]

Since 1940, the International Association of Drilling Contractors (IADC) has exclusively represented the worldwide oil and gas drilling industry. Its mission is to promote commitment to safety, preservation of the environment, and advances in drilling technology.

From its Houston headquarters, the IADC strives to secure responsible standards, practices, and regulations that provide for safe, efficient, and environmentally sound drilling operations worldwide. The Association educates its members through programs and publications and develops industry training standards. The IADC has offices in Washington, D.C., the United Kingdom, the Netherlands, and the Middle East, and has chapters in the United Kingdom, Venezuela, Brazil, Australia, South Central Asia, Southeast Asia, the Middle East, North Africa, and throughout the United States.

The IADC is an independent trade association that has more than 500 member companies, most of whom are drilling contractors. IADC membership includes contract drilling and well-servicing firms, oil and gas producers, and manufacturers and suppliers of oilfield equipment and services. The IADC's contract drilling members own most of the world's land and offshore drilling units and drill the vast majority of the world's oil, natural gas, and geothermal wells. A full list of the IADC's members can be found on its website at http://www.iadc.org.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus* or its members, made any monetary contribution to the preparation or submission of this brief. Petitioners have filed a letter with the Clerk of Court giving blanket consent to the filing of all *amicus curiae* briefs in this case. A letter of consent from respondents has been filed in the Court with this brief.

The IADC holds "Accredited Observer" status at the International Maritime Organization and the International Seabed Federation, both agencies of the United Nations. The IADC also drafts and publishes model drilling contract forms for use in the oil and gas industry.

The IADC files this *amicus* brief in support of the Petition for a Writ of Certiorari. This Court's opinion on the significant federal maritime law issues of vicarious liability for punitive damages, judge-made remedies expanding Congressionally specified statutory penalties, and the legal standards to be used to determine punitive damages, will directly affect the offshore drilling contractor members of the Association. *Amicus curiae* believes that this Court may benefit from the perspective of the Association, many of whose members operate under the statutory and judge-made admiralty and maritime law of the United States.

Members of the IADC have direct exposure for the risks incurred by the imposition of punitive damages. *Amicus* thus has a vital interest in the proper interpretation of the legal standards and limits under which punitive damages may be imposed, if in fact, they may be, under the statutory and judge-made maritime law of the United States.

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STATEMENT

This case arises from the 1989 grounding of the *EXXON VALDEZ* and resulting oil spill. In this maritime tort action an Alaska federal court jury awarded punitive damages of $5 billion against Exxon.

The trial court instructed the jury that it was required, as a matter of law, to impute the conduct of the master of the *EXXON VALDEZ* to the ship owner. *See* Pet. App. 301a-302a.

Over the course of three appeals, the punitive damage award was ultimately adjusted by the Ninth Circuit Court of Appeals to a figure of $2.5 billion.

The questions presented here are: 1) whether a shipowner may be vicariously liable for punitive damages, as held by the Ninth Circuit, which is contrary to more than 200 years of federal maritime law and in conflict with decisions of four other circuit courts of appeals; 2) whether a judge-made remedy of punitive damages is available, as held by the Ninth Circuit, when Congress has spoken through a federal statute outlining the available remedies pursuant to that statute, and the Ninth Circuit's holding is in conflict with decisions of this Court and those of four other circuit courts of appeals; and 3) whether substantive federal maritime law allows such a large punitive damages award under the circumstances involved in this case.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The issues of vicarious liability for punitive damages, the availability of judge-made maritime law remedies expanding existing statutory penalties, and the permissible size of punitive damages under substantive federal maritime law are all of vital concern to every interest in the maritime community. Offshore drilling contractor members of the IADC, like other maritime interests, operate in more than one area of the nation. Being subject to such wide variation in federal maritime legal standards depending on the location of the dispute creates great uncertainty and has the potential to cause great harm to the continued development of the offshore drilling industry. At a minimum, the industry should have the benefit of uniform laws.

Until now, this Court has addressed issues regarding punitive damages in the context of state law, and has therefore been able to provide guidance only on the Constitutional limits imposed by the Fourteenth Amendment's due process clause. *See, e.g., Philip Morris USA v. Williams,* 127 S. Ct. 1057, 1060 (2007) (analyzing due process limits of state law punitive damages award); *State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 412 (2003) (same); *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 562 (1996) (same).

In this case, the issues are matters of federal maritime law, which means that this Court has the ultimate responsibility for formulating the governing rules by applying prior precedents, applying sound public policy, and formulating new maritime law to the extent necessary, just as state supreme courts have the ultimate responsibility for formulating the state common law that governs most punitive damages claims. *See E. River S.S. Corp. v. Transamerica Delavel,* 476 U.S. 858, 864-65 (1986).

This case also affords this Court an opportunity to provide the maritime community with guidance regarding due process of law limits on punitive damages under the Fifth Amendment to the United States Constitution. Respondents' Conditional Cross-Petition (No. 07-276) recognizes the need for guidance on the due process question.

This Court should grant certiorari to provide the maritime industry with uniform standards under maritime law and to provide guidance regarding punitive damages without being constrained to interpret only the outer limits of due process.

◆

ARGUMENT

I. The Maritime Law Essential Characteristic Requirement of Uniformity Makes this Court's Addressing Conflicts Imperative.

Our courts have long recognized that the federal system requires uniformity of substantive law in maritime matters. Each court applies its own procedural rules to cases before it, but looks to the rules of the "general maritime law" or to applicable federal statutes for the substantive law. This Court quite recently spoke of the value of uniformity in *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd., et al.*, 543 U.S. 14, 28 (2004). In this "maritime case about a train wreck," this Court declared:

> We have explained that Article III's grant of admiralty jurisdiction "'must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'" *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)). See also *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 (1996) ("[I]n several contexts, we have recognized that vindication of

> maritime policies demanded uniform adherence to a federal rule of decision" (citing *Kossick* [*v. United Fruit Co.,* 365 U.S. 731, 742 (1961)]; *Pope & Talbot* [*Inc. v. Hawn*], 346 U.S. [406], 409 [(1953)]; *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 248-249 (1942))); *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 373 (1959).

The absence of uniformity created by the Ninth Circuit's opinion in this case must be addressed and resolved. The Ninth Circuit's opinion is in conflict with other circuit courts with respect to the issue of vicarious liability for punitive damages. *See, e.g., In re P&E Boat Rentals*, 872 F.2d 642, 651-52 (5th Cir. 1989) (*en banc*). For example, offshore drilling contractors operate both within the geographical area of the Ninth Circuit and in the Gulf of Mexico, within the geographical area of the Fifth Circuit. They can become embroiled in litigation in both circuits, where they will face the application of conflicting sets of rules regarding punitive damages.

In fact, under admiralty law's generous venue rules, drilling contractors are subject to suit in either circuit regardless of where the incident made the basis of the lawsuit occurred. The conflict allows forum shopping for favorable law on the application of punitive damages.

In the same manner, the Ninth Circuit's opinion in this case on the issue of whether a judge-made remedy of punitive damages may be allowed to expand clear statutory penalties is in conflict with the

Fifth Circuit's view. *See, e.g., Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1512-13 (5th Cir. 1995) (*en banc*).

Drilling contractors operate within the geographical area of various circuit courts of appeals and a uniform rule is required to govern the contractors' expectations with respect to operating in one geographical area or another.

II. This Court's Role in Declaring and Shaping Federal Maritime Law Requires Establishment of Standards for Punitive Damages.

Punitive damages are a major issue on which this Court should provide guidance. In this case, the punitive damage issues are admittedly governed by federal maritime law. The cause of action which resulted in the jury award of punitive damages was a maritime tort action.

Federal maritime law may be statutory, but when no federal statute controls, judges hearing maritime cases declare and shape federal maritime law. *See, e.g., E. River S.S. Corp. v. Transamerica Delavel,* 476 U.S. 858, 864-65 (1986). This Court is the ultimate source of our non-statutory federal maritime law and this Court's role in maritime cases is, thus, comparable to a common law court because it has ultimate authority to formulate the applicable law in the maritime field, just as state courts have authority to formulate state common law. *See id.*

This Court must establish substantive maritime law limits and standards for punitive damages independently of considerations of due process. Why is this so? Why is something other than the limits of due process required? The answer is simple – for the same reasons articulated by this Court in *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994). There must be a system of review of jury awards of punitive damages. Review must be allowed by the trial court and by appellate courts. This is just as true in respect of federal maritime law as it is with regard to state law punitive damages.

In *Honda,* an amendment to the Oregon Constitution prohibited judicial review of the amount of punitive damages awarded by a jury unless the court could affirmatively state no evidence supported the verdict. 512 U.S. at 426-27. Petitioner, who had been assessed punitive damages in a negligence action, argued this prohibition denied him due process. *Id.* at 420-29.

This Court recognized that jury-awarded punitive damages pose an acute danger of arbitrary deprivation of property, particularly in cases involving wealthy corporate defendants. *Id.* at 431-32. This Court held that Oregon's denial of judicial review of the size of punitive damage awards violated the Due Process Clause because Oregon removed its safeguards without providing any substitute procedure, and without any indication that the danger of arbitrary awards had in any way subsided over time. *Id.* at 431-35.

This Court has unfettered freedom to tell United States maritime interests what the standards and limits are with respect to awarding punitive damages in federal maritime law cases. This will bring uniformity, predictability, and clarity to the issue of awarding punitive damages in federal maritime law cases.

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CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

[redacted] INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS AND INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS [redacted] AS *AMICI CURIAE* AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

International Association of Independent Tanker Owners ("INTERTANKO") and International Association of Dry Cargo Shipowners ("INTERCARGO") respectfully request that the Court grant leave to file the attached *amicus* brief in support of petitioners' request that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

The issue arises in the context of a $2.5 billion punitive damage award against the owners of the tank vessel *Exxon Valdez*. The Ninth Circuit's decision for which issuance of a writ is sought creates conflict among the circuits with regard to shipowner liability for punitive damages. Petitioners have sought issuance of a writ to the Ninth Circuit to reconcile divergent dispositions between the circuits and to address the legitimacy of massive punitive damage awards against vessel owners under the Constitution and general maritime law. The divergence between the circuits creates uncertainty as to the liability exposure of vessel owners having minimal contacts with the Ninth Circuit, home to some of the busiest ports in the United States. Resolution of this conflict will provide INTERTANKO and INTERCARGO members, as well as much of the worldwide shipping industry with clarity as to the magnitude of risk they confront when engaging in maritime commerce.

Pursuant to Rule 37.2 of the Rules of this Court, INTERTANKO and INTERCARGO have sought and received written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. On September 12, 2007, counsel for the Petitioner consented in writing to the filing of this brief. On September 13, 2007, INTERTANKO and INTERCARGO received written consent from counsel for respondents.[1] Accordingly, counsel for INTERTANKO and INTERCARGO move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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[1] Letters from Petitioners and Respondents indicating consent to file are being filed with the clerk of the Court.

QUESTIONS PRESENTED

In the view of *amici curiae*, INTERTANKO and INTERCARGO, the questions presented for review are as follows:

1. Whether the Ninth Circuit erred in departing from the traditional maritime rule governing vicarious liability maintained in the First, Fifth, Sixth and Seventh Circuits.

2. Whether the remedies and penalties set forth in the Clean Water Act are the exclusive remedies available for marine pollution claims.

3. Whether a $2.5 billion punitive damage award is permissible under maritime law or constitutional due process.

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BRIEF OF *AMICI CURIAE* INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO) AND THE INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS (INTERCARGO)

INTEREST OF *AMICI CURIAE*[1]

INTERTANKO is an unincorporated, not-for-profit association of independent tanker owners and operators. As used in this context, "independent" reflects INTERTANKO membership criteria that member companies be tanker owners neither owned nor controlled by cargo owners (*e.g.*, oil companies) whose cargo is carried aboard INTERTANKO vessels. INTERTANKO, however, works closely with all sectors of the international marine tanker market, and oil company-owned tanker companies participate in INTERTANKO activities as associate members. INTERTANKO's approximately 250 independent members and 300 associate members own, operate and manage more than 3,000 tankers in all major maritime trades of the world, including all major liquid bulk ports in the United States. The independent owner members of INTERTANKO operate somewhat more than 2,500 vessels totaling approximately 210 million tons (deadweight), or 70 percent of the world's independent tanker fleet.

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[1] Pursuant to Sup. Ct. R. 37.6, no counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amici curiae*.

INTERCARGO is an unincorporated, not-for-profit association of owners, operators, and managers of bulk dry cargo vessels. These vessels carry bulk (non-containerized) commodities such as ores and other minerals, grains, steel, coal and timber throughout the world, including to and from ports in the United States.

Both INTERTANKO and INTERCARGO provide for policy discussion and exchange of information on developments that affect the highly regulated and complex business of carrying oil, chemicals and dry bulk cargoes by ship between ports throughout the world. The organizations advance their members' interests before local, state, regional and national legislatures, courts, administrative agencies and United Nations bodies with authority over international maritime activities. Both organizations are uniquely situated to apprise the Court of the impacts of liability regimes governing marine oil spills. Because both INTERTANKO and INTERCARGO vessels trade to United States ports on all three (Atlantic, Gulf and Pacific) ocean coasts of the United States and in the Great Lakes, both organizations are concerned that liability regimes governing casualties relating to the release of oil into the marine environment be rational, harmonious and uniform, not only within the United States, but, to the maximum achievable extent, throughout the world.

While there is wide variation in the size of the fleets and the financial profiles of companies who are members of INTERTANKO and INTERCARGO, many of the companies are relatively small, privately held enterprises. The average fleet size for INTERTANKO and INTERCARGO members is less than ten vessels and the assets of these companies are generally not sufficient to sustain large awards of punitive damages. While owners, operators and managers of marine transport providers rely heavily on global insurance markets to provide coverage for awards of compensatory damages, punitive damage assessments in jurisdictions that recognize such awards are generally uninsurable.

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STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Petition.

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SUMMARY OF ARGUMENT

For nearly 190 years, federal courts sitting in admiralty have faithfully applied this Court's unanimous decision in *The Amiable Nancy* which limited the vicarious liability of shipowners to compensatory damages, allowing vicarious punitive damages only in instances where shipowners were complicit in the misconduct of their agents. 16 U.S. 546, 559 (1818). The Ninth Circuit adopted this rule in 1905 and adhered to it for eighty years before it elected to apply a new rule from the Restatement (second) of Torts § 909 (1969). *Protectus Alpha Navigation v.*

N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1386 (9th Cir. 1985). In the decision below, faced with two incompatible panel decisions, a split panel of the Ninth Circuit opted to supplant the traditional maritime rule, bringing that court into direct conflict with every other circuit that has addressed this issue – the First, Fifth, Sixth and Seventh Circuits. *In re the Exxon Valdez*, 270 F.3d 1215, 1236 (9th Cir. 2001).

The conflict created by the Ninth Circuit's recent decision undermines both the uniformity and substance of settled maritime law. Shipowners now confront two very different liability regimes in the United States, the world's largest maritime trading destination. Under the traditional maritime rule found in most circuits, shipowners can manage their risk by planning for familiar contingencies and preparing to bear actual remedial costs when accidents occur. Under the Ninth Circuit's rule, however, actual remedial costs are only a point of departure, with incalculable and potentially ruinous punitive damages stretching beyond the horizon. The persistence of such inconsistent liability laws would be a burden in many industries, but given the inter-jurisdictional movements of ocean-going vessels, the costs of legal discord are particularly disruptive to interstate and international commerce. Indeed, it was the essential need for uniform maritime laws that caused the Framers to make this Court the final arbiter of maritime law. U.S. CONST. art. III, § 2, cl.1. Because this Court alone has the power to restore uniformity and clarity to a crucial question of maritime law, *amici* respectfully request issuance of a writ of certiorari to the court of appeals below.

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ARGUMENT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT, WHICH HAS ABANDONED THE TRADITIONAL MARITIME RULE LIMITING VICARIOUS LIABILITY FOR PUNITIVE DAMAGES, AND THE FIRST, FIFTH, SIXTH AND SEVENTH CIRCUITS, WHICH ADHERE TO THE TRADITIONAL RULE.

Five U.S. Circuit Courts of Appeals have addressed the important issue of whether punitive damages can be imposed on shipowners for the acts of shipmasters. The First, Fifth, Sixth and Seventh Circuits apply the traditional maritime rule articulated by this Court in *The Amiable Nancy*, 16 U.S. 546 (1818) – that punitive damages *can* be imposed on shipowners for the acts of shipmasters, but only when owners have directed, countenanced, or participated in the conduct of their agent.[2] *See CEH Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995); *In re P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143

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[2] Even in the absence of such culpability, shipowners are subject to vicarious liability for compensatory damages.

(6th Cir. 1969); *The State of Missouri*, 76 F. 376 (7th Cir. 1896). After eighty years of adhering to this rule, the Ninth Circuit has deviated from it and has adopted a rule that is irreconcilable with the binding precedents of this Court and the general maritime law adhered to in every other circuit.

A. Since This Court's Decision in *The Amiable Nancy*, Courts Outside the Ninth Circuit Have Consistently Applied the Traditional Rule Limiting Shipowner Vicarious Liability.

When American privateersmen sailing on the brig *Scourge* boarded and plundered a neutral Haitian vessel, the schooner *Amiable Nancy*, the owner of the schooner, Monsieur Mirault, libeled the *Scourge* in the Southern District of New York, thereby seeking relief from her American owners. After finding the owners of the *Scourge* liable for the tortious acts of their privateersmen, the court ordered its clerk to estimate damages with the aid of "two respectable merchants." *The Amiable Nancy*, 1 Fed. Cas. 765, 766 (C.C.D.N.Y. 1817) (relaying the unpublished decision of the district court). The resulting award was approximately seventeen times the value of the looted property, and on appeal, Justice Henry Livingston, riding circuit, found it "impossible not to be struck with the very large amount which [had] been assessed for damages, when compared with the actual injury sustained." 1 Fed. Cas. at 768. As Livingston observed, the district court had "taken for granted that vindictive damages are to be recovered, and that in such cases a court will not be very particular as to the limits within which it will circumscribe a defendant's liability."[3] The Circuit Court, therefore, made it clear that there are limits on vicarious liability by rejecting the "rule of vindictive damages which [had been] pressed upon the court" and holding that "the measure of [a shipowner's] responsibility is simply "the full value of the property injured or destroyed." 1 Fed. Cas. at 769 (quoting *Del Col v. Arnold*, 3 U.S. 333 (1796)).[4]

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[3] Punitive damages at this time were often awarded through the undeclared inflation of compensatory damages. This practice originated in early English common law as a way for jurors to express their sympathy for plaintiffs and their scorn for defendants since damages for emotional harms were not recognized at common law. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 83-84. This practice, seen in *The Amiable Nancy*, is also manifest in several other maritime cases from the era. *See, e.g., Chamberlain v. Chandler*, 5 F. Cas. 413 (C.C.D. Mass. 1823) (awarding what amounted to punitive damages for "precisely the same purposes as those in the leading English decisions . . . " Robertson, *supra* n. 4, at 88-89).

[4] Justice Livingston also made several compelling policy arguments against vicarious punitive damages in this context. For example, he observes that the promise of high punitive damages from shipowners will create a disincentive to settle disputes ("Such heavy assessments . . . scarcely reducible to any rule, will also prevent compromises between the parties. No offer of compensation . . . however fair, and although fully commensurate with the loss that has been sustained, will satisfy the extravagant pretensions of the injured party . . ." 1 Fed. Cas. at 770).

The following year, this Court voted unanimously to uphold the Circuit Court's limitation on vicarious liability. Justice Joseph Story, the "father of American admiralty law,"[5] wrote that the owners of the *Scourge* clearly had "a responsibility for the conduct of the officers and crew employed by them," and thus, were "bound to repair all the real injuries and personal wrongs sustained . . . " (*i.e.* compensatory damages). 16 U.S. at 558-59. However, even though the "lawless conduct" of the privateersmen warranted the imposition of "exemplary damages," this was a suit against the owners, and the Court held the owners were "not bound to the extent of vindictive damages" (*i.e.* punitive damages) because they were "innocent of the demerit" complained of, "having neither directed it, nor countenanced it, nor participated in it in the slightest degree . . . " 16 U.S. at 559.

The Amiable Nancy is not a quaint relic of the Marshall Court. It is a binding precedent of maritime law that has been expressly affirmed by this Court, *Lake Shore & Michigan S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893), and followed by federal courts sitting in admiralty for almost 190 years.

To counsel's knowledge, the first case to apply *The Amiable Nancy* was *Ralston v. The State Rights*,

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[5] *See* SCHWARTZ, A HISTORY OF THE SUPREME COURT 60 (1993) ("Early American commercial and admiralty law were largely the creation of Story's decision."); Story was the editor of the influential TREATISE ON THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN (1810).

20 F. Cas. 201 (E.D. Pa. 1836), in which the captain of the steamship *State Rights* deliberately and repeatedly rammed its competitor, the steamship *Linnaeus*, with its ice-breaker bow. The court acknowledged its authority to award "exemplary damages" as a general matter, but, applying *The Amiable Nancy*, it limited liability to compensatory damages. 20 F. Cas. at 201. Despite the fact that the owners were found to have been "too inattentive to the manner in which [their captain] was using the authority they had committed to him," the court refused to award punitive damages because the owners were not "particularly informed" of the captain's actions or "the vindictive motives he avowed for his misconduct." 20 F. Cas. at 201.

Twenty years later, the Ninth Circuit's predecessor, the California Circuit, held in *McGuire v. The Golden Gate*, 16 F. Cas. 141 (C.C.N.D. Cal. 1856), that "damages may be inflamed to teach offenders their duty; but not when the proceedings are against the owners. . . . Such should not be made liable beyond the amount of actual damages, uninfluenced by any considerations of punishing the act of the perpetrator . . . " 16 F. Cas. at 143. Citing *The Amiable Nancy*, the court held "in actions against innocent owners, while the policy of the law holds them liable for actual damages as proved, these cannot be enhanced to admonish the guilty." 16 F. Cas. at 144.

Toward the end of the nineteenth century, this Court unequivocally affirmed *The Amiable Nancy* in *Lake Shore & Michigan S. Ry. Co.*, 147 U.S. 101, 107-08 (1893). In this case, a train conductor had abused and caused the wrongful arrest of a passenger who sought punitive damages against the railroad. Extending *The Amiable Nancy* beyond the maritime context, the Court held that "[a] principal" is "of course liable to make compensation for injuries done by his agent within the scope of his employment," but "cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*." 147 U.S. at 107-08.

By 1896, *The Amiable Nancy* rule was so well established that, when the Seventh Circuit found a steamship owner liable for the act of the steamer's master in *The State of Missouri*, 76 F. 376 (7th Cir. 1896), the court simply said "[u]ndoubtedly the damages to be awarded must be compensatory, and not exemplary, where recovery is sought against the master for the unauthorized tort of the servant." 76 F. at 380.

The Ninth Circuit confronted this issue for the first time nine years later in *Pac. Packing & Navigation Co. v. Fielding*, 136 F. 577 (9th Cir. 1905). After being falsely imprisoned aboard a steamship by her captain, the plaintiff sought punitive damages from the shipowner. The plaintiff urged the court to treat shipmasters as corporate executives under the theory that the intent of those who wield "the whole executive power" can be imputed to the corporation itself. 136 F. at 580. The Ninth Circuit rejected this theory. Although the court recognized that "the master of a ship at sea . . . is for the time being in the sole and absolute command of the ship and of everybody in it," the court refused to equate shipmasters with corporate executives "especially in view of the decision of the Supreme Court in the case of the *Amiable Nancy* . . . the doctrine of which case was expressly approved in *Lake Shore, etc., Railway Company v. Prentice.*" 136 F. at 580.

Over the next ninety years, district courts sitting in admiralty in the First, Fifth and Eleventh Circuits consistently applied what had clearly emerged as the traditional maritime rule limiting shipowner vicarious liability for punitive damages. *See The Seven Brothers*, 170 F. 126, 127 (D.R.I. 1909) (declaring that "punitive damages cannot be awarded" against the owner of a vessel "who is not proved to have had any share in or knowledge of the malicious act."); *The Ludlow*, 280 F. 162, 163 (N.D. Fla. 1922) ("There is a clear distinction in the admiralty law between the liability of the owner or principal as a consequence of the tort of the agent. . . . The owner or employer is exempt from punitive damages, unless it may be shown that the owner acquiesced in or ratified the wrong, or that the deed was perpetrated in the line of the agent's authority. Otherwise, he is liable only for actual damages suffered."); *McGuffie v. Transworld Drilling Co.*, 625 F. Supp. 369, 373 (D. La. 1985) (rejecting the Ninth Circuit's deviation from the traditional rule: "except for a single Ninth Circuit case [*Protectus Alpha Navigation v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985)], all the cases we discovered, which were decided under the general maritime law, are in accord. They hold that the principal or master cannot be cast for punitive damages for the willful or reckless act of the agent or employee unless the act was committed with the approval or knowledge of the principal."); *Jones v. Compagnie Generale Maritime*, 882 F. Supp. 1079, 1086 (S.D. Ga. 1995) ("This principle is well considered, especially in the maritime context . . . The retribution and deterrence objectives of punitive awards are not achieved 'when courts drop the punitive damage hammer on the principal for the wrongful acts of [an employee].' The employee alone committed the wrongful acts, while the principal may not condone or encourage any behavior of the kind." 882 F. Supp. at 1086 (citations omitted)).

The Sixth Circuit adopted the traditional maritime rule limiting vicarious liability for punitive damages in 1969 with *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969). The Fifth Circuit followed suit with *In re P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989). The *P & E Boat Rentals* court cited *Fuhrman* favorably, noting that the Sixth Circuit was "more faithful to the teaching of the Supreme Court in *The Amiable Nancy* and *Lake Shore* . . . " than the Ninth Circuit which had recently adopted a new rule based on the Restatement (second) of Torts § 909 (1969). 872 F.2d at 652. The court also made clear that "to define the scope of the punitive damage relief that should be accorded under the general maritime law," it is the general maritime law

– not the Restatement – that provides the appropriate authority. 872 F.2d at 651-52.

Finally, in 1995, the First Circuit adopted the traditional maritime rule in *CEH Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995). Unwilling to make a "wholesale adoption of the Restatement" as the Ninth Circuit had, the First Circuit maintained that shipowners cannot be vicariously liable for punitive damages unless they exhibit "some level of culpability for the misconduct." 70 F.3d at 705. ("section 909(c) [of the Restatement], read literally, could impose liability in circumstances that do not demonstrate any fault on the part of the principal.").

Notwithstanding minor variations in emphasis and verbalization, the above survey demonstrates that federal courts have generally held fast to the principles announced by this Court in *The Amiable Nancy* with great consistency. It is thus all the more remarkable that the Ninth Circuit has chosen to jettison the traditional rule.

B. The Ninth Circuit's Diverging Course on Vicarious Liability for Punitive Damages Cannot Be Justified by This Court's Decisions Concerning Due Process Implications of Punitive Damages.

The Ninth Circuit adhered to the traditional maritime limitation on punitive damages for eighty years. However, in the case of *Protectus Alpha Navigation v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379

(9th Cir. 1985), it inexplicably deviated from *The Amiable Nancy* and its own precedent in *Pacific Packing*. The court supplanted these authorities by applying the Restatement (second) of Torts § 909 (1969) which permits in a landside context punitive damages against a master for the act of a principal whenever the tortfeasor acts in a "managerial capacity." § 909(c). Because virtually all shipmasters have significant "managerial" responsibilities, application of the Restatement standard to a maritime context necessary undermines the traditional maritime limitation on vicarious liability.

In the case at bar, the Ninth Circuit concluded that the patent conflict between *Pacific Packing* and *Protectus Alpha* was not "irreconcilable," though it suggested "the question is close." *In re the Exxon Valdez*, 270 F.3d 1215, 1235 (9th Cir. 2001). Noting that a "three judge panel may reconsider the decision of a prior panel only when 'an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point,'" the court pointed to *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), as such an intervening case. 270 F.3d at 1236. In *Haslip*, however, this Court held that vicarious punitive damages do not violate the Due Process Clause. 499 U.S. at 15. Therefore, *Haslip* is not "closely on-point" because, as petitioners correctly submit, the relevant "point" is whether vicarious punitive damages are permissible under maritime law – not under the standard of constitutional due process. The controlling Supreme Court precedent in a maritime context continues to be *The Amiable Nancy*, and guided by this precedent, the Ninth Circuit should have foresworn the error of *Protectus Alpha*, returning it to conformity with the First, Fifth, Sixth and Seventh Circuits.

II. THE DIVERGENCE BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUITS IN THE FEDERAL JUDICIAL SYSTEM BURDENS THE INTERNATIONAL SHIPPING INDUSTRY BY UNDERMINING THE UNIFORMITY THAT THE CONSTITUTION AND GENERAL MARITIME LAW SEEK TO PROMOTE.

This Court has frequently championed "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970) (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)); *see also*, *Petition of M/V Elaine Jones*, 480 F.2d 11, 31 (5th Cir. 1973), *cert. denied*, 423 U.S. 840 (1975) (finding that uniformity is "mandated" by *Moragne*). Just as it is today, maritime commerce was "the jugular vein of the Thirteen States." As such, "[t]he need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *Calif. v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (citing F. FRANKFUTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 7 (1927)).

This Court's commitment to the uniformity of maritime law is shared by the legislative and executive branches, as evidenced by numerous maritime treaties and statutes interpreted by the Court. *See, e.g., Intertanko v. Locke,* 529 U.S. 89, 103 and 108 (2000)[6] (finding both that "uniformity of regulation for maritime commerce" was one of the key "objectives" of the Ports and Waterways Safety Act of 1972, and that several "international treaties and agreements on standards of shipping . . . indicate that Congress will have demanded national uniformity regarding maritime commerce."); *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (finding that the Carriage of Goods by Sea Act of 1936 "is the culmination of a multilateral effort 'to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade,'" (citations omitted)).

The essential need for uniformity in maritime law derives from the fact that ocean-going vessels are subject to myriad jurisdictions as they navigate the world's territorial waters and ports of call. *See* GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 1 (1997) ("From its inception . . . maritime law involved navigation and trade between diverse communities so that judges were driven to find principles and application that would have common standards between people of different countries."). The transaction costs of operating in maritime jurisdictions with divergent admiralty laws are burdensome at best, and at worst, the costs raise formidable barriers to trade. Given the international nature of maritime commerce, it is particularly important to achieve uniformity among the jurisdictions of the United States so that we may negotiate with a coherent voice the terms of trade and seafaring with foreign powers. *See Intertanko v. Locke,* 529 U.S. 89, 103 (2000) (acknowledging national uniformity in maritime law as a prerequisite for international maritime agreements). As Joseph Story explained,

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[6] Consolidated with and reported as *United States v. Locke*, 529 U.S. 89 (2000).

> It is obvious, that this class of cases [civil acts, torts, and injuries done on the sea] has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states; and raise many questions of international law, not merely touching private claims, but national sovereignty, and national reciprocity . . . There is, therefore, a peculiar fitness in appropriating this class of cases to the national tribunals; since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication; and thus to become more satisfactory to foreigners.

JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1664 (1833).

The Ninth Circuit's recent decision creates a conflict among U.S. jurisdictions with regard to liability for punitive damages and confuses what was once a uniform scheme of shipowner liability.

This conflict carries especially grave consequences for shipowners like *amici's* members who are now forced to navigate two very different spheres of risk. Because ocean carriage is an inherently risky and peripatetic enterprise, shipowners go to great lengths to protect themselves and others from these risks by identifying perils, taking preventative safety measures, budgeting for casualties and insuring against major losses. In most jurisdictions, such preparations are effectual because shipowners can rationally approximate their liabilities – they know their duty is to make whole those parties who are wrongfully injured as a result of their vessel operations. That is no longer the case in the Ninth Circuit where shipowners face risks that are unpredictable and seemingly indefinite.

In addition to quantifiable, precautionary measures and recompense, shipowners with minimal, episodic contacts to the West Coast of the United States must now contend with untold punitive damages. Because punitive damages are generally not covered by insurers, shipowners will be forced to reconfigure their global business models simply to reallocate risk in this one coastal area of the United States.

It does not suffice to say that shipowners can reconcile two conflicting liability rules simply by taking the level of care necessary to avoid punishment under the more stringent rule. Vessel owners already have every incentive to invest in state-of-the-art technology, to employ highly trained seamen, and to develop sophisticated operational protocols to prevent accidents. Notwithstanding these precautions, as Judge Kozinski points out, "[a]ccidents at sea happen – ships sink, collide and run aground – often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless." *In re the Exxon Valdez*, 490 F.3d 1066, 1070 (9th Cir. 2007). Given the demonstrated willingness of juries to award colossal punitive damage awards, many vessel owners are just one major casualty away from bankruptcy if subjected to exemplary damages for the faults or errors of their vessel masters.

Regardless of whether the Ninth Circuit's position has merit as a matter of law or policy, it clearly creates a conflict between the circuits that is certain to have a profound and lasting negative consequence on interstate and international maritime commerce. As the final arbiter of maritime law, this Court alone has the power to restore clarity to maritime liability and "assure uniform vindication of . . . exclusive maritime substantive concepts." *Moragne*, 398 U.S. at 401. *Amici*, therefore, respectfully request issuance of a writ of certiorari to the court of appeals below.

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CONCLUSION

For the foregoing reasons, INTERTANKO and INTERCARGO respectfully request the Court to grant the petition of Exxon Shipping Co., et al., for issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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September 20, 2007

AMICUS
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No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERNATIONAL CHAMBER OF SHIPPING, THE BALTIC AND INTERNATIONAL MARITIME COUNCIL, CHAMBER OF SHIPPING OF AMERICA, TEEKAY CORPORATION, AND THE BAHAMAS SHIPOWNERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The amici curiae represent members of the United States and international maritime industry. The maritime industry transports about 97 percent of United States trade by weight excluding trade with Canada or Mexico.[2] That trade is vital to our nation's economic and national security, and uniform and predictable laws are critical to the maritime community.

International Chamber of Shipping

Formed in 1921, the International Chamber of Shipping ("ICS") is the trade association for the international shipping industry. Its membership comprises shipowners' associations and shipping companies from thirty-five countries (including the United States, Canada, and Mexico).[3]

ICS coordinates its efforts with the European Community Shipowners' Associations (ECSA), which represents the European shipping industry. In addition to associations that belong to ICS, ECSA membership includes associations from Estonia, Latvia, Lithuania, Malta, Poland, Portugal, and Slovenia. ICS also coordinates with national shipowners' associations from China, Chinese Taipei, Indonesia, Korea, Malaysia, the Philippines, Thailand, and Vietnam through the

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the *amici curiae* represented in this brief made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

[2] *See* Bureau of Transportation Statistics, Figure 2: *Modal Shares of U.S. Merchandise Trade Handled by Land, Water, and Air Gateways by Value and Weight: 2003*, *at* http://www.bts.gov/publications/americas_freight_transportation_gateways/.

[3] The membership of ICS also comprises national shipowners' associations from the following countries: Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Ireland, Italy, Japan, Kuwait, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Singapore, Spain, Sweden, Switzerland, Turkey, the United Arab Emirates, the United Kingdom, and the United States of America.

Asian Shipowners' Forum, a voluntary organization that is now being formalized.

Shipowner members of ICS represent about 450 million gross tons,[4] which constitute about two thirds of the world merchant fleet. ICS members carry about two thirds of the volume of United States ocean-going trade a year, making approximately fifty thousand United States port calls per year.

The shipowner members of ICS operate ships in all sectors and trades, including containerships (which carry the shipping containers in which the overwhelming majority of U.S. imports and experts, in terms of value, is transported), bulk carriers (which carry raw materials such as grain, ore, coal and other cargo that is not packaged and is shipped in large quantities), oil and chemical tankers (which carry petroleum products and the many different chemicals that are transported worldwide), gas carriers (which carry liquefied gas), general cargo ships (which carry many different kinds of cargo that are not carried in containers, including large pieces of cargo that would not fit inside a container), specialist ships (e.g. automobile carriers and offshore oil rig supply vessels), and passenger ships. ICS members serve over 100 nations—virtually every nation with a seagoing port.

ICS acts as an advocate for the maritime industry on issues of maritime affairs, shipping policy, legal and technical matters, ship construction, operation, safety, and management, to develop the best possible practices in the industry. To accomplish these goals, ICS strives for a uniform regulatory environment that embraces safe shipping operations, protection of the environment, maintenance of open markets, and fair competition, as well as adherence to internationally adopted standards and procedures. ICS supports regulation of shipping at an international level to obtain uniform regulations that will be enforced worldwide.

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[4] Gross tonnage of a vessel "consists of its total measured cubic contents expressed in units of 100 cubic feet or 2.83 cubic meters." René DeKerchove, *International Maritime Dictionary* 339 (2d ed. 1948).

The Baltic and International Maritime Council

The Baltic and International Maritime Council ("BIMCO"), founded in 1905, is the world's oldest and one of the largest association of shipowners, ship managers, ship brokers, agents, operators, associations, and other entities connected with the international shipping industry. Almost 1,000 shipowners, 1,400 ship brokers, and other shipping related companies are BIMCO members. Shipowner members represent more than 65% of the world's available cargo-carrying capacity.

BIMCO strives to raise standards of its members through the harmonization of commercial shipping practices. It promotes quality, safety, security, and environmental protection, the fair treatment of seafarers, and free trade and open access to markets. To accomplish these goals, when appropriate and circumstances so demand, BIMCO takes a position on important issues facing the shipping industry, including filing briefs amicus curiae with thi[illegible]urt.

BIMCO also is a leader in producing standard contractual documents for the shipping industry.[5] These documents are balanced to be acceptable both to shipowners and to charterers[6] of ships. Use of standard documents reduces the need to negotiate each contract, promotes uniformity, and raises standards. These balanced documents are trusted by all parties in the maritime industry. BIMCO drafted the documents in reliance on existing statutes and treaties. This reliance would be impossible if the underlying statutory and treaty provisions could be circumvented by an award of punitive damages.

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[5] The documents are published and may be found at the BIMCO website, *at* http://www.bimco.org/. The many BIMCO documents can be found by clicking on the "Documentary" menu.

[6] A charterer is a person or entity who, pursuant to an agreement, called a charter party, hires a ship from a shipowner for a period of time, or who reserves all or part of a ship for carriage of goods for a period of time or voyage. *See* Jo Desha Lucas, *Cases and Materials on Admiralty* 587-88 (Foundation Press 1969).

Chamber of Shipping of America

The Chamber of Shipping of America ("CSA") represents 30 U.S. based companies that own, operate, or charter oceangoing container ships, dry bulk vessels, and tankers engaged in both the domestic and international trades, and companies that maintain a commercial interest in the operation of such oceangoing vessels.

CSA provides the voice of the U.S. maritime industry in promoting sound public policy through legislative and regulatory initiatives that include marine safety, maritime security, and environmentally protective operating principles. CSA supports a viable United States domestic maritime industry and promotes open international trade in shipping services. CSA also provides strong technical expertise, marine experience, and knowledge in order to be an authoritative and effective forum for U.S. maritime issues.

CSA represents owners, operators, and charterers of both U.S. and foreign flag ocean vessels before U.S. regulatory, legislative, and administrative entities.

Teekay Corporation

Teekay Corporation ("Teekay") operates a fleet of approximately 170 vessels, including time chartered and commercially managed vessels, and is an essential marine link in the global energy supply chain. Teekay's vessels connect upstream gas and oil production with their downstream refining and distribution.

In 2006, Teekay's tanker fleet transported 236.8 million metric tons of oil and 3.9 million metric tons of liquefied natural gas ("LNG")[7] – representing approximately 10 percent of the world's seaborne oil movements and about 2.4 percent of the world's LNG transport. Last year, the Teekay fleet completed 3307 voyages. In 2006, the United States imported about 12 million metric tons of LNG, about 10.1 million barrels per day of crude oil, and about 3.4 million barrels per day of other petroleum products.

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[7] Liquefied natural gas is natural gas that is cooled to about minus 161° Celsius and compressed to 25kPa (3.6 psi) to keep the LNG in liquid form. *See* MarAd website, *at* http://www.marad.dot.gov/dwp/lng/faqs/index.asp#faq_7. It is transported in specially designed ships. While LNG supplies about 4% of the natural gas consumed n the United States at this time, it predicted that LNG will supply 20% of natural gas consumed in the United States by 2015. Joe Silha, *Far East LNG demand siphons more supply from U.S.*, Reuters UK, Sept. 17, 2007, *available at* http://uk.reuters.com/article/oilRpt/idUKN1723399520070917/.

The Bahamas Shipowners Association

The Bahamas Shipowners Association ("BSA") was inaugurated by The Bahamas Minister of Transport in 1997 to promote the interests of Bahamian registered vessels, currently 1,582 ships with a total of approximately 44 million gross tons. United States based shipowners represent more than 10 percent of the Bahamian tonnage.

The BSA fleet comprises a variety of ships, including cruise ships,[8] refrigerated cargo ships, dry bulk carriers, tankers, ferries, and ships involved in short sea shipping (coastal trade for short distances). BSA represents the interests of the owners of Bahamian registered vessels and voices its views on international policy before such organizations as the U.S. Coast Guard, the IMO, and the European community.

SUMMARY OF ARGUMENT

The amici curiae seek uniformity and predictability in the law governing ocean shipping and international trade. Shipping law will be more uniform and predictable if acts of Congress and treaties are applied as written. When, as here, Congress has prescribed a certain punishment for a certain act or provided certain defenses or limitations, the courts should not displace the uniformity and predictability furnished by that legislation by inventing and imposing other punishments or ignoring the Congressionally mandated defenses and limitations. The Judiciary should not amend treaties and laws. Awarding punitive damages in an area of admiralty law governed by a statute or treaty that does not provide for punitive damages, as in this case, will harm or destroy the order, uniformity, and predictability furnished by treaty and statute.

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[8] Cruise ships contributed more than $35 billion to the United States economy in 2006. Sandra Spears, *Hard-hitting cruise sector adds $35bn to US economy*, Lloyd's List, Sept. 3, 2007, at 7.

Imposing punitive damages in this case also threatens order, uniformity, and predictability in many aspects of ocean shipping and world trade governed by treaties and statutes unrelated to pollution. Many of these treaties and statutes punish grievous behavior by denying the shipowner or carrier the right to limit its liability; none of these statutes or treaties imposes, or permits imposing, punitive damages.

Order, uniformity, and predictability would be further harmed if punitive damages were imposed on a carrier for an act or omission not committed by a carrier, as in this case, but by a so-called "managerial employee" of the carrier, even though the employee acted contrary to the carrier's instructions.

Guidance from this Court is needed on the subject of punitive damages in federal causes of action.

ARGUMENT

I. The Court Should Prevent the *De Facto* Amendment of an Act of Congress, the Clean Water Act, by the Lower Courts in This Case to Prevent Serious Harm to the Uniformity and Predictability Needed in All Areas of the Maritime Industry.

The Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*,[9] governs Exxon Shipping Company's and Exxon Mobil's[10] liability and specifies the punishment to be imposed on Exxon for the EXXON VALDEZ spill. The CWA does not provide for the award of punitive damages against Exxon, the owner of the EXXON VALDEZ, and the statutorily-mandated responsible party. Instead, the CWA, on the one hand, limits the liability of the party responsible for the oil spill, but, on the other hand, denies limitation of that liability if the "discharge was the result of wilful negligence or wilful misconduct within the privity and knowledge of the owner." 33 U.S.C. § 1321(f). We understand that Exxon voluntarily paid for virtually all the damage caused by the spill and did not attempt to limit its liability.

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[9] 62 Stat. 1155, 33 U.S.C. § 1251, *et seq.*, as the Clean Water Act read on March 24, 1989, the date EXXON VALDEZ grounded.

[10] Exxon Shipping Company and Exxon Mobil are referred to hereinafter as "Exxon."

Punitive damages were imposed, despite the CWA, because a jury, acting under faulty instructions, determined that Exxon was reckless.[11] Punitive damages were awarded against Exxon as an employer for acts of its employee that were prohibited by Exxon. Punitive damage awards have no basis whatsoever in the statutory scheme of sanctions Congress crafted in the CWA.

The amendment of the CWA by the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. §§ 2701-2761, after the EXXON VALDEZ spill and as a result of that spill, does not lessen the danger presented by the Ninth Circuit's opinion in this case. OPA 90 provides punishment for a party responsible for spilling oil.[12] It also provides for limitation of liability unless the incident "was proximately caused by . . . gross negligence or wilful misconduct" or by "the violation of an applicable Federal safety, construction, or operating regulation" by "the responsible party, an agent or employee of the responsible party or a person acting pursuant to a contractual relationship with the responsible party." 33 U.S.C. § 2704(c)(1).

OPA 90 does not provide for punitive damages. 33 U.S.C. § 2702(b); *see also South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58, 64-65 (1st Cir. 2000). OPA 90 does far more to prevent an oil spill than the threat of punitive damages could do. OPA 90 requires the carrier to take specified measures to prevent an oil spill. *See, e.g.*, 46 U.S.C. §§ 3703, 3703a.[13] Punitive damages cannot, of course, specify any preventive measure a shipowner should take. OPA 90 also requires a carrier to establish means to pay for damage that an oil spill might cause. 33 U.S.C. §§ 2716, 2716(a). Further, OPA 90's proscriptions punish shipowners by depriving them of statutory defenses as well as imposing extremely serious consequences – unlimited statutory liability for compensatory damages – when the incident was proximately caused by "gross negligence or wilful misconduct." 33 U.S.C. § 2704(c)(2)(A).

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[11] *See* Jury Instructions on Vicarious Liability for Punitive Damages, Jury Instruction No. 33 (reproduced as Appendix K to Exxon's Petition for Certiorari at 301a).

[12] *See, e.g.*, 33 U.S.C. § 1319(c).

[13] 46 U.S.C. § 3703 and its implementing regulations set forth regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels. Section 3703 is implemented via 33 C.F.R. §§ 155, 156, 157, 162, 163 and 46 C.F.R. §§ 2, 8, 15, 30-32, 34-36, 38, 39, 50, 52-54, 56-64, 70,

(Cont'd)

The problems that could be caused by the Ninth Circuit opinion allowing a court to award a remedy not provided by a statute in an area of admiralty law governed by statute prove the wisdom of Justice Story's opinion in *The Amiable Isabella*, 19 U.S. 1, 71, 72 (1821), which concerned the analogous issue of treaty interpretation:

> [T]his Court does not possess any treaty-making power . . . ; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law.
>
> * * * *
>
> [T]his Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise.

This established principle of law was relied on by the Court recently in *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2679-80 (2006). In *Sanchez*, the Court, citing *The Amiable Isabella* states:

> . . . where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal

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(Cont'd)

71, 90, 98, 105, 110-14, 146, 150, 151, 153, 154, 157-164, 170, 172, 174, 175, 178, 179, 199. 46 U.S.C. § 3703a and its implementing regulations set forth tank vessel constructions standards including double hull requirements. Section 3703a is implemented via 33 C.F.R. §§ 156, 157.

> courts to impose one on the States through lawmaking of their own.

Id. at 2680.

The same reasoning was applied by this Court to an act of Congress in *Miles v. Apex*, 498 U.S. 19 (1990). There, this Court awarded the remedies and only the remedies provided by an admiralty statute, the Jones Act. *Id.* at 33. Punitive damages and other remedies not provided by the Jones Act were not awarded:

> [W]e must . . . keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.
>
> * * * *
>
> [I]n an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." [Quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)].
>
> * * * *
>
> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.

Miles, 498 U.S. at 27, 31, 36.

The rule expressed in *Miles v. Apex* should prevent imposing punitive damages in any area of maritime law that is governed by a treaty or statute that does not provide for the imposition of punitive damages. The risk of punitive damages in such a case threatens to destroy the uniformity and predictability and the balance of rights and liabilities achieved by the many admiralty treaties and statutes.

Other maritime treaties or statutes, described below, would deprive a shipowner of a limitation for grievous acts or omissions by an employee, but none would impose punitive damages.

II. The Court Should Prevent a Unilateral Award of Punitive Damages From Disturbing the Appropriate Punishment for Egregious Conduct Established by Congress and the International Community of Nations to Maintain Uniformity and Allocation of Risks in the Maritime Industry.

Order, uniformity, and predictability are needed to obtain efficient insurance coverage in shipping. The adverse effect of the Ninth Circuit opinion is not limited to oil tankers. It could easily extend to all kinds of ships and marine ventures. Judge Kozinski, in his dissent from the Ninth Circuit's refusal to rehear the case en banc, noted:

> The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction – a staggeringly huge area – to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious liability, ship owners won't be able to protect themselves against our newfangled interpretation of maritime law through careful hiring practices. Accidents at sea happen – ships sink, collide and run aground – often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the understanding that they won't be subject to punitive damages if they "[n]either directed it, nor countenanced it, nor participated in" the wrong, *The Amiable Nancy*, 16 U.S. at 559; the panel opinion has thrown this protection overboard.
>
> * * * *
>
> If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive

> damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

Pet. App. at 291a-92a.

If the uncertainty produced by the Ninth Circuit's opinion were allowed to stand, insurance costs for maritime shipping, if insurance were even available, would increase the cost of trade with the United States. The more clearly risks inherent in the maritime industry are defined and assigned, the more efficient the insurance system protecting such risks can be. Efficient definition and assignment of risks are found in the many admiralty treaties and the many United States admiralty statutes.[14]

When maritime risks are clearly assigned to only one party, that party alone will obtain insurance cover and pay insurance premiums for that risk. When risks are not clearly assigned to only one party, then all parties to whom the risk might possibly be assigned need to obtain insurance cover and pay insurance premiums for the risk that might be assigned to them, resulting in increased business cost, and hence increased cost of trade with the United States.

Letting stand the Ninth Circuit opinion would call intc question assignment of risks in maritime statutes and treaties across the board. The rationale of the Ninth Circuit could justify an award of punitive damages for an act or omission that by statute or treaty should be excused outright or should result in limited liability. Punitive damages could be imposed on a carrier in one case and on cargo interests in precisely the same circumstances in another case.

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[14] Although the United States has not ratified all of the world's admiralty treaties, even unratified treaties often apply in the United States under our conflict of law rules. *See, e.g., Man Ferrostal, Inc. v. M/V Vertigo*, 447 F.Supp.2d 316 (S.D.N.Y. 2006), *reconsideration and certificate of appealability denied*, 2006 U.S. Dist. LEXIS 66621 (S.D.N.Y. Sept 18, 2006)(applying 1910 Collision Convention); *Otal Investments Ltd., M/V Kariba*, 03 Civ. 4304, 03 Civ. 9962, 04 Civ. 1107, 2005 U.S. Dist. LEXIS 13321, 2005 AMC 2454 (S.D.N.Y. July 7, 2005)(applying 1910 Collision Convention), *aff'd in part, rev'd and remanded in part*, 494 F.3d 40 (2d Cir. 2007); *see also Itel Container Corp. v. M/T Titan Scan*, 139 F.3d 1450 (11th Cir. 1998), *cert. denied*, 525 U.S. 962 (1998) (applying the Hague/Visby Rules as incorporated by reference).

The treaties and statutes that govern the waterborne carriage of goods provide a good example of this comprehensive system relied upon by the community. Even when statutes and treaties do not necessarily govern contracts, they are commonly incorporated by reference into those contracts for the sake of uniformity and predictability.

The first statute to assign the risks inherent in the carriage of goods was the Harter Act, enacted by the United States in 1893.[15] The Hague Rules[16] refined and modified the assignment of risks in 1924. The United States adopted the Hague Rules as the Carriage of Goods by Sea Act (COGSA) with minor amendments in 1936[17] and ratified the Hague Rules with reservations for those minor amendments in 1937.[18] The Hague Rules assignment of risk still governs the carriage of goods in most of the maritime nations today. By assigning risks inherent in the carriage of goods, the Hague Rules determine risks for which the carrier would pay for insurance and those for which cargo interests would pay for insurance.

A great body of case law has developed on risk allocation for the carriage of goods by sea during over a century of experience with the governing statutes and treaties. Courts in the United States and abroad have interpreted the Harter Act since 1893, the Hague Rules since 1924, COGSA since 1936, and the Hague/Visby Rules since 1968.[19] These decisions have all built on those that went before, creating well-established authority, because changes among the successive regimes are primarily concerned with the limitation of value of the goods for which a carrier would be liable. Those changes did not affect the basic liability apportionment structure. Punitive damages seriously harm the precedential value of this entire line of authority.

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[15] Act of Feb. 13, 1893, ch. 105, 27 Stat. 445 (1893) (codified at 48 U.S.C. §§ 30702-30707).

[16] International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels, Aug. 25, 1924, 51 Stat. 233, 247, 120 L.N.T.S. 155 ("Hague Rules"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 1-1 (7th rev. ed. 2007).

[17] Carriage of Goods by Sea Act, Ch. 229, 49 Stat. 1207 (1936), Pub. L. No. 109-304, 120 Stat. 1485 (2006), *reprinted in* note following 46 U.S.C. § 30701 (formerly codified at 46 U.S.C. §§ 1300, *et seq.*)

[18] International Convention for the Unification of Certain Rules Relating to (Ocean) Bills of Lading ("Hague Rules"), June 29, 1937, 51 Stat. 233, T.S. 931, 120 L.N.T.S. 155, 157, 183.

In the same manner, the Ninth Circuit opinion adversely affects a treaty that is currently being drafted by the United Nations Commission on International Trade Law (UNCITRAL) because the present draft of the proposed convention employs the same basic method used by the original Hague Rules and the Hague/Visby Rules to define the risk allocation between carriers and cargo interests.[20] UNCITRAL Working Group III, which is drafting the new treaty, is carefully balancing the interests of all parties. Non-governmental organizations are consultative members of UNCITRAL and attend the meetings to give their expert advice to the Working Group. Both amicus ICS and amicus BIMCO are consultative members of UNCITRAL and actively participate in drafting the new treaty. The United States is playing a very active role in drafting the treaty, which will likely be ratified. Like the Working Group as a whole, the United States Delegation to the Working Group is carefully balanced to reflect the interests of all segments of the industry. It comprises representatives of the U.S. State Department, the U.S. Maritime Administration, The Maritime

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[19] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Signed at Brussels on Aug. 25, 1924, Feb. 23, 1968, 1412 U.N.T.S. 128 ("Hague-Visby Rules"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 1-2 (7th rev. ed. 2007).

[20] A/CN.9/WG.III/WP.81 – Transport Law: draft convention on the carriage of goods [wholly or partly] [by sea], dated February 13, 2007. The present draft of the proposed convention may be found at the UNCITRAL website: www.uncitral.org. by clicking on Working Group III.

Law Association of the United States, and trade organizations representing shippers, carriers, transportation intermediaries, insurers, inland carriers, and terminal operators.

The delicate balance between carrier interests and cargo interests in this risk allocation system, carefully crafted through more than a century of experience, and used in the UNCITRAL treaty now being drafted, should not be changed or circumvented by judicial awards of punitive damages. The Ninth Circuit's opinion in this case, however, in a single stroke, could nullify the defenses and limitations of liability provided in all of these laws and treaties and the system of commerce and commercial relations that has evolved and exists in reliance on them.

Congress and the international community have together established uniformity in admiralty law, which allows members of the community to plan and calculate the consequences of their actions. The regulations of the International Maritime Organization ("IMO"),[21] such as the International Maritime Dangerous Goods Code ("IMDG")[22] and the Nairobi International Convention on the Removal of Wrecks,[23] are other examples of this careful balance in statutes and treaties. This body of international maritime law, crafted by expert bodies and political branches of government, sets standards, sanctions unsafe behavior, and at the same time avoids indeterminacy and penalties that would discourage maritime commerce.[24]

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[21] Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 3. IMO promotes cooperation among governments and the shipping industry to improve maritime safety and prevent marine pollution. IMO is the source of legal instruments that guide the regulatory development of its 167 member states to improve safety at sea, facilitate trade among seafaring states, and protect the maritime environment. International Maritime Organization, http://www.imo.org./home.asp (last visited, Sept. 17, 2007).

[22] International Maritime Dangerous Goods Code, London, November 2003, *at* www.imo.org/home.asp. The IMDG Code achieves world-wide uniformity for regulations concerning the transport of dangerous goods by sea as well as other modes of transport. *See id.*

[23] This new Convention, expected to go into force in 2009, provides a sound legal basis for coastal States to remove, or to have removed, from their coastlines, wrecks which pose a hazard to the safety of navigation or to the marine and coastal environment. It makes shipowners financially liable and requires them to have insurance or provide other financial security to cover costs of wreck removal. *See id.*

III. The Court Should Prevent Awards of Punitive Damages Circumventing Further Refinement of Risk Assignment in the Maritime Industry by Liability Limitations.

Limitation of liability performs two valuable functions in the maritime world. It increases a carrier's ability to obtain insurance for risks assigned to it and thus assures that parties' losses will be paid. It also further defines the party to bear the risk of loss or damage.

Carriers bear the risk of damage, if they are liable, up to the limitation amount, and cargo interests bear the risk above the limitation amount. Shippers of expensive cargo must pay the insurance premium for the value of their cargo above the limitation amount. The carrier pays the insurance premium for its liability up to the limitation amount. The carrier pays the insurance premium from the freight that the carrier charges to carry the cargo. The freight charged by the carrier is not computed according to the value of the cargo. The carrier usually does not know the value of cargo it carries. Without limitation, shippers of moderately valued cargo would subsidize shippers of high value cargo. All cargo would pay the same freight rate and that freight would pay for insurance for the carrier's risk for all cargo, low value and high value.

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[24] Other examples of this body of international law include the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 ("SOLAS") (entered into force May 25, 1980), and its 1978 Protocol, Feb. 17, 1978, 32 U.S.T. 5577, 1226 U.N.T.S. 237 (entered into force May 1, 1981), as amended; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1978, S. Exec. Doc. No. 96-1 EE, 1361 U.N.T.S. 2 ("STCW") (entered into force Apr. 28, 1984, for the United States Oct. 1, 1991), and its July 7, 1995 amendments, *reprinted in* 6D Benedict on Admiralty Doc. No. 14-6 (7th rev. ed. 2007); and the International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407, 1313 U.N.T.S. 3 ("MARPOL")(entered into force Mar. 30, 1983), and its 1978 Protocol, Feb. 17, 1978, 17 I.L.M. 546, 1340 U.N.T.S. 61 (entered into force Oct. 2, 1983), *reprinted in* 6A Benedict on Admiralty Doc. No. 6-1 (7th rev. ed. 2007). These treaties are subject to continuing amendment under the auspices of the IMO.

Many admiralty treaties and statutes use loss of limitation, rather than punitive damages, to punish grievous behavior. Two general types of limitation provisions are common. "Global limitations" are provided by the United States Limitation of Liability Act of 1851, 46 U.S.C. §§ 30502-30512, the 1976 Limitation Convention,[25] and the 1996 Protocol to the 1976 Limitations Convention.[26] These limit all liability of shipowners, not only liability for cargo, subject to certain exceptions. The other type of limitation regime limits the carrier's liability for cargo damage to a set amount per package or other unit.

In the United States, the Limitation Act provides global limitation. It limits a shipowner's liability to the value of the ship at the end of the voyage plus freight earned on the voyage. The Limitation Act also provides a fund for wrongful death and personal injury claims. The shipowner is denied the right of limitation if it was liable and someone high enough in its corporate structure to be considered "the owner" knew, or should have known, of the fault for which the shipowner was be liable. 46 U.S.C. § 30505(b).

The 1976 Limitation Convention and its 1996 Protocol limit the liability of shipowners, charterers, and others for all claims with certain exceptions.[27] This convention limits liability according to the tonnage of the ship. Limitation is denied "if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." 1976 Limitation Convention, Article 4.

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[25] International Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 221, 16 I.L.M. 606 ("1976 Limitation Convention"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 5.4 (7th rev. ed. 2007).

[26] Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, May 2, 1996, [2004] Austl. T.S. 16, 35 I.L.M. 1433, *reprinted in* 6 Benedict on Admiralty, Doc. No. 5.4A (7th rev. ed. 2007). The United States has not ratified or adhered to the 1976 Limitation Convention or its 1996 Protocol. United States courts, nevertheless, will apply these international treaties when appropriate under choice of law principles.

The Athens Convention[28] established a regime of liability for damages suffered by passengers carried on seagoing vessels. Under Article 13 of the Athens Convention, a carrier's liability is limited to a fixed amount per incident, unless "if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

The Hague/Visby Rules[29] deprive a carrier of its right to limitation "if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result." Hague/Visby Rules, Article IV, Section 5(e).

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[27] The 1976 Limitation Convention was preceded by a 1924 and a 1957 Convention. International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels, 1924, 120 LNTS 123 (Brussels, August 25, 1924) ("1924 Convention"); The International Convention Relating to the Limitation of the Liability of Owners of SeaGoing Ships (Brussels, October 10, 1957) ("1957 Convention"). The 1924 Convention was similar to the United States Limitation Act in that it did not limit "obligations arising out of acts or faults of the Owner of the vessel . . ." Article 2 of the 1924 Convention. The 1957 Convention did not permit limitation if "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner."

[28] Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, Dec. 13, 1974, U.K.T.S. 43 (1989), 16 I.L.M. 625 ("Athens Convention"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 2.2 (7th rev. ed. 2007).

[29] Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 ("Hague/Visby Rules").

The UNCITRAL Instrument will probably use the same limitation mechanism as the Hague/Visby Rules, but the amount of the limitation has not yet been determined. Limitation of liability will probably be denied by the new treaty if the breach of the carrier's obligation "was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result."[30]

Although COGSA does not have a comparable provision for loss of limitation rights, case law interpreting COGSA's package limitation provision deprives a carrier of limitation rights if the carrier unreasonably deviated from the voyage[31] or fundamentally breached the contract of carriage.[32] But these doctrines are limited. Judge Friendly's decision in *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 507 F.2d 68 (2d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), specifically held that wilful and wanton recklessness would not deprive a carrier of its limitation rights. There, the very test used by the Ninth Circuit to award punitive damages below was rejected by the Second Circuit to deprive a carrier of the COGSA limitation.[33]

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[30] WP.81 article 64(1), note 20 *supra*.

[31] *See, e.g., P&E Shipping Corp. v. Empresa Cubana Exportada E Importadora de Alimentos*, 335 F.2d 678 (1st Cir. 1964).

[32] *See, e.g., Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir. 1985), *cert. denied*, 476 U.S. 1188 (1986).

[33] In *John Weyerhaeuser*, Judge Friendly explained that gross negligence or wilful and wanton misconduct should not deprive the carrier of its limitation rights. He described the advantage of a clear and narrow definition of the circumstances in which limitation rights could be lost. His reasoning indicates that uniformity and predictability should not be disturbed by punitive damages:

> [A]cceptance of plaintiff's argument would mean that in almost all cases of loss due to unseaworthiness, in addition to the inquiry, directed by § 4(1) of COGSA, . . . shippers or, realistically, their insurers would demand a further inquiry into the degree of the carrier's culpability, with

(Cont'd)

The drafters of all these admiralty statutes and treaties relied on the loss of limitation rather than punitive damages to deter egregious behavior. Courts should not now permit jury punitive damage awards to disturb that well-known system.

If allowed to stand, the decision of the Ninth Circuit in this case will wrongheadedly allow a single American jury to nullify the detailed consideration of the members of Congress, the international community and the UNCITRAL Working Group, by awarding punitive damages even though punitive damages are not included in the treaties and statutes, which themselves provide a comprehensive, orderly and uniform system of mandates, proscriptions, defenses, and sanctions governing waterborne shipping in the United States and abroad.

(Cont'd)

> enormous potential liability, as illustrated by this case, riding on the decision of the fact finder, protected in many circuits by the "unless clearly erroneous" rule, and enjoying great weight even in this one. . . . The difficulties that have been experienced in defining and applying varying degrees of negligence or even the concept of "wilful and wanton" are indicated in Prosser, Torts § 34 (4th ed. 1971).
>
> * * * *
>
> In sum, loss due to an allegedly exceptional degree of negligence in furnishing an unseaworthy ship falls into Lord Diplock's category of risks concerning which 'it is more practical and economical from the point of view of insurance to spread the risk to the cargo in excess of a fixed limit among a number of cargo insurers rather than to concentrate it in the carrier's [protection and indemnity] insurer.' Diplock, Conventions and Morals – Limitation Clauses in International Maritime Conventions, 1 J.Mar.L. & Comm. 525, 528-29 (1970).

507 F.2d at 7273 (internal citations omitted).

IV. The Court Should Prevent the Award of Punitive Damages Against An Employer for the Unauthorized Acts of Its Employee.

Order, uniformity, and predictability would be further harmed if punitive damages were imposed on a carrier for an act or omission not committed by a carrier, as in this case, but by a so-called "managerial employee" of the carrier, even though the employee acted contrary to the carrier's instructions.

The reasoning of this Court in the landmark *The Amiable Nancy*, 16 U.S. 546 (1818), referred to in Judge Kozinski's dissent,[34] should be upheld in this case. Imposing punitive damages for the unauthorized act of an employee, particularly an award as large as in this case, encourages unneeded and wasteful litigation. Judge Kozinski also noted the conflict between the circuits on the vicarious liability for punitive damages issue and that no circuit that dealt with the issue agreed with the Ninth Circuit opinion below. Pet. App. 288a-90a.

V. This Court Should Establish Clear Standards for the Award of Punitive Damages In Areas of General Maritime Law Not Governed By Treaties or Statutes.

Punitive damages should not be awarded in this case, because it is governed by the CWA, which does not provide for punitive damages. Nevertheless, guidance from this Court in this federal maritime case would assist future cases and would reduce future litigation. Guidance is needed to define when punitive damages should be awarded in non-statutory maritime cases and how large those awards may be.

CONCLUSION

The petition for writ of certiorari should be granted.

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[34] Pet. App. at 287a-92a.

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In The
Supreme Court of the United States

◆

EXXON SHIPPING COMPANY, et al.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF OF KEYSTONE SHIPPING CO. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

◆

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CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Keystone Shipping Co., states that it is a privately held Delaware corporation. None of its shares is held by a publicly traded company.

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BRIEF OF KEYSTONE SHIPPING CO. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Keystone Shipping Co. ("Keystone") respectfully submits this brief as *amicus curiae* in support of the petition of Exxon Shipping Company and Exxon Mobil Corporation (hereinafter collectively "Exxon") for a writ of *certiorari.*

◆

STATEMENT OF INTEREST[1]

Keystone is a privately held American company which currently owns, operates or participates in joint ventures involving twenty-nine vessels in the global transport of bulk cargos. Keystone's shipping business started in 1909 in Philadelphia. Its current leadership includes the grandson of the company's founder, Charles Kurz. The company is now based in the suburbs of Philadelphia with five additional offices throughout the United States, and employs approximately eighty shore-side and two thousand seagoing personnel, all of whom are American citizens. The operation of its fleet, one of the largest still flying the U.S. flag today and engaging in the U.S. coastwise trade, contributes to this nation's economy and indirectly creates or supports thousands of American jobs each year.

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[1] Pursuant to Supreme Court Rule 37.6, undersigned counsel represent that no counsel for any party authored this brief, in whole or in part, and that no person or entity other than Keystone has made any monetary contribution to its preparation or submission. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of respondents to the filing of this brief has been filed with the Clerk.

Keystone's tank vessels carry crude oil, liquid chemicals and refined petroleum products. The company participates in a joint venture which transports crude oil in the Alaskan trade. Keystone also operates bulk carriers which carry stone, aggregate and other dry cargos. Its vessels ply the waters of the United States including both coasts, Alaska, the Gulf of Mexico and the Great Lakes. Several of the company's ships are involved in the Ready Reserve Fleet program of the U.S. Maritime Administration which provides support to our troops in Iraq and elsewhere around the world by transporting tanks, humvees, and other military equipment as directed by our armed forces. Keystone also operates three strategic vessels for the U.S. Navy's Military Sealift Command which carry Special Forces and highly sensitive military equipment. Keystone routinely participates in worldwide humanitarian relief efforts such as assistance for tsunami and hurricane victims.

During the last fifty years, the size of the American merchant marine has been shrinking at an alarming pace. Third world countries produce seamen who are willing to work for a fraction of the pay to which American mariners are entitled. The preservation of the U.S. merchant marine is vital not only to U.S. trade but primarily to our military. The merchant marine is considered the sixth military arm supporting the Army, Marine Corps, Navy, Air Force and Coast Guard. For more than two centuries, Congress has supported our shipping industry by requiring that vessels engaged in "coastwise" trade (i.e. carrying merchandise or passengers from one U.S. port to another) must be built, owned and operated by U.S. entities and manned by American citizens. The protection of this fleet and maritime commerce in general has been of paramount importance to this country, as demonstrated by our laws and the creation of admiralty jurisdiction to ensure that the rules which govern the trade will be uniform.

The very nature of shipping dictates that the commercial vessels which carry goods and passengers are continually passing through and into the waters of different states, and indeed different federal circuits. Both Congress and this Court have emphasized the need for the uniform application of maritime law to ensure that the consequences which flow from an accident on the West Coast will be no different than if that same accident occurred in the Gulf of Mexico, New York Harbor, or in one of the Great Lakes. Maritime trade and commerce depend upon the ability of the participants to foresee those consequences in the best and worst case scenarios.

The events of the last two decades have shown that the interests of national security and consumer prices are also impacted by the continued vitality of a U.S. fleet, both in times of war and times of peace. The circumstances surrounding any maritime accident must be evaluated, and any damages assessed, in a uniform manner, irrespective of the fortuitous location of the incident.

This is not just a Ninth Circuit issue. This is not just a "big oil" issue, or a tanker issue. This Petition and the resolution of the issues it raises are at the very heart of what U.S. businesses such as Keystone need for their continued existence. The threat of insurmountable, uninsurable, astronomical punitive damages in addition to the fines, penalties and compensatory damages under statutory schemes could conceivably cause companies such as Keystone to disappear. This would leave the U.S. government without a competent merchant marine to meet the logistical needs of our worldwide military forces. In order to plan for the worst case scenario, Keystone needs to know what to expect. Keystone and others in the trade need to know that uniform laws will be applied, without regard to the identity of the circuit into whose waters their ships may be sailing.

Keystone recognizes that maritime safety is paramount, and is committed to a strong environmental and safety program in the operation of its ships. It simply needs to know whether or not it will be exposed to punitive damages in the event of a pollution or other major incident, even though management has taken every precaution to prevent it.

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SUMMARY OF ARGUMENT

Keystone urges this honorable Court to grant *certiorari* in order to clarify a particularly murky area of maritime law - the availability of punitive damages in pollution cases. This Court's guidance is needed on two critical issues:

1. Should a vessel owner's vicarious liability for the master's misconduct be extended to liability for punitive damages in the event of a pollution incident?

2. Are punitive damages precluded by a federal statutory scheme which already addresses the remedy for pollution caused by willful misconduct or gross negligence, but does not provide for punitive damages?

This case has been before the Ninth Circuit on numerous occasions, however, the punitive damage determinations can be found within two appellate court decisions, which will henceforth be referred to as "*Valdez I*" and "*Valdez II*."[2] In each of these opinions, the Ninth Circuit expressed doubts about its resolution of the very issues raised above. In the most recent decision, Judge Kozinski's dissent highlights the conflict among the circuits on the imposition of punitive damages on the vessel owner who neither ratifies nor authorizes the actions of the master and crew at sea. *Valdez II,* Pet. App. 289a. In *Valdez I*, the majority identified the question of the statutory preemption of punitive damages in pollution cases as "close" and "not without doubt." Pet. App. 75a, 77a.

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[2] Throughout this brief, citations to *Valdez I* and *Valdez II* refer to the Appendix filed with Exxon's Petition.

At the heart of this petition lies the uniformity of maritime law, a concept which has traditionally merited careful consideration by this honorable Court. *See, e.g., Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004); *United States v. Locke*, 529 U.S. 89, 108-111 (2000); *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 211 (1996); *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970). Because the Ninth's Circuit's opinions have created confusion and conflict, this Court should grant *certiorari* so that the lower courts can uniformly apply the law of punitive damages to this and future pollution incidents, and those in the industry who send vessels to sea can do so with a clear understanding of the ramifications of any pollution incident.

◆

ARGUMENT

A. VICARIOUS LIABILITY AND THE SCUTTLING OF *THE AMIABLE NANCY* DECISION

As far as punitive damages are concerned, the Ninth Circuit's imposition of vicarious liability upon a shipowner for the acts of the vessel's master is a departure from the sound decisions of this Court and other circuits. Given the seriousness of this deviation from the course set by this Court in *The Amiable Nancy, certiorari* should be granted in order to bring this decision back on course or to set a new heading for the future. 16 U.S. 546 (1818).

In evaluating this question, the Court should be mindful that most accidental spills of oil or other hazardous substances are the result of navigational error or other negligence on the part of a vessel's crew while the ship is at sea, and not under the direct control of her owner. When it comes to navigational decisions, the vessel is under the authority of the ship's captain, whose autonomy is absolute. *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1147 (6th Cir. 1969). For centuries, maritime law has therefore made a distinction between the negligence of the captain and that of shore-side management, especially when deciding whether to impose limitations on the damages for which the vessel owner should be responsible.[3] The Ninth Circuit ignored this precedent, and found that punitive damages could be imposed against Exxon for the reckless conduct of the vessel's master.

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[3] *See, e.g., Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 952 (3d Cir. 1985) (*citing Complaint of Bankers Trust Co.*, 651 F.2d 160, 169 (3d Cir. 1981) (discussing the focus on "shore-based, high level management" rather than the captain and crew in a limitation of liability context)); *See also Union Oil Co. of California v. M/V Point Dover*, 756 F.2d 1223 (5th Cir. 1985) (distinguishing between corporate officers and vessel's master/crew in various scenarios); *Tittle v. Aldacoste*, 544 F.2d 752, 756 (11th Cir. 1977) (affording protection to "the physically remote owner who, after the ship breaks ground, has no effective control over his water-borne servants").

This Court specifically rejected such vicarious liability almost two hundred years ago in *The Amiable Nancy*, 16 U.S. 546 (1818). In that case, the owner of a vessel besieged by privateers sought compensatory and punitive damages from the rogue vessel's owner. *Id.* In a unanimous decision, this Court found that exemplary damages could not be awarded for the outrageous conduct of the vessel's crew against an owner who "neither directed it, nor countenanced it, nor participated in" such behavior. *Id.* at 559. This precedent has been faithfully followed throughout the nineteenth and twentieth centuries. *See, e.g., Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652-653 (5th Cir. 1989); *Fuhrman*, 407 F.2d at 1148; *Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577, 580 (9th Cir. 1905).

Without specifically overruling its own opinion in *Pacific Packing*, the Ninth Circuit expanded the vicarious liability of a corporation to include the acts of a managerial employee in a maritime case. *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985). This decision was based on § 909(c) of the *Restatement (Second) of Torts* (1979) which limits the vicarious liability for punitive damages to situations in which, *inter alia*, the wrongdoer was employed in a managerial capacity and was acting within the scope of his or her employment. In *Protectus*, however, the employee in question was a **shore-side** employee and not the master of a vessel at sea. 767 F.2d at 1381.

Whatever the validity of the imposition of punitive damages under maritime law for the acts of a managerial employee under the *Restatement*, such vicarious liability has rarely been imposed for the acts of a ship's captain. *Matter of P&E Boat Rentals,* 872 F.2d at 652 (specifically rejecting *Protectus* as an aberration and contrary to this Court's rulings in *The Amiable Nancy, supra* and *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893)); *Fuhrman*, 407 F.2d at 1148 (declining to impose punitive damages vicariously or to require a corporate shipowner to second guess the master's navigational decisions at sea); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) (confirming that shipowner is liable for compensatory, but not punitive, damages for injuries caused by the misconduct or negligence of the master). As the Sixth Circuit suggested in *Fuhrman*, "the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." 407 F.2d at 1148; *See also Matter of P&E Boat Rentals*, 872 F.2d at 651-652.

This approach is compatible with the general maritime principle that distinguishes between the acts of shore-based management and those of the master of a vessel at sea. *See, e.g., Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 952 (3d Cir. 1985) (*citing Complaint of Bankers Trust Co.*, 651

F.2d 160, 169 (3d Cir. 1981)); *See also Union Oil Co. of California v. M/V Point Dover*, 756 F.2d 1223 (5th Cir. 1985).

Until the Ninth Circuit's decision in *Valdez I*, the only case which arguably imposed punitive damages on the owner for the actions of the captain was *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694 (1st Cir. 1995). In that case, the owner of a small fleet of fishing vessels was held responsible for both compensatory and punitive damages as a result of the reckless destruction of another fisherman's lobster traps by one of his captains during a trawling operation. *Id.* In reaching its decision, however, the First Circuit required at least **some** level of culpability on the part of the employer.

> Our approach today falls short of wholesale adoption of the *Restatement* because section 909(c), read literally, could impose liability in circumstances that do not demonstrate any fault on the part of the principal. Because this is not such a case, however, we need not resolve whether the *Restatement*'s vicarious liability principle would in fact reach so far.

Id. at 705.

As noted by Judge Kozinski in his dissent from the denial of rehearing in *Valdez II*, the Ninth Circuit completely jettisoned *The Amiable Nancy* in favor of § 909(c) of *the Restatement (Second) of Torts* (1979). Pet. App. at 288a. In *Valdez I*, the Ninth Circuit attempts to avoid this rejection of two hundred years of precedent by resting the imposition of punitive damages on the recklessness of Exxon itself, and not on the actions of Captain Hazelwood alone. Pet. App. at 83a. However, the dissent to *Valdez II* correctly challenges that rationalization, and in fact supports Exxon's argument that the jury instructions did not require, or even allow, the jury to make that determination.[4] The relevant jury instructions took the decision concerning Exxon's independent conduct out of the hands of the jury. Jury Instruction 33 stated that "[t]he reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." Pet. App. at 301a. The subsequent instruction forced the jury to find that Captain Hazelwood was employed in a managerial capacity, since it defined a managerial employee as one who "supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business." *Id.* Finally, the third instruction in this series directed the jury to attribute the conduct of any managerial employee to the employer, irrespective of whether the conduct was contrary to company policy. *Id.* at 302a. It is clear, therefore, that the jury was never asked to determine whether Exxon's own conduct should be characterized as reckless.

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[4] *See* Exxon Petition at 12-13.

The Ninth Circuit reaffirmed its commitment to *Protectus* when it upheld the punitive damage award, despite its acknowledgement that other circuit courts were in strong disagreement with its reasoning. Pet. App. at 85a, n. 84. As even the majority opinion recognized in *Valdez I*, any challenge to this extension of punitive damages should have been left to either an *en banc* review or to the judgment of this honorable Court. Pet. App. at 85a, n. 84.

In lamenting the denial of a rehearing *en banc*, the dissent in *Valdez II* notes that the majority's decision "puts us at loggerheads with every other circuit that has considered the case," and is also "contrary to the modern drift of maritime law." Pet. App. at 289a-290a. Given the significance of the issue, this Court should grant *certiorari* in order to settle, once and for all, the question of whether the actions of the master at sea can lead to the imposition of punitive damages against the owner of the vessel which he commands.

It is one thing to hold the shipowner responsible for compensatory damages based on the actions of the captain and crew, or to impose punitive damages based on its failure to properly hire, train and supervise those who navigate its vessels through both calm and stormy seas. It is quite another to make that owner liable for punitive damages solely on the basis of reckless or wanton behavior of a captain who was, at that moment, in complete charge of the vessel and all of those onboard. It was this Court who first proclaimed that such vicarious liability is too onerous a burden to place on the vessel owner, and the Ninth Circuit was not free to simply jettison this time honored principal in favor of the land-based doctrine of the *Restatement*. Vicarious liability in maritime cases should only be expanded, if at all, by this honorable Court, who is respectfully urged to grant Exxon's petition for a writ of *certiorari*.

B. PREEMPTION BY FEDERAL POLLUTION STATUTES

Whether or not Captain Hazelwood's conduct is imputed to Exxon, or its own conduct deemed worthy of punishment, Congress has already provided a framework of fines and penalties designed to address gross negligence or willful misconduct which results in the pollution of our nation's waters. Clean Water Act, 33 U.S.C. § 1321(b)(7)(D) [hereinafter "CWA"]. The CWA, together with other federal pollution legislation, forms a statutory scheme that lays out the factors to be considered in determining the basis for and amount of the penalty, including the wrongdoer's degree of culpability, history of prior violations and the extent to which any mitigation efforts have been successful. 33 U.S.C. § 1321(b)(8). The Ninth Circuit's evaluation of the relevant conduct and the amount of punitive damages at common law was based on the same principles. *See Valdez I*, Pet. App. at 22a-30a. Because Congress has already legislated the consequences of willful and grossly negligent conduct in a pollution context, the availability of **any** punitive damages under general maritime law presents a question which even the Ninth Circuit admits is "serious" and "not without doubt." *Valdez I*, Pet. App. at 75a. Given the "massive significance"[5] of the issue to all of those impacted by a serious pollution incident, this Court should grant *certiorari* in order to dispel that doubt.

This Court's decision in *Mobil Oil Co. v. Higginbotham* established that federal courts should not, and indeed cannot, expand maritime law remedies beyond those created by Congress in any applicable statute. 436 U.S. 618 (1978). Since *Miles v. Apex Marine Corp.*,[6] however, federal courts have struggled to determine the extent to which the damages available under general maritime law are limited by any relevant statutory scheme that addresses the situation or context of the underlying claim, but is not directly applicable to the cause of action at issue. *Miles* involved the death of a seaman, a situation addressed by the Jones Act, which governs a seaman's cause of action for negligence, and limits his recovery to pecuniary damages. 46 U.S.C. § 30104, *et seq*. The seaman's family, however, brought survival and wrongful death actions under general maritime law in which they sought non-pecuniary damages as well. *Miles,* 498 U.S. at 19. After careful analysis, this Court refused to sanction more expansive remedies under maritime common law than Congress had created in the statutory scheme which addressed the underlying factual scenario (the death of a seaman during the course of his employment). *Id.* at 32-33. To the extent that courts have applied its rationale, the holding in *Miles* has since been extended to punitive damages, which are generally considered to be non-pecuniary in nature. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1997); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1506 (5th Cir. 1995); *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984). The application of *Miles*, however, has been anything but uniform.

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[5] *Valdez I*, Pet. App. at 74a.

[6] 498 U.S. 19 (1990).

If the cause of action in question is **directly** addressed by a statute, such as the Jones Act, there is no question that maritime common law remedies cannot be expanded beyond those delineated by the statute. Where the relationship between the statute and cause of action is more tenuous, however, the lower courts have not managed to fashion a consistent rule of law, thus creating confusion and a lack of uniformity.

For example, some courts apply *Miles* to all maritime injury and death cases, while others limit its application to cases in which the plaintiff is a seaman. *See, e.g., Jurgensen v. Albin Marine, Inc.*, 214 F. Supp. 2d 504 (D. Md. 2002) (collecting cases). Other courts have held that the damages are limited when the general maritime law cause of action arises out of the same events or activities addressed by the statute, even when that statute does **not** speak to that particular cause of action at all. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d at 1506 (punitive damages barred for wrongful failure to pay maintenance and cure to a seaman, even though cause of action was not governed by the Jones Act). "If the situation is covered by a statute like the Jones Act or the Death on the High Seas Act, and the statute directs and delimits the available damages, the statute directs and delimits the recovery under general maritime law as well." *Id.*

Not all courts agree. Just last month, the Eleventh Circuit announced a view contrary to *Guevara*, holding that because *Miles* did not specifically address punitive damages in a maintenance and cure case, it was bound to follow pre-*Miles* precedent in the circuit which was directly on point. *Atlantic Sounding Co. v. Townsend*, No. 06-13204, 2007 WL 2385928 (11th Cir. Aug. 23, 2007). This has become yet another area of punitive damages under maritime law on which the circuits conflict. *Id.* at *5-6.

It is not hard to understand why both courts and commentators continue to seek clarification, even in seamen cases. "It appears, therefore, that a universal rule governing the recoverability of punitive damages by seamen in maritime law will not be realized until the Supreme Court or Congress provides a clearer, more express rule." Stephen K. Carr, *Living and Dying in the Post-Miles World: A Review of Compensatory and Punitive Damages Following Miles v. Apex Marine Corp.*, 68 Tul. Mar. L. J. 595, 621 (Jan. 1994).

In other cases, especially those involving non-seamen, a few courts have permitted the imposition of punitive damages under the general maritime law, at least in the absence of an applicable statute. In *CEH, Inc. v. F/V Seafarer*, the First Circuit held that *Miles* did not bar the recovery of punitive damages for the reckless destruction of a fisherman's lobster traps, a situation which was not covered by any federal statute. 70 F.3d 694 (1st Cir. 1995). As noted by another court in a subsequent opinion, "*Miles* does not signify a 'universal uniformity of maritime tort remedy,' but rather 'emphasizes the importance of uniformity in the face of applicable legislation.'" *Jurgensen*, 214 F. Supp. 2d at 509 (*quoting CEH v. F/V Seafarer, supra*). Unfortunately, the distinction between the two concepts has become blurred, especially in the area of property and economic damages such as those at issue here.

The application of *Miles* to other cases has been aptly characterized as "a labyrinth of factual scenarios and legal theories from various courts yielding different results." *Jurgensen,* 214 F. Supp. 2d at 506 (*citing Schumacher v. Cooper,* 850 F. Supp. 438, 454 (D.S.C. 1994) (*quoting Emery v. Rock Island Boatworks, Inc.,* 847 F. Supp. 114, 116 (C.D. Ill. 1994)). It is generally thought by the commentators, and many courts, that non-pecuniary damages in general, and punitive damages in particular, are unavailable under general maritime law. *Kelly v. Bass Enter. Production Co.,* 17 F. Supp. 2d 591, 600 (E.D. La. 1998) ("Since the Supreme Court's ruling in *Miles,* there has been considerable dialogue by both the courts and commentators over not only the vitality but also the very existence of punitive damages under general maritime law"); *Complaint of Clearsky Shipping Corp.*, No. 96-4099, 1998 WL 241515 (E.D. La. May 11, 1998) ("Although not completely settled, since the Supreme Court's decision in *Miles v. Apex Corp.*, the prevailing view is that non-pecuniary damages . . . are unavailable under the general maritime law"), Robert Force, *Post-Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity Whither Goest Thou?*, 21 Tul. Mar. L. J. 7, 51 (Winter 1996) ("While punitive damages were once available as a matter of course under appropriate circumstances, the availability of such damages under general maritime law in the wake of *Miles* . . . is now uncertain at best.").

This uncertainty has spilled over into the pollution arena. "[I]t remains unclear exactly how much vitality punitive damages under the general maritime law retain in light of Congress's enactment of comprehensive damage schemes such as OPA which do not include them." Lawrence K. Kiern, *Damages in Maritime Cases: Environmental Damages Under Federal Law*, 72 Tul. Mar. L. J. 693, 704 (Dec. 1997). This unpredictability is inimical to the interests of Keystone and others in the United States maritime industry. Every day, hundreds of U.S. flag tankers, tugboats and other vessels ply our lakes and coastal waters carrying cargo and passengers between ports. Although most voyages are completed safely and without incident, there is a unique risk inherent in sending one's ships to sea. *See, e.g., Valdez II*, Pet. App. at 290a-291a. Carriers of dry cargo and passengers are not unaffected by the specter of punitive damages, as they carry fuel and lubricating oil which can be spilled in the event of a collision, grounding or other marine incident. Keystone and other owners of tank vessels have a particular need to fully understand the consequences of a pollution incident, including all of the damages to which they may be exposed. The possibility of punitive damages is of particular importance because such damages are often uninsurable by reason of public policy. *Northwestern Nat. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *But see Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 669 (5th Cir. 1992) (no specific and controlling maritime law on the issue)[7] and *Sarrio v. McDowell*, No. 85-1692, 1987 WL 32336 at *3 (E.D. La. Dec. 23, 1987) (law on insurability of punitive damages varies from state to state).

This Court should therefore dispel the ambiguity that surrounds the issue of statutory preemption in the area of pollution. In 1990, Congress enacted the Oil Pollution Act of 1990 [hereinafter "OPA"] in response to the very spill at issue in this case. 33 U.S.C. § 2701, *et seq.* Since then, the issue of punitive damages in pollution cases has been litigated on several occasions. The First Circuit found that punitive damages are unavailable under the general maritime law when the injury involves an oil spill. *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000). That Court's reasoning was based squarely on the premise that Congress had adopted a comprehensive scheme to deal with oil spills, stating, "*Miles* dictates deference to congressional judgment 'where, at the very least, there is an overlap between statutory and decisional law.'" *Id.* at 66 (*quoting CEH*, 70 F.3d at 701). This decision was followed in *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127 (D. Or. 2001). Both *South Port* and *Clausen* involved property damage claims which resulted from pollution, and the latter case involved the economic losses of oyster farmers after a spill, claims which are not dissimilar to those of the Respondent fishermen in this case.

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[7] *on remand to*, No. 90-1403, 1994 WL 118303 (E.D. La. Mar. 25, 1994), *aff'd in part*, 47 F.3d 427 (5th Cir. 1995).

Although the spill of oil from the EXXON VALDEZ is obviously not governed by OPA, the Ninth Circuit recognized that the statute could nonetheless provide valuable guidance. *Valdez I*, Pet. App. at 1031-104a.[8] The VALDEZ spill was governed by the CWA, which is still in effect today and applies to, *inter alia*, the spill of hazardous substances which are not within OPA's purview. 3 *Benedict on Admiralty* § 112 p. 9-44 (7th Ed. 2005). After analyzing the criminal and civil penalty provisions of the CWA, the Ninth Circuit concluded that the statute did not preempt the application of punitive damages under general maritime law. *Valdez I*, Pet. App. at 78a-79a. In reaching that conclusion, however, the Court candidly acknowledged its own doubts on this particularly close question. *Id.* at 75a, 77a.

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[8] "Nevertheless, the Oil Pollution Act has value as a legislative judgment, made in the course of legislative evaluation of this particular oil spill, of what amount of punishment serves the public interest in deterring and punishing, but not over deterring, the conduct that caused the spill. Congress sought to deter pollution, but not so aggressively as to deter transporting oil." *Id.* at 104a.

Finally, this discussion would not be complete without referencing this Court's decisions in *Milwaukee* and *Sea Clammers*, which held that the federal common law of nuisance has been completely preempted by the CWA in pollution cases, and therefore the plaintiffs' tort claims were barred. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). These decisions did not, however, specifically address the legislative preemption of the general **maritime** tort remedies at issue here, and this case presents the Court with the perfect opportunity to do so now. 453 U.S. at 10.

In adopting both the CWA and OPA, Congress specifically delineated the consequences which a vessel owner faces when his gross negligence or willful misconduct has caused the spill. 33 U.S.C. §§ 1321(b)(7)(D) and 2715(c)(1)(A). Although, unlike OPA, the CWA does not provide the remedies available to third parties injured by a spill, the CWA can certainly be read as part of the comprehensive scheme of federal legislation which addresses spills in general, and those caused by gross negligence and willful misconduct in particular, thus triggering the *Miles* prohibition against an expansion of remedies under general maritime law. Put simply, should one who spills a non-petroleum substance be subject to punitive damages while one who spills a similar or even greater amount of petroleum is not? In light of the Ninth Circuit's own doubts on the subject, it should have considered the issue *en banc*, and this Court's guidance is needed.[9]

Keystone has a unique interest in this issue, as the vessels which it owns and operates carry petroleum products, chemicals, and dry cargo in the Great Lakes and Gulf of Mexico, as well as the coastwise waters of the United States and other nations. Keystone is one of the largest operators of U.S. flagged ships in the country today, and its vessels continue to play an important role in commercial shipping as well as our nation's military operations.[10] The protection of such maritime commerce and the need for a uniform set of laws has been hailed as the very foundation of the federal court's admiralty jurisdiction. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004); *Exxon Corp. v. Central Gulf Lines Inc.*, 500 U.S. 603, 608 (1991); *Sisson v. Ruby*, 497 U.S. 358, 367 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982).

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[9] Keystone realizes that this case does not involve the spill of hazardous substances, or the application of OPA. Nonetheless, this potential disparity in the treatment of willful or grossly negligent spills should be a matter of concern for this Court, as both uniformity and fairness are at stake. As one commentator noted, a narrow reading of *Miles* has led to a perceived "functional preference for property damage plaintiffs over personal injury and death plaintiffs [which] is perverse enough to demean our legal system." David W. Robertson, *Punitive Damages in American Maritime Law*, 28 Journal Mar. Law & Comm. 73, 161 (Jan. 1997). Unless *certiorari* is granted to resolve such issues, carriers of hazardous substances, which are in many cases less harmful to the environment, may face greater liabilities than those contemplated by Congress and which are imposed upon the spillers of oil.

Congress has also encouraged the continued vitality of a national merchant marine with the passage of the legislation which requires that cargo and passengers carried between U.S. ports fly the American flag, and be built, owned and manned by U.S. citizens. *See, generally*, Jones Act, 46 U.S.C. § 55102. In order to maintain a strong American presence in the shipping industry and a merchant marine to support our military, it is critical that all responsible owners and operators are treated equally and fairly in the event of a pollution incident, irrespective of where the spill occurs and whether the substance spilled is petroleum or non-petroleum based. This Court is, therefore, urged to review and correct the disparity which has been created by the Ninth Circuit's punitive damages decisions in the EXXON VALDEZ case.

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[10] Keystone's vessels have supported the United States military in every war since the business was founded in 1909.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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United States v. *Locke*, 529 U.S. 89 (2000) 3
Yamaha Motor Corp., U.S.A. v. *Calhoun*, 515 U.S. 1186 (1995) 3

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33 U.S.C. §§2001-2073 2
33 U.S.C. §§1251-1367 2
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SECONDARY SOURCES

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IN THE

Supreme Court of the United States

No. 07-219

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,
v.
GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF MARITIME LAW ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS* [1]

The Maritime Law Association (MLA) is a nationwide bar association founded in 1899 and incorporated in 1993. It has a membership of about 3200 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, *amicus curiae* states that petitioner and respondents have consented to the filing of this brief. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of amicus briefs, and a letter reflecting the consent of respondents to the filing of this brief has been filed with the Clerk.

The MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers, and other maritime plaintiffs and defendants.

The MLA's purposes, as stated in its Articles of Incorporation, are

> to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

To further these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters and has cooperated with congressional committees in formulating other maritime legislation.[2] Similarly, the MLA has assisted with international maritime projects undertaken by the United Nations, the International Maritime Organization, and the Comité Maritime International.

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[2] *E.g.*, Carriage of Goods by Sea Act, 46 U.S.C. §30701 note; Death on the High Seas Act, 46 U.S.C. §§30301-30308; Federal Arbitration Act, 9 U.S.C. §§1-16; Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-1611; Jones Act, 46 U.S.C. §30104; Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251-1367; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C. §§2001-2073.

Consistent with its mission to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in cases that raise substantial questions affecting uniformity.[3] The MLA believes that this case presents substantial questions about the availability and extent of punitive damages under maritime law, and that this Court should grant certiorari to resolve those questions.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling that a vessel owner may be subject to punitive damages in these circumstances conflicts with rulings of several other Circuits. The conflict created by that ruling creates substantial uncertainty for maritime actors, and those who advise them, about what standards and protections should be put in place to select, monitor, and control the conduct of maritime employees. That uncertainty will promote and prolong litigation, and so the Court should grant certiorari to resolve the uncertainty and prevent those undesirable results.

ARGUMENT

I. THE CONFLICT OVER THE AVAILABILITY OF PUNITIVE DAMAGES UNDER MARITIME LAW CREATES UNDESIRABLE UNCERTAINTY FOR MARITIME ACTORS AND THOSE WHO ADVISE THEM.

The Ninth Circuit's decision confirmed a split among the circuits as to when a vessel owner may be held liable for the conduct of the ship's captain. The Ninth Circuit in this case, following its decision in *Protectus Alpha Navigation Co., Ltd.* v. *North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (CA9 1985), held that punitive damages can be imposed on a vessel owner based on the reckless conduct of the vessel's captain, when it upheld the jury instructions that required the jury, if it determined that the captain had been reckless, to find that Exxon had been reckless. *In re the Exxon Valdez* (*Valdez I*), 270 F.3d 1215, 1233 (CA9 2001).

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[3] *E.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002); *United States* v. *Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 515 U.S. 1186 (1995); *American Dredging Co.* v. *Miller*, 510 U.S. 443 (1994); *Sisson* v. *Ruby*, 497 U.S. 358 (1990); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986); *Ray* v. *Atl. Richfield Co.*, 435 U.S. 151 (1978).

The Ninth Circuit's ruling conflicts directly with the rulings of a number of other circuits that have interpreted *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), and other cases following it, to hold that the general maritime law prohibits the imposition of punitive damages in these circumstances. See *CEH, Inc.* v. *F/V Seafarer*, 70 F.3d 694, 699 (CA1 1995); *In re P&E Boat Rentals, Inc.* v. *Ennia Gen. Ins. Co., Inc.* 872 F.2d 642, 652 (CA5 1989); *U.S. Steel Corp.* v. *Furhman*, 407 F.2d 1143, 1148 (CA6 1969); see also T. J. Schoenbaum, Admiralty & Maritime Law §5-17 (2005) ("[A]dmiralty cases deny punitive damages in cases of imputed fault.").

The Ninth Circuit's decision in this case, therefore, confirms the persistence of a circuit split over when the actions of a ship captain can subject a vessel owner to punitive damages liability. That split will produce substantial uncertainty and difficulty for vessel owners, and those who advise them, because vessel owners now face two different legal standards to govern their conduct in hiring, training, managing, and monitoring their ships' captains.

In the waters of the Ninth Circuit—which comprise a large portion of the navigable waters of the United States, vessel owners will potentially be liable for any reckless act of the ship's captain, and will have to hire, plan, control—and insure—accordingly. Cf. *The Amiable Nancy*, 16 U.S., (3 Wheat) at 558-559 ("But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can *scarcely ever* be able to secure to themselves an adequate indemnity in cases of loss."). Elsewhere, a different, narrower rule will govern liability for the conduct of the captain.

This disuniformity imposes shifting standards governing conduct and liability on specific individual voyages (*e.g.*, any voyage that takes a vessel to or from the waters of the Ninth Circuit into or from the Gulf of Mexico). Further, the discrepancy will frustrate efforts by the owners of vessels (and fleets of vessels) to develop and implement consistent internal policies relating to the selection and monitoring of managerial employees, and the result will be inefficiency and needless expense.

The uncertainty of outcome will also encourage needless litigation as parties will be encouraged to "roll the dice" until a verdict has been rendered and appealed. Finally, those uncertainties resulting from the conflict in the circuits will make it more difficult for maritime lawyers to effectively advise their clients about what policies to adopt, and what liabilities to anticipate, for their voyages. The MLA believes the Court should grant certiorari to resolve this conflict and avoid the undesirable consequences that will follow from it.

Further, the issues raised in the case implicate more broadly the Court's recent constitutional punitive-damages jurisprudence, and how it applies to the arena of general maritime law.

This Court has in the past fifteen years significantly evolved its jurisprudence on the constitutional due process limits on punitive-damages awards, mainly in cases involving rulings on state-law claims by state courts. In a line of cases beginning with *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), running through cases such as *BMW of*

North America v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), and continuing up to last Term's decision in *Philip Morris USA* v. *Williams*, 127 S.Ct. 1057 (2007), the Court has developed and refined a substantial new legal framework for determining when an award of due process transgresses the constitutional limits of due process.

At the same time, though, the Court has been careful to emphasize that, when reviewing the constitutionality of state-law judgments, its role is highly circumscribed. See, *e.g.*, *Haslip*, 399 U.S. at 42 (Kennedy, J, concurring in the judgment). In those cases, it is for the state courts to implement and interpret common-law or state-statutory guidelines for the assessment and limitation of punitive damages, and for this Court only to define the outermost constitutional bounds of permissible awards.

In the maritime context, however, the Court's authority and responsibility to prescribe rules for the assessment of punitive damages are much more far-reaching, extending to the development not only of constitutional but also common-law guidelines for the review of punitive-damages awards. See, *e.g.*, *Norfolk Southern Ry. Co.* v. *James N. Kirby Pty Ltd.*, 543 U.S. 14, 22-25 (2204); *California* v. *Deep Sea Research*, 523 U.S. 491, 501 (1998); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 396-397 (1970).

In this case, the Ninth Circuit simply applied the constitutional *BMW/State Farm* analysis, without conducting a separate analysis under maritime law. App. 68a-70a. Thus, the panel seems to have taken the general maritime rule to be coterminous with the limits of permissible punitive damages under the Constitution.

Ultimately, the Court may decide to equate the common-law general maritime rule with the constitutional one. But there are other possible answers. Given the Court's wide-reaching responsibility and authority over maritime law, the Court's emphasis on the critical importance of the availability of common-law review of punitive damage awards, the logical corollary that there should be clear and well-defined standards for that constitutionally necessary review, and the Court's unique role as the only institution able to prescribe such clear and well-defined rules, it is appropriate for the Court to speak about the rules for reviewing punitive damage awards under maritime law and how those rules are informed by the Court's constitutional punitive-damages jurisprudence.

All of these concerns make it appropriate for the Court to grant certiorari in this case and resolve the conflict in the Circuits about the availability of punitive damages under maritime law.

CONCLUSION

The MLA respectfully requests that the Court grant certiorari.

Respectfully submitted,

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AMICUS
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In the Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL., PETITIONERS,

v.

GRANT BAKER, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* TRANSPORTATION INSTITUTE AND OVERSEAS SHIPHOLDING GROUP, INC. IN SUPPORT OF PETITIONERS

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Am. Dredging Co. v. Miller, 510 U.S. 443 (1994) 5

Boyle v. United Techs. Corp., 487 U.S. 500 (1988) . . . 5

De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815) . 3

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 5

Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249 (1972) 4, 5

Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603 (1991) 4

Halcyon Lines v. Haenn Ship, Ceiling & Refitting Corp., 342 U.S. 282 (1952) 5

Indep. U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908 (D.C. Cir. 1982) 7, 8

Lake Tankers Corp. v. Henn, 354 U.S. 147 (1957) . . . 4

Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001) 4

McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994) . . . 5

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Miles v. Apex Marine Corp., 498 U.S. 19 (1990) . . . 3

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 3, 5

Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004) 4

Taylor v. Lloyds Underwriters of London, 972 F.2d 666 (5th Cir. 1992) 6

Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957) 5

The Lottawanna, 88 U.S. 558 (1875) 3

The Main v. Williams, 152 U.S. 122 (1894) 5

United States v. Locke, 529 U.S. 89 (2000) 5

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Limitation of Shipbuilders' Liability Act, 46 U.S.C. §§ 30501 *et seq.* 8

Maritime Security Act of 1996, 46 U.S.C. § 53102 . . . . 10, 11

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Merchant Marine Act of 1936, 46 U.S.C. § 50101 . . . . 9, 10, 11

Shipping Act of 1984, 46 U.S.C. §§ 40101 *et seq.* . 10

1 Stat. 27 (1789) 8

1 Stat. 287 (1792) 8

CONGRESSIONAL MATERIALS

Hearing to Receive Testimony on the Posture of the U.S. Transportation Command, Before the Senate Armed Services Seapower Subcommittee, 108th Cong. (2004) 13

Renewable Energy and Energy Conservation Tax Act of 2007, H.R. 3221, 110th Cong., 1st Sess. (2007) 17

S. Rep. No. 66-573, at 1 (1920) 9

Statement of General John W. Handy, USAF Commander, United States Transportation Command; Vice Admiral David L. Brewer III, USN Commander, Military Sealift Command; and Major General Ann E. Dunwoody, USA Commanding General, Surface Deployment and Distribution Command, Before the Senate and Armed Services Seapower Subcommittee on the State of the Command, 108th Cong. (2004) 12, 13

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Transportation Energy Security and Climate Control Mitigation Act of 2007, H.R. 2701, 110th Cong., 1st Sess. (2007) 17

TREATISES

Benedict on Admiralty (7th ed. 2005) 5

Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty (2d ed. 1975) 7, 8, 11, 14

Thomas J. Schoenbaum, Admiralty and Maritime Law (4th ed. 2004) 4, 8, 10

MISCELLANEOUS

American Commercial Lines 10-Q for quarter ending June 30, 2007 18

Bureau of Economic Analysis, United States Dep't of Commerce, *Gross Domestic Products by Industry*, http://www.bea.gov/industry/gpotables/gpo_action.cfm 15

Bureau of Transportation Statistics, United States Dep't of Transportation, *Introduction and Overview*, http://www.bts.gov/publications/americas_freight_transportation_gateways/introduction_and_overview/index.html 15, 16

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Bureau of Transportation Statistics, United States Dep't of Transportation, *TABLE 8. U.S. Maritime Freight Gateways, Ranked by Value and Weight*, 2003, http://www.bts.gov/publications/americas_freight_transportation_gateways/intro duction_and_overview/html/table_08.html 16, 17

Bureau of Transportation Statistics, United States Dep't of Transportation, Tables 4-40, 4-41, 4-43 (2002), http:/www.bts.gov/publications/national_transportation_ statistics/2002index//html 17

Chris Dupin, *The New Administration: Bush Backs Maritime Security Program, Jones Act*, Journal of Commerce, Dec. 14, 2000 15

Fortune 500 Largest U.S. Corporations, Fortune, Apr. 30, 2007 18

Kirby Corp. 10-Q for quarter ending June 30, 2007 18

Maritime Cabotage Task Force, *About the U.S. Maritime Cabotage Laws*, http://www.mctf.com/about_cabotage.shtml 14, 15, 17

Maritime Cabotage Task Force, *Statements of Support*, http://www.mctf.com/statements.shtml 15

Lorelie S. Master, *Punitive Damages: Covered or Not?*, 55 Bus. Law. 283 (1999) 6

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Robert L. McGeorge, *United States Coastwise Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of a Global Economy*, 11 NW. J. INT'L L. & BUS. 62 (1990) 7

Terrence Moran, *Well Heeled Shipping Lobby Sails to Victory*, LEGAL TIMES, Jan. 11, 1988 14

National Ports and Highway Institute, Louisiana State University, *High Speed Ferries and Coastwide Vessels: Evaluation of Parameters and Markets for Application* (2000), available at http://www.market.data90V/MHI/Documents/High_Speed_Ferries_Report-Part1.pdf (last visited Sept. 19, 2007) 17, 18

National Security Sealift Policy, National Security Directive 28, approved by President Bush, Oct. 5, 1989 12

Ontario Marine Transportation Forum, *Fact Sheet*, http://www.omtf.org/subfiles/factSheet.pdf 17

Overseas Shipbuilding Group 10-Q for quarter ending June 30, 2007 18

PriceWaterhouseCoopers, *Economic Impact of OSG's U.S. Flag Fleet Expansion* (Sept. 4, 2007) 16

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Reeve & Associates, *The Role of the United States' Commercial Shipping Industry in Military Sealift* (Aug. 2006) 11, 13

Reuters, *Company Ranks*, http://www.investor.reuters.com/IndSectList.aspx?indtrgpage=%2findustries%2findhighlights%2findcmprank%2findview10&sectorcode=TRANSP&target=%2findustries%2findhighlights%2fbrowseindustries%2findbysectors&indscrpage=%2findustries%2findhighlights%2findcmprank%2findview 18

Transportation Institute, *The Jones Act: An American Tradition* (1996) 7, 15, 16, 20

Transportation Institute, *The U.S.-Flag Merchant Marine* (Mar. 2007) 12, 13

Transportation Institute, *The U.S. Merchant Marine and National Defense* (1996) 14

United States Dep't of Transportation, Maritime Administration, *Domestic Shipping Overview*, http://www.marad.dot.gov/programs/dom_ship.html 15, 17

United States Dep't of Transportation, Maritime Administration, *U.S. Water Transportation Statistical Snapshot* (May 2007) 17

INTEREST OF THE *AMICI CURIAE*[1]

The Transportation Institute was established in 1967 as a Washington-based, non-profit organization dedicated to maritime research and promotion. The Institute advocates and works for sound national maritime policy to help maintain America's political and economic strength and national security. The Institute is comprised of companies that participate in the nation's deep sea foreign and domestic shipping trades, and barge and tugboat operations on the Great Lakes and on the 25,000 mile network of America's inland waterways. Many of the Institute companies' vessels are contracted to the U.S. military services. All Transportation Institute companies operate U.S.-flagged vessels crewed by American citizens, and the Institute recognizes that an adequate and well-trained work force of seafarers and other maritime employees is essential to the maritime industry.

The Transportation Institute believes that a balanced, competitive, and efficient waterborne transportation system is indispensable to America's economy and security. A privately-owned, citizen-crewed, U.S-flagged merchant fleet has been the foundation for the commercial and military success of this nation in times of peace and of war. It is imperative for the United States to maintain a strong maritime capability in order to protect its economic and national-security interests. Excessive punitive damages awarded against U.S.-flag vessel owners, especially if imposed vicariously and outside the congressional statutory scheme, such as the staggering $2.5 billion punitive-damages award at issue in this case, threaten the continued viability of the U.S. fleet that the Transportation Institute promotes in the interests of U.S. commerce and national defense.

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[1] Respondents have consented to the filing of this brief, and their written consent is being submitted to the Clerk of this Court. Petitioners have already filed a blanket consent with the Clerk. Pursuant to S. Ct. R. 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

Overseas Shipholding Group, Inc. ("OSG") is one of the world's leading bulk shipping companies engaged primarily in the ocean transportation of crude oil and petroleum products. The company owns or operates a modern fleet of 108 vessels; 87 operate in the international market and 21 in the U.S. Flag market. Thus, OSG owns and operates vessels in both domestic and international maritime commerce. OSG is the only major global tanker company with a significant U.S. Flag fleet. Its fleet includes crude oil tankers, product carriers, and articulated tug barges and dry bulk and car carriers. OSG's vessel operations are organized into strategic business units and focused on four market segments: crude oil, refined petroleum products, U.S. Flag vessels, and gas.

Within its U.S. Flag Fleet operations, the company participates, among other things, in the Alaska North Slope Crude Oil Transportation through its 37.5% equity interest in Alaska Tanker Company, LLC, a joint venture that was formed in 1999 among OSG, BP p.l.c., and Keystone Shipping Company, to support BP's Alaskan crude oil transportation. In addition, since 1996, OSG has participated in the Maritime Security Program, which ensures that militarily useful U.S. Flag vessels are available to the U.S. Department of Defense in the event of war or national emergency.

As the second largest publicly traded tanker company in the world, OSG is substantially concerned that excessive punitive damages, imposed vicariously for the reckless behavior of a vessel's master, would adversely affect the financial position of the company and the entire maritime industry and thus undermine the commercial and national-security interests of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have demonstrated that the Ninth Circuit's decision is wrong in several important respects. *Amici* fully agree with that analysis.

Petitioners also have demonstrated that the rulings below conflict with the decisions of this Court and of other courts of appeals. *Amici* agree that this conflict calls for this Court's intervention. Indeed, not only is such a conflict a recognized ground for the Court's review, but the need for uniformity is particularly compelling in the area of maritime law and provides a further substantial reason for the petition to be granted. *See, e.g.*, *The Lottawanna*, 88 U.S. 558, 575 (1875) ("[it] is unquestionable [that] the Constitution must have referred to a system of [maritime] law ... operating uniformly in ... the whole country" in order to achieve "the uniformity and consistency at which the Constitution aimed").[2]

Finally, petitioners have demonstrated that the questions presented here are of profound importance to the entire maritime industry. *Amici* fully agree with this showing as well, and it is to this concern that *amici* address themselves in this brief.

For more than 200 years, federal maritime law has protected and promoted the U.S. maritime industry in order to further our country's economy and national security. The Ninth Circuit's decision is contrary to established maritime law and inimical to federal maritime policies. If the law is to be changed, it should be done by Congress, not by the courts. Furthermore, a substantial part of our nation's international and domestic maritime commerce occurs within the Ninth Circuit, thereby underscoring the importance of, and exacerbating the adverse effects of, the court of appeals' holding. Accordingly, this Court should grant review and reverse the judgment below.

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[2] In 1815, Justice Storey, sitting as circuit justice, explained "[t]he advantages resulting to the commerce and navigation of the United States from a uniformity of rules and decisions in all maritime questions." *De Lovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3776). This Court consistently has recognized the overarching need for uniformity in maritime law. *See, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-02 (1970).

ARGUMENT

I. FEDERAL MARITIME LAW SERVES TO FOSTER THE U.S. MARITIME INDUSTRY AND PROTECTS THE INDUSTRY FROM UNDUE LIABILITY.

The U.S. maritime industry is unique in this country and unlike any other economic sector that has been before the Court in previous punitive-damages cases. In brief, it is long-established federal policy to promote this industry in order to further our nation's economic and national-security interests (*see* Section II, *infra*) and to protect the industry from undue liability under federal maritime law. For this reason, "[a]dmiralty and maritime law includes a host of special rights, duties, rules, and procedures." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001).

From the founding of the Republic, maritime law has served "primarily to encourage the development of American merchant shipping." *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957). Thus, "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (internal quote and citation omitted). *See also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004). "Because the shipping industry is vitally important both to our national commerce and national defense, the Federal Government has maintained a special interest in trying to promote its growth and stability." *Aktiengesellschaft Volkswagenwerk v. Fed. Mar. Comm'n*, 390 U.S. 261, 297 (1968) (Douglas, J., dissenting in part).[3]

In particular, "[l]imitation of liability [of carriers] is an important theme of admiralty law" and "is accepted as necessary to serve the needs of commercial practicality as well as the shipowner." 2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 15-1, at 136 & n.1 (4th ed. 2004). "[L]imitation of liability" has "long" been a principal feature of "[t]he law of the sea." *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*,

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[3] The relevant statutes and specific policies are discussed in Section II, *infra*.

409 U.S. 249, 270 (1972). Furthermore, this principle of limited liability "springs from the general maritime law"; "[i]t was not recognized either by the [general] common law or by the civil law." 3 BENEDICT ON ADMIRALTY § 4, at 1-31 (7th ed. 2005). *See The Main v. Williams*, 152 U.S. 122 (1894).

As petitioners explain, maritime law is a form of federal common law. Accordingly, it should reflect federal policies and be consonant with the laws of Congress. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994). Maritime law accordingly looks to Congress for "'policy guidance.'" *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207 (1994). As Justice Harlan explained, courts in developing federal maritime common law take account of the "legislative establishment of policy," and such policy becomes part of the "decisional law." *Moragne*, 398 U.S. at 390-91; *see also id.* at 392-93, 395 (referring to "the general policies of federal maritime law"). *See also, e.g.*, *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (courts fashion federal common law "from the policy of our national ... laws"); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988). Furthermore, the federal interest in maritime commerce is exceptionally broad (*see, e.g.*, *United States v. Locke*, 529 U.S. 89, 108-09 (2000)), and that is reflected in maritime law as well.

Finally, although not an invariable rule, the Court has recognized the wisdom of entrusting to the legislature rather than to the judiciary fundamental changes in maritime law. *See, e.g.*, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272-73 (1979); *Halcyon Lines v. Haenn Ship, Ceiling & Refitting. Corp.*, 342 U.S. 282, 285-86 (1952). In this case, it is Congress that is in the better position to determine the applicable facts and weigh the policy and economic considerations in order to decide whether longstanding maritime law should be radically and abruptly upset in the manner done by the Ninth Circuit's decision. If the maritime law of punitive damages is to be fundamentally altered, Congress is the appropriate branch to do so.

In fact, the need to leave the matter to Congress is especially strong in this case. While the issue may not be entirely clear, it appears that the insurability of maritime carriers against punitive damages is governed by state law. *See Taylor v. Lloyds Underwriters of London*, 972 F.2d 666, 668-69 (5th Cir. 1992). The law on the insurability of punitive damages varies widely among the states (including insurability both where the carrier itself has engaged in wrongful conduct and where, as here, it is held vicariously liable in punitive damages for the acts of its non-managerial employees). *See* Lorelie S. Master, *Punitive Damages: Covered or Not?*, 55 BUS. LAW. 283 (1999). If punitive damages are insurable, it would be grievously unfair and economically unjustified suddenly to impose punitive-damages liability on carriers without an opportunity for them to seek coverage. If, however, punitive damages are not insurable, the entire weight of the dire consequences of the Ninth Circuit's decision (as discussed below) would fall on the maritime industry. In either event, therefore, because Congress can better resolve these matters and balance the competing claims, it rather than the judiciary is the proper body to decide whether the maritime law of punitive damages should be modified.

II. THE DECISION BELOW IS INCOMPATIBLE WITH MARITIME LAW AND ESTABLISHED FEDERAL POLICIES DESIGNED TO PROTECT THE U.S. MARITIME INDUSTRY IN ORDER TO FURTHER THE COMMERCIAL AND NATIONAL-SECURITY INTERESTS OF THE UNITED STATES.

A. Maritime Law And Federal Policy Protect The U.S. Maritime Industry For Economic And National-Security Reasons.

From the inception of our nation, maritime law, including congressional enactments, provided special aid and assistance to the U.S. maritime industry. This longstanding maritime policy reflects both the commercial and the national-security interests of the United States. In particular, in order to promote a strong U.S. maritime industry, maritime law has furthered the interests of carriers, shipbuilders, seafarers and other maritime employees, and consumers. Moreover, as experience has tellingly borne out, our national security requires a strong maritime industry, including an adequate number of vessels, a domestic capacity to build and repair such vessels, and sufficient workers to crew the ships and to build and repair them. *See Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 911 (D.C. Cir. 1982) ("[i]t has long been recognized that an adequate merchant marine, with U.S.-flag ships and trained American sailors, is vital to both the national defense and the commercial welfare of our country").

Preliminarily, to put the following discussion in context, a number of the statutes discussed below involve "cabotage" or shipments between ports in the United States. A cabotage statute advantaging U.S. carriers was among the initial enactments passed by the First Congress, and this legislative policy continues unbroken to the present. Some 50 other countries also have cabotage statutes protecting their own carriers within their domestic commerce. *See* Robert L. McGeorge, *United States Coastwise Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of a Global Economy*,11 NW. J. INT'L L. & BUS. 62, 62-63 (1990) ("[t]he right of a nation to exclude foreign vessels from its domestic maritime trade is accepted without question in the international community; and most coastal nations, including the United States, have adopted cabotage laws to enforce that right"); Transportation Institute, *The Jones Act: An American Tradition* 2 (1996).

In the United States, the cabotage statute requires that waterborne shipments between U.S. ports be made by ships that are U.S.-owned, U.S.-flagged, U.S.-built, and U.S.-crewed. This preference is needed because "[t]he American merchant marine as a whole seemingly cannot now or in the foreseeable future operate in free competition; our ships are too expensive and our wages too high for that." Grant Gilmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY § 11-5, at 968 (2d ed. 1975); *see also id*,. § 11-6, at 970. Accordingly, to ensure the existence and viability of U.S. carriers in the interest of our country's economy and national security, this congressional cabotage policy is necessary. *See Indep. U.S. Tanker Owners*, 690 F.2d at 911 ("[s]ince the earliest days of the Republic, preferential legislation has mandated that only U.S.-built and U.S.-flag vessels can be operated in commerce between points in the United States").[4]

1. The Acts of 1789-1817.

"In 1789, in the second law passed under the new Constitution, Congress enacted a discriminatory tax on foreign vessels in the coasting trade, making it impractical economically for them to operate [between U.S. ports]." Gilmore & Black, *supra*, § 11-4, at 963 n.34. *See* 1 Stat. 27 (1789). Following independence, "the maintenance of the shipbuilding industry, and the creation of an operating merchant marine, were among the most urgent tasks facing the Congress and the nation." Gilmore & Black, *supra*, § 11-4 at 963. Thus, the "coastwide trade was early reserved to domestic vessels." *Id. See also* 1 Stat. 287 (1792).

In 1817, Congress expressly prohibited foreign carriers from transporting goods between two U.S. ports. *See* Act of March 1, 1817, ch. 31, § 4, 3 Stat. 351. This provision was part of a broader statute designed to protect the domestic maritime industry. *See also* Limitation of Shipbuilders' Liability Act of 1851, Act of Mar. 3, 1851, ch. 43, 9 Stat. 635, currently codified at 46 U.S.C. §§ 30501 *et seq.*, *discussed in* 2 Schoenbaum, *supra*, § 15-1, at 137 ("[t]he announced purpose of the law is to encourage shipbuilding and to induce the investment of money in the shipbuilding industry").

2. The Jones Act of 1920.

This early federal cabotage policy – which provided that "the coastwise trade was prohibited outright to foreign ships" – "has lasted down to now." Gilmore & Black, *supra*, § 11-4, at 963 n.34. This policy is currently embodied in the Jones Act of 1920, (Section 27 of the Merchant Marine Act of 1920).

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[4] A similar cabotage policy applies to air carriers for flights between airports within the United States.

Pub. L. No. 66-261, 41 Stat. 988 (1920), currently codified at 46 U.S.C. §§ 50101 *et seq.*. Enacted in the aftermath of World War I, the restriction of cabotage trade to U.S. carriers was justified in terms of the critical need "to develop and encourage a merchant marine" in order to serve "the national defense" and "foreign and domestic commerce":

> It is necessary for the *national defense* and for the proper growth of its foreign and domestic *commerce* that the United States shall have a merchant marine of the best equipped and most suitable types of vessels *sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency*, ultimately to be owned and operated privately by citizens of the United states; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine.

46 U.S.C. app. § 861, currently codified at 46 U.S.C. § 50101 (emphasis added). *See also* S. Rep. No. 66-573, at 1 (1920) (national policy favors "an American merchant marine, built in American shipyards by American labor, manned by American seamen, flying the American flag"; "[w]e need such a fleet, not only for our commercial growth, but for the Nation's defense in time of war and the stability of domestic industry in time of peace").

3. The Merchant Marine Act of 1936.

The next important expression of congressional policy was the Merchant Marine Act of 1936. Adopted in the shadow of World War II and in the midst of the Great Depression, the Act declared that "[i]t is the policy of the United States to encourage and aid the development and maintenance of a merchant marine . . . for the national defense and the development of the domestic and foreign commerce of the United States":

> **(a) Objectives.**—It is necessary for the *national defense* and the development of the domestic and foreign *commerce* of the United States that the United States have a merchant marine—

> **(1)** sufficient to carry the waterborne domestic *commerce* and a substantial part of the waterborne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of the waterborne domestic and foreign commerce at all times;
>
> **(2)** capable of serving as a *naval and military auxiliary in time of war or national emergency*;
>
> **(3)** owned and operated as *vessels of the United States by citizens of the United States*;
>
> **(4)** composed of the best-equipped, safest, and most suitable types of vessels and *manned with a trained and efficient citizen personnel*; and
>
> **(5)** supplemented by efficient *facilities for building and repairing vessels*
>
> **(b) Policy.**—It is the policy of the United States to encourage and aid the development and maintenance of a merchant marine satisfying the objectives described in subsection (a).

46 U.S.C. § 50101 (emphasis added). "The Merchant Marine Act of 1936 is designed to develop and maintain an adequate and well-balanced American merchant marine and shipyard industry." 1 Schoenbaum, *supra*, § 10-2 at 582. *See also* The Shipping Act of 1984, Pub. L. No. 98-237, currently codified at 46 U.S.C. §§ 40101 *et seq.* (purposes of the Act include commerce and national security).

4. The Maritime Security Act of 1996.

Most recently, the Maritime Security Act of 1996 continues to recognize the importance of the U.S. maritime industry to commerce and national security. It provides that "[t]he Secretary of Transportation shall establish a fleet of active, commercially viable, militarily useful, privately owned vessels to meet national defense and other security requirements and maintain a United

States presence in international commercial shipping." 46 U.S.C. § 53102.

5. Overview of U.S. maritime industry and national security.

For more than two centuries, the privately-owned U.S. merchant marine has played a crucial role in the defense and security of the nation. Without this support, the government (and taxpayers) would have to assume the burden of providing and maintaining this maritime capability – a responsibility that would run into billions of dollars annually. *See, e.g.*, Reeve & Associates, *The Role of the United States' Commercial Shipping Industry in Military Sealift* 4-5 (Aug. 2006). "[T]he privately-owned United States-flag commercial shipping fleet has proven to be the most cost-effective means for the U.S. military to acquire sealift capability." *Id.* at 3. Between the alternatives of government operation of maritime capabilities and government support of a private merchant marine, the country consistently has chosen the latter course. *See* Gilmore & Black, *supra*, § 11-5, at 968.

In modern times, the U.S. maritime industry has aided the military effectively and with distinction. *Id.* In the early part of the 20th century, "World War I thrust upon the country the necessity of building up a merchant marine," and "[o]ur entry into the war vastly increased the importance of [this effort.]" *Id.* at 965-66.

Following the war, the industry underwent a decline. "[I]n 1933 the Black Committee of the Senate uncovered extensive abuses in the operation of . . . the merchant marine in general." *Id.* at 966.

> Thoroughly convinced that strategic factors, if not economic ones, imperatively called for the maintenance of a healthy shipping industry, Congress, under the then persuasive stimulus of an urgent plea from President Franklin Roosevelt, passed the Merchant Marine Act of 1936.

Id. As the Act itself makes clear (*see* pages 9-10, *supra*), it "gives weight both to the economic and to the strategic factors that have pulled at shipping policy through the ages." *Id.* at 967.

The Merchant Marine Act and concerted military and civilian wartime programs enabled the United States to meet "the unprecedentedly acute shipping problem created by [World War II]." *Id.* This successful policy "continued through the Viet Nam war, when great ocean transport was required." *Id.* at 968.

The U.S. maritime industry has continued to perform this essential responsibility in more recent days. For example, in 1989, President George H.W. Bush reaffirmed that "[s]ealift is essential both to executing this country's forward defense strategy and to maintaining a wartime economy," and therefore "[t]he U.S.-owned commercial ocean carrier industry . . . will be relied upon to provide sealift in peace, crisis and war." *National Security Sealift Policy,* National Security Directive 28, approved by President Bush, Oct. 5, 1989.

The Persian Gulf War of 1991 "was the first time in decades that the merchant marine was called upon to serve in a full mobilization capacity." Transportation Institute, *The U.S.-Flag Merchant Marine*, ch. 6, at 1 (Mar. 2007). U.S.-flag ocean liners carried 29% of the dry cargo to the region – more than any other category of transport. *Id.*

Most recently, the U.S. maritime industry has been used to support our military in Operations Enduring and Iraqi Freedom. As military officials testified to Congress:

> Here is the big picture – in the largest and most demanding test of our total lift capability since Operation Desert Shield/Desert Storm, USTRANSCOM [United States Transportation Command] delivered the necessary combat power to Iraq faster and more efficiently than ever before. The men and women of USTRANSCOM, in concert with our service partners and commercial teammates, have performed brilliantly.

Statement of General John W. Handy, USAF Commander, United States Transportation Command; Vice Admiral David L. Brewer III, USN Commander, Military Sealift Command;

and Major General Ann E. Dunwoody, USA Commanding General, Surface Deployment and Distribution Command, Before the Senate Armed Services Seapower Subcommittee on the State of the Command, 108th Cong. 4 (2004) (hereafter "*Statement*"). USTRANSCOM includes "both military and commercial transportation assets" and "relies on its commercial transportation industry partners and associated labor organizations to provide significant transportation capability during contingencies." *Id.* at 2, 6; *see also id.* at 36-37. In the Iraqi conflict, more than 90% of cargo was carried aboard U.S.-flag vessels crewed by 3,900 commercial mariners and 3,800 civil service mariners. Transportation Institute, *The U.S. Flag Merchant Marine*, ch. 6, at 1. During this engagement, the U.S. military was able to reduce its use of foreign-flag vessels from 22.6% of total dry cargo in Operations Desert Storm/Desert Shield to 3.4%; "[a] key factor behind the increase in the United States' overall level of self-sufficiency for military sealift was the increase in the U.S. commercial liner shipping industry's contribution to the sealift mission that rose from 21.2 percent in 1990-1991 to 49.3 percent for all dry cargo." Reeve & Associates, *supra*, at 11-12. And in his live testimony to Congress, Admiral Brewer reiterated that civilian maritime vessels were "extremely important" and "extremely critical in terms of readiness"; "[w]e cannot exist without [them]." *Hearing to Receive Testimony on the Posture of the U.S. Transportation Command Before the Senate Armed Services Seapower Subcommittee* 108th Cong. 73 (2004)(hereafter "*Hearing*"). He and Senator Talent agreed that "[i]t is an amazing civilian-military synergy." *Id.* at 74.

However, military officials have expressed "concern" about "the continued availability of a sufficient number of qualified civilian mariners." *Statement*, *supra*, at 12. Accordingly, they "support the maintenance of a viable U.S. mariner pool." *Id.* As Admiral Brewer testified, "without [the maritime trades, departments, and unions] we could not have fought the war." *Hearing*, *supra*, at 74.

In sum, it remains "orthodoxy" that the United States "cannot sustain its responsibilities as a world power without a merchant marine." Gilmore & Black, *supra*, § 11-5, at 968. "From World War II on, some 95% of all military equipment and material sent to crisis and combat theaters was carried by sea." Transportation Institute, *The U.S. Merchant Marine and National Defense* 9 (1996). "The U.S. Merchant Marine . . . is recognized as 'The Fourth Arm of National Defense.'" Maritime Cabotage Task Force, *About the U.S. Maritime Cabotage Laws*, http://www.mctf.com/about_cabotage.shtml (last visited Sept. 19, 2007).

6. Overview of U.S. maritime industry and economic interests of the United States.

The predicate for the U.S. merchant marine to assist in national defense is a healthy and sustainable maritime industry. The vessels themselves, the shipyards that build and repair the vessels, and the seafarers who crew the ships and other maritime labor are the tripod of the industry. *See, e.g.*, Gilmore & Black, *supra*, § 11-6, at 971 (under the Merchant Marine Act of 1936, "the maintenance of the shipbuilding industry . . . was thought to be as important as the maintenance of operational shipping").

The U.S. maritime industry is highly sensitive to economic conditions and susceptible to downturns. Over the last century, the industry has often been in "deplorable condition." Gilmore & Black, *supra*, § 11-7, at 974 ("deplorable condition" has been "chronic"). Thus, economic considerations – including exorbitant liability awards – critically affect the strength and viability of the industry.

The Jones Act remains a key federal policy and has been supported by recent Presidents both Republican and Democratic. For instance, in the 1980 campaign, President Reagan stated that "I can assure you that a Reagan Administration will not support legislation that would jeopardize this long-standing policy embodied in the Jones Act . . . or the jobs dependent on it." *See* Terrence Moran, *Well Heeled Shipping Lobby Sails to Victory*, Legal Times, Jan. 11, 1988. In 1997, President Clinton likewise stated that "[m]y Administration . . . continues to support the Jones Act as essential to the maintenance of the nation's commercial and defense maritime interests." Maritime Cabotage Task Force, *Statements of Support*, http://www.mctf.com/statements.shtml (last visited Sept. 19, 2007). And in 2000, President George W. Bush stated that "[p]rograms that have contributed to the growth of our domestic fleet, such as the Jones Act, . . . should be maintained." *See* Chris Dupin, *The New Administration: Bush Backs Maritime Security Program, Jones Act*, JOURNAL OF COMMERCE, Dec. 14, 2000.

The U.S. maritime industry makes a significant contribution to our nation's economy. For example, the water transportation industry produces annual gross output of approximately $36 billion. Bureau of Economic Analysis, United States Dep't of Commerce, *Gross Domestic Products by Industry*, http://www.bea.gov/industry/gpotables/gpo_action.cfm (last visited Sept. 19, 2007). The U.S. water transportation system carries more trade, in terms of both tonnage and value, than any other mode of transportation: 78 percent of the weight and 41 percent of the value of U.S. merchandise trade. Bureau of Transportation Statistics, United States Dep't of Transportation, *Introduction and Overview*, http://www.bts.gov/publications/americas_freight_transportation_gateways/introduction_and_overview/index.html (last visited Sept. 19, 2007).

Furthermore, the Jones Act fleet consists of more than 44,000 vessels, carries more than 1 billion tons of cargo and 80 million passengers annually, and employs 80,000 seafarers and more than 40,000 other maritime workers. *See* Transportation Institute, *The Jones Act: An American Tradition* 6-7 (1996). Jones Act carriers transport 17% of the country's intercity freight (in ton-miles). *See* Maritime Cabotage Task Force, *About the U.S. Maritime Cabotage Laws*, http://www.mctf.com/about_cabotage.shtml (last visited September 19, 2007). Jones Act ships serve some 40 states and 90% of the U.S. population. United States Dep't of Transportation, Maritime Administration, *Domestic Shipping Overview*, http://www.marad.dot.gov/programs/dom_ship.html (last visited Sept. 19, 2007). And Alaska in particular benefits greatly from this system, ranking third among the states in originating tonnage. *See* Transportation Institute, *The Jones Act: An American Tradition* 5. *See also id.* at 6 ("[s]ince their existence depends on reliable and efficient transportation services, the economies of Alaska, Hawaii, and Puerto Rico rely heavily on domestic ocean vessels").[5]

The significant contribution of the maritime industry to our nation's commerce comes in substantial part from ports within the Ninth Circuit. For example, the largest gateway (measured in dollar value) in the United States' international merchant trade – including water, land, and air gateways – is the Port of Los Angeles. Bureau of Transportation Statistics, United States Dep't of Transportation, *Introduction and Overview*, http://www.bts.gov/publications/americas_freight_transportation_gateways/introduction_and_overview/index.html (last visited Sept. 19, 2007). The Port provides a gateway for $122 billion annually in oceanborne cargo and alone is responsible for nearly one quarter of the nation's $533 billion international merchandise trade. *Id.* Moreover, five of the top ten maritime ports in the United States—which collectively account for 90% of the U.S. international container trade—are located within the Ninth Circuit: Los Angeles, Long Beach, Tacoma, Oakland, and Seattle. Bureau of Transportation Statistics, United States Dep't of Transportation, *TABLE 8. U.S. Maritime Freight Gateways, Ranked by Value and Weight*, 2003, http://www.bts.gov/publications/americas_freight_transportation_ gateways/intro duction_and_overview/html/table_08.html (last visited Sept. 19, 2007); United States Dep't of Transportation, Maritime Administration, *U.S. Water Transportation Statistical Snapshot* 4 (May 2007).

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[5] A recent study illustrates the economic importance of U.S. maritime carriers. In June 2005, *amicus* Overseas Shipholding Group ordered 10 new Jones Act tankers to be built at the Aker Philadelphia Shipyard. The study estimated that this order would (1) on a national basis, increase gross domestic output by $9.65 billion, labor compensation by $2.22 billion, and average annual employment by 2,401; and (2) on a local basis, increase Philadelphia's gross economic output by $1.29 billion, labor compensation by $490 million, and average annual employment by 1,217 workers. *See* PriceWaterhouseCoopers, *Economic Impact of OSG's U.S. Flag Fleet Expansion* E-1 (Sept. 4, 2007).

In addition, waterborne carriers enjoy significant advantages over other modes of transport. For example, while Jones Act ships carry 17% of the nation's intercity cargo in ton-miles, it charges only 1.7% of the freight bill, demonstrating that it is a highly efficient means of carriage. *See* Maritime Cabotage Task Force, *supra*. Likewise, marine vessels offer significant environmental advantages, emitting less carbon monoxide, nitrous oxide, and particulate matter than on-road vehicles, railroads, and aircraft. *See* Bureau of Transportation Statistics, United States Dep't of Transportation, Tables 4-40, 4-41, 4-43 (2002), http:/www.bts.gov/publications/national_transportation_statistics/2002index//html (last visited Sept. 19, 2007). Water transportation ranks second among shipping alternatives in energy costs (energy costs per dollar of gross output). *See* U.S. Department of Transportation, Maritime Administration, *U.S. Water Transportation Statistical Snapshot* 14 (May 2007). Waterborne transport also is the safest means of shipment. *See*, *e.g.*, Ontario Marine Transportation Forum, *Fact Sheet*, http://www.omtf.org/subfiles/factSheet.pdf (last visited Sept. 19, 2007). And maritime traffic relieves the problems of congestion, energy consumption, pollution, and aging infrastructure on our nation's roads, particularly on the East and West Coasts. *See* United States Dep't of Transportation, Maritime Administration, *Domestic Shipping*, http://www.marad.dot.gov/programs/dom_ship.html (last visited Sept. 19, 2007); Renewable Energy and Energy Conservation Tax Act of 2007, H.R. 3221, 110th Cong., 1st Sess. (2007) (a bill, passed by the House of Representatives, "to focus public and private efforts to use the waterways to relieve landside congestion along coastal corridors"); Transportation Energy Security and Climate Control Mitigation Act of 2007, H.R. 2701, 110th Cong., 1st Sess. (2007); National Ports and Highway Institute, Louisiana State University, *High Speed Ferries and Coastwide Vessels:*

Evaluation of Parameters and Markets for Application (2000), available at http://www.market.data90V/MHI/Documents/High_Speed_Ferries_Report-Part1.pdf (last visited Sept. 19, 2007) (project sponsored by the Maritime Administration of the U.S. Department of Transportation to examine the development of coastwide shipping to advance waterborne trade and relieve highway congestion).

Despite its economic importance, the U.S. maritime industry is relatively small under modern corporate standards. The weighted average market capitalization of companies in the U.S. water transportation industry is $ 1.9 billion. *See* Reuters, *Company Ranks*, http://www.investor.reuters.com/IndSectList.aspx?indtrgpage=%2findustries%2findhighlights%2findcmprank%2findview10&sectorcode=TRANSP&target=%2findustries%2findhighlights%2fbrowseindustries%2findbysectors&indscrpage=%2findustrie s%2findhighlights%2findcmprank%2findview10 (last visited Sept. 19, 2007). This, along with the weighted average market capitalization for the trucking industry, is the lowest of all domestic transportation industries. *Id.* (air courier-$59.4 billion; railroad-$23.5 billion; airline-$7.5 billion; trucking-$1.9 billion). Furthermore, it is dwarfed by the weighted average market capitalization of companies in numerous other industries. *Id.* (pharmaceuticals-$119.5 billion; auto and truck manufacturers-$95.8 billion; tobacco-$93.4 billion). By comparison, the average capitalization of the 500 largest domestic corporations is $9.2 billion. *See Fortune 500 Largest U.S. Corporations*, F-25 (totals), FORTUNE, Apr. 30, 2007. *Amicus* Overseas Shipbuilding Group is the second largest publicly traded tanker company in the world, and its capitalization is $2.2 billion. *See* Overseas Shipbuilding Group 10-Q for quarter ending June 30, 2007. Similarly, the two largest liquid cargo barge operators in the inland marine industry (American Commercial Lines and Kirby Corporation) have a capitalization of, respectively, $1.3 billion and $2.2 billion. *See* American Commercial Lines 10-Q for quarter ending June 30, 2007; Kirby Corp. 10-Q for quarter ending June 30, 2007. Furthermore, a significant number of maritime companies are relatively small, many operating a single vessel.

In light of these characteristics, the U.S. maritime industry is intensely concerned about the effects of enormous punitive damages on the overall industry and its members.

B. The Ninth Circuit's Decision Is Inconsistent With Maritime Law And Inimical To Federal Maritime Policies.

In light of the foregoing, the Ninth Circuit's decision should not be allowed to stand. The ruling below is directly contrary to U.S. maritime law and federal maritime policy.

The burden on U.S. carriers of exorbitant punitive damages – imposed here on the basis of vicarious liability and in addition to the penalties and remedies provided in federal statutes – is self-evident. As explained above, U.S. carriers are not heavily capitalized, and many are relatively small companies operating only one vessel. Moreover, it is not clear that companies can insure against punitive damages. *See* page 6, *supra*. Nor is it clear that insurance, even if permitted, would be reasonably priced or adequate in coverage; for example, at the present time, the maximum total amount of protection and indemnity (P&I) coverage available is $1 billion per incident – which must cover *all* the liabilities of the carrier, including (if upheld here) punitive damages. In these circumstances, awards of punitive damages like the one at issue in this case pose a clear and serious threat to U.S. carriers.

In turn, this would threaten the rest of the U.S. maritime industry. If the business of U.S. carriers declines, there will be fewer jobs for seafarers. Similarly, if new ships are not ordered or older ones taken out of service, there will be less work for the shipyards that build and repair such vessels.

The consumers of goods transported by U.S. carriers – which ultimately means the entire U.S. economy – will suffer as well. As U.S. carriers' cost of doing business rises, two consequences can be expected. First, consumers will pay more for the waterborne transportation of goods. Second, some shipments will shift to other modes of transport, such as trucks. *See* Transportation Institute, *The Jones Act: An American Tradition* 11 (1996) ("[i]n virtually every market, rising maritime shipping rates trigger customers to shift cargoes to other modes of transportation"). This reduction in business will, contrary to federal policy, harm U.S. maritime carriers and the entire industry as well as increase pollution, aggravate traffic congestion, and reduce safety.[6]

To be sure, the adverse implications of the Ninth Circuit's decision for the U.S. maritime industry – and in turn for the U.S. economy and national security – cannot be foreseen with absolute certainty or precision. But they are sufficiently foreseeable to conclude that the ruling below cannot be reconciled with U.S. maritime law and federal maritime policy. In the end, it should be left to Congress, rather than undertaken by the courts, to decide whether the law of punitive damages should be transformed in light of these longstanding economic and national-security concerns. Accordingly, the Court should grant the petition and reverse the judgment of the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] The harm to consumers also will occur if foreign carriers are subjected to punitive damages for accidents in the waters of the Ninth Circuit. Furthermore, foreign carriers will routinely be in a better position than American carriers; they are unlikely to have assets in the United States that can be attached to satisfy a large punitive-damages judgment, and most foreign courts will not enforce a U.S. punitive-damages judgment. By contrast, the entire assets of U.S. carriers are exposed. Moreover, domestic carriers are less likely to be able to insure against punitive damages.

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IN THE

Supreme Court of the United States

EXXON SHIPPING CO., *et al.*,
Petitioners,
v.
GRANT BAKER, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?

3. Is this $2.5 billion punitive damages award, which is larger than the *total* of all punitive damages awards affirmed by all federal appeals courts in our history, within the limits allowed by (1) federal maritime law or (2) it maritime law could permit such an award, constitutional due process?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation[1] is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, tort reform activities constitute a substantial portion of WLF's work. WLF is concerned that economic development and consumer welfare not be impeded by improper and excessive punitive damages awards. WLF has regularly appeared before this and other federal courts in cases raising punitive damages issues. *See, e.g., Philip Morris USA v. Williams,* 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999); *BMW of North America v. Gore*, 517 U.S. 559 (1996). WLF also filed a brief in this case in 1997 when it was before the U.S. Court of Appeals for the Ninth Circuit.

WLF fully supports Petitioners' efforts to obtain review of the three Questions Presented in their petition. WLF is submitting this brief because of its particular interest in persuading the federal courts to establish clearer limits, based on federal common law, on the size of punitive damages awards. The Ninth Circuit essentially held that no such limits exist. WLF urges the Court to grant review in order to consider whether that holding is consistent with the Court's traditional view of remedial issues arising under federal causes of action.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

Counsel for Petitioners has filed a blanket consent to all *amicus curiae* briefs. WLF has lodged with the clerk a letter of consent from counsel for Respondents.

STATEMENT OF THE CASE

The EXXON VALDEZ ran aground in Prince William Sound, Alaska in 1989, spilling several hundred thousand barrels of oil into the Sound. Petitioners (collectively, "Exxon") subsequently spent $2.1 billion in cleaning up the spill and paid private claims totaling $300 million. The proceedings commenced against Exxon by state and federal governments were settled in 1991, with Exxon agreeing to pay environmental and natural resources damages of $900 million. Exxon also paid criminal and restitution fines in the amount of $125 million. The total liabilities incurred by Exxon as a result of the oil spill exceeded $3.4 billion. Notwithstanding the liabilities that Exxon had already incurred, an Alaskan jury awarded an additional punishment of $5 billion as punitive damages. The U.S. Court of Appeals for the Ninth Circuit upheld a punitive damages award of $2.5 billion, several orders of magnitude larger than the next highest punitive damages award ever upheld by a federal appellate court. The petition requests that the Court review whether under the circumstances of this case federal law permits a punitive damages award of that magnitude, or any punitive damages award at all.

The immediate cause of the grounding of the EXXON VALDEZ is not in dispute. As the ship was leaving Valdez harbor, Joseph Hazelwood (the ship's captain) explained to Gregory Cousins (the officer on watch) a maneuver that would be required to avoid ice detected in the ship's path. In violation of Exxon's written policy regarding operation of Exxon vessels, Hazelwood then left the ship's bridge and went to his cabin, leaving Cousins and a helmsman alone on the bridge. Cousins failed to steer the ship away from a reef (the final step necessary to complete the maneuver Hazelwood had explained to him), and the ship ran aground. Hazelwood had a history of alcoholism (a history of which Exxon was aware), and there was evidence at trial that he was drinking heavily on the night of the grounding.

In an action filed in federal district court in Alaska, the plaintiffs (a certified class consisting of all persons who possessed or asserted a punitive damages claim arising from the spill) sought punitive damages under federal maritime law against Hazelwood and Exxon. The case was tried in 1994 along with compensatory damages claims filed by commercial fishermen who alleged that their economic losses exceeded the compensation they had received under Exxon's claims program.

In the first phase of the trial, the jury was instructed to determine whether Hazelwood and/or Exxon had acted recklessly (a necessary predicate for a punitive damages award). It was instructed that because Hazelwood was a supervisory employee, his conduct (even though it violated official Exxon policy) was attributable to Exxon, and thus that if it found that Hazelwood acted recklessly, it should also find that Exxon acted recklessly. The jury found that both acted recklessly.[2]

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[2] The plaintiffs contended – and submitted relevant evidence hotly disputed by Exxon – that Exxon also should be deemed reckless based on actions of Exxon officials other than Hazelwood. For example, the plaintiffs contended that Exxon officials acted recklessly in allowing Hazelwood to continue to captain the EXXON VALDEZ despite their

(continued...)

In the second phase of the trial, the jury considered the economic damages claims of commercial fishermen. Rejecting the great majority of those claims, the jury awarded $287 million in compensatory damages; after Exxon was given credit for its prior claims payments, the net award was $19.6 million. In the third phase, the jury considered punitive damages. It awarded $5,000 in punitive damages against Hazelwood and $5 billion in punitive damages against Exxon. The trial court entered judgment on those awards.

On appeal, the Ninth Circuit in November 2001 affirmed in part, vacated in part, and remanded. Pet. App. 57a-117a. The court rejected each of Exxon's challenges to the permissibility of a punitive damages award. *Id.* 68a-79a. In particular, it rejected Exxon's claim that such damages were impermissible because, in light of the $3.4 billion paid by Exxon in the aftermath of the spill, a punitive damages award would serve neither of the accepted purposes of such awards: deterrence and retribution. *Id.* 68a. The court said:

> Exxon's argument has some force as logic and policy. But it has no force, in the absence of precedent, to establish that the law, or the Constitution, bars punitive damages in these circumstances. . . . [W]e reject the argument.

Id.

The appeals court also rejected Exxon's argument that federal maritime law bars punitive damages awards against a shipowner on the basis of the ship master's reckless conduct,

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[2](...continued)
knowledge of his history of alcoholism. But the jury made no separate finding on that claim; it was instructed to arrive at a finding that Exxon acted recklessly once it determined that Hazelwood acted recklessly.

in the absence of a finding that the owner directed, countenanced, or participated in that conduct. *Id.* 80a-86a. The court said it was bound in that regard by an earlier Ninth Circuit decision in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), which held that punitive damages could be imposed on a maritime company based on the grossly negligent conduct of a dock foreman employed in a managerial capacity and acting within the scope of his employment. *Id.* 84a-85a.[3] The court did not address Exxon's alternative argument that even when punitive damages are permitted under maritime law, it strictly limits the size of such awards.

The court held that the $5 billion punitive damages award was too high to withstand review under the Due Process Clause. *Id.* 90a-104a. The court noted that the district court had upheld the verdict prior to this Court's decision in *BMW* and thus did not have an opportunity to apply that decision's three guideposts for review of punitive damages awards – degree of reprehensibility, disparity between the harm or potential harm suffered by the victim and his punitive damages award, and the difference between the award and the civil/criminal penalties authorized in comparable cases. *Id.* 94-95 (*citing BMW*, 517 U.S. at 574-75). After discussing how those three factors might be applied in this case and suggesting that a more appropriate punitive damages award might well be significantly less than $5 billion, the court vacated the $5 billion award and remanded "so that the district court can set a lower amount in light of the *BMW* and *Cooper Industry* standards." *Id.* 104a.

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[3] The appeals court conceded that it was impossible to determine from the verdict whether the jury's finding that Exxon acted recklessly was based on anything other than an imputation from Hazelwood's recklessness. *Id.* 88a. Accordingly, the determination that Exxon acted recklessly – and thus can be held liable for punitive damages – depends on whether *Protectus Alpha* is a proper interpretation of federal maritime law.

The case made two more round-trips to the district court and back to the appeals court, with each decision focusing on due process limitations on the punitive damages award. Finally, in May 2007 a Ninth Circuit panel announced that it was "time to for this protracted litigation to end," and directed the district court to reduce the punitive damages award to $2.5 billion. *Id.* 1a-56a. The appeals court denied Exxon's petition for rehearing *en banc*, with two judges writing dissents from the denial. *Id.* 285a-293a. Judge Kozinski dissented on the ground that the panel decision conflicted with a well-established federal maritime law prohibition against vicarious punitive damages awards against ship owners. *Id.* 287a-292a. Judge Bea agreed with Judge Kozinski that punitive damages were not awardable in this case, and added that the award was excessive under *State Farm* because the ratio between punitive and compensatory damages was too high. *Id.* 292a-293a.

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. Even in an era in which punitive damages awards are often "many times the size of such awards in the 18th and 19th centuries,"[4] the $2.5 billion award in this case stands out as particularly worthy of the Court's attention. It is nearly 100 times larger than the largest punitive damages award ever previously affirmed by a federal appeals court. It is imposed in a case lacking any of the usual hallmarks of particularly culpable conduct, *e.g.*, personal injury, intentional misconduct, or efforts to cover up the results of one's wrongdoing. It is imposed in a field of law (maritime law) with a long tradition of limiting damage awards in tort suits. Review is warranted to determine whether the decision of an Alaska jury to transfer massive amounts of wealth from Exxon's stockholders to a group of fellow Alaskans and their attorneys is an appropriate means of punishing a shipowner whose captain acted recklessly, and of deterring such conduct in the future.

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[4] *Philip Morris USA v. Williams*, 127 S. Ct. at 1064.

The petition ably demonstrates that the decision below conflicts with numerous federal appeals court decisions (and decisions of this Court dating back 200 years) regarding the availability of punitive damages under federal maritime law; conflicts with numerous federal appeals court decisions regarding the availability of punitive damages in oil spill cases governed by the Clean Water Act; and upholds a damages award that exceeds limits – imposed both by maritime law and by the Due Process Clause – on the size of such awards.

WLF writes separately to urge the Court to grant review for the additional reason that the lower federal courts are in need of guidance regarding federal common law limitations on the size of punitive damages awards arising under federal law causes of action. When such cases arise, the lower federal courts all too often confine their analysis of limits on the size of punitive damages awards to a due process an analysis. If the size of the award passes muster under the *State Farm/BMW* line of cases, the analysis comes to an end. That is essentially what happened here: the Ninth Circuit spent a decade examining whether the size of the punitive damages award violated the Due Process Clause, but it barely glanced at the substantial statutory and federal common law arguments raised by Exxon.

Yet it stands to reason that the federal common law imposes far more demanding standards on punitive damages awards than does the Due Process Clause. This Court has long recognized that state courts are entitled to a significant degree of deference regarding how they go about furthering a State's legitimate interests in punishing unlawful conduct and deterring its repetition. For that reason, the *State Farm/BMW* line of cases grants States substantial leeway in determining the proper size of punitive damages awards, and only steps in to impose limits when an award is so large as to amount to arbitrary punishment that serves no legitimate state interest.

The need for deference disappears when (as here) the punitive damages award arises in a case raising federal questions. In such cases, whether punitive damages are an appropriate remedy and, if so, the appropriate size of such awards are issues that must be settled by the federal government alone. When Congress has adopted legislation that addresses those issues, the job of the federal courts is relatively easy; they simply do their best to discern congressional intent. But Congress often fails to address punitive damages issues when creating new causes of action, thereby leaving it to the courts to fill in the blanks through the creation of federal common law.

Rather than fulfilling that role in the appropriate manner – by, for example, turning for guidance to the general common law or discerning rules based on the purposes sought to be served by punitive damages awards – lower federal courts often turn to the *State Farm/BMW* line of cases. But those cases articulate due process rules that are intended to create an absolute minimum level of fairness, not to govern proceedings peculiarly within the province of the federal courts.

Review is warranted to determine whether the Ninth Circuit inappropriately abdicated its role in creating rules governing the appropriate size of punitive damages awards in federal-question cases, by devoting virtually its entire analysis to the due process limits on the size of the punitive damages award. For example, the Ninth Circuit conceded that there was "some force as logic and policy" behind Exxon's argument that punitive damages were inappropriate because its $3.4 billion in post-spill payments had already "thoroughly punished and deterred any similar conduct in the future." Pet. App. 68a. But it was unwilling to adopt federal common law rules implementing that "logic and policy," because it was unable to locate any case law establishing precedent for doing so. *Id.* Review is warranted to provide guidance to the lower courts regarding the propriety of adopting federal common law rules governing punitive damages awards. In the absence of such guidance, lower courts will continue to focus solely on due process limitations – limitations that often are insufficient by themselves to ensure that punitive damages awards are properly serving society's interests in deterrence and retribution.

I. REVIEW IS WARRANTED TO PROVIDE GUIDANCE REGARDING FEDERAL COMMON LAW LIMITATIONS ON THE SIZE OF PUNITIVE DAMAGES AWARDS ARISING UNDER FEDERAL-LAW CAUSES OF ACTION

In a line of case stretching back 16 years, the Court has recognized that the Fourteenth Amendment's Due Process Clause imposes limitations on the size of punitive damages awards. The Court has recognized that when such awards can fairly be categorized as "grossly excessive" in relation to a State's interests in punishment and deterrence, they "enter the zone of arbitrariness that violates the Due Process Clause." *BMW*, 517 U.S. at 568.

At the same time, however, the Court has been cognizant that States have very legitimate interests in imposing punitive damages for purposes of punishment and deterrence. Accordingly, the Court has repeatedly expressed federalism-based warnings that its due process standards are not intended to dictate to state courts all facets of their punitive damages jurisprudence but instead impose bare minimum standards designed to prevent only those awards that most clearly constitute nothing more than arbitrary punishment. Thus, in *BMW*, the Court explained, "In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id.* In *Cooper Industries*, the Court said, "As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards." *Cooper Industries, Inc. v. Leatherman Tool Group,* 532 U.S. 424, 433 (2001). *See also Philip Morris USA*, 127 S. Ct. at 1065 ("States have some flexibility to determine what kinds of procedures" they will adopt to ensure that punitive damages award comport with due process.).

Similarly, those justices who have opposed recognition of substantive due process limits on the size of punitive damages awards have based their opposition in part on a reluctance to invoke the U.S. Constitution to interfere with States' prerogatives to decide how best to punish and deter wrongdoing. *See, e.g., TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., concurring in the judgment) ("State legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime, and have frequently exercised that authority in recent years."); *BMW,* 517 U.S. at 598-99 (Scalia, J., dissenting) ("[T]he Court's activities in this area are an unjustified incursion into the province of State governments. . . . The Constitution provides no warrant for federalizing yet another aspect of our Nation's culture"); *id.* at 607, 613 n.3 (Ginsburg, J., dissenting) ("The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain. . . . In any 'lawsuit where state law provides the rule of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.'") (quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989)).

By way of contrast, in lawsuits where (as here) it is *federal* law that provides the rule of decision, there are no federalism-based reasons for federal courts to restrict themselves to adopting bare-minimum fairness standards, and every reason to adopt rules to ensure that punitive damages awards are serving their proper purposes. This Court has stated repeatedly that punitive damages serve two legitimate purposes only: deterrence and retribution. *State Farm,* 538 U.S. at 419 ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *BMW,* 517 U.S. at 568, 584-85; *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 19 (1991).

Moreover, the proper level of deterrence and retribution is an issue of law to be determined by Congress and the courts – not simply handed off to the jury with instructions to do its best to come up with a result that it deems just. As the Court explained in *Cooper Industries,* it is wholly appropriate for courts to impose strict limits on the size of permissible punitive damages awards in federal-law cases and to review such awards carefully to ensure that juries adhere to those limits; unlike the measure of actual damages suffered, "'the level of punitive damages is not really a fact tried by the jury.'" *Cooper Industries*, 532 U.S. at 437 (quoting *Gasperini v. Center for*

Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).[5]

A handful of federal statutes provide explicit caps on punitive damages awards. *See, e.g.*, 42 U.S.C. § 1981a(b)(3) (imposing $300,000 monetary cap on punitive damages in cases filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*). But by and large, when enacting new federal-law causes of action, Congress has left to the courts the job of fleshing out federal common law rules governing the size of punitive damages awards.

Unfortunately, rather than fulfilling that function, many federal appeals courts have simply turned to the due process limitations imposed by the *State Farm/BMW* line of cases as the sole check on excessive punitive damages awards in federal-law causes of action. *See, e.g., Bach v. First Union National Bank*, 486 F.3d 150 (6th Cir. 2007) (applying due process limitations, court reduces from $2.2 million to $400,000 punitive damages award under Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*); *Gaffney v. Riverboat Servs. of Indus.*, 451 F.3d 424, 464 (7th Cir. 2006) (rejecting challenge to size of punitive damages award under 46 U.S.C. § 2114, which prohibits discharge of seamen for acting as whistleblowers; only review available besides due process review is abuse-of-discretion review), *cert. denied*, 127 S. Ct. 933 (2007); *Bowles v. Osmose Utils. Servs., Inc.*, 443 F.3d 671 (8th Cir. 2006) (applying due process limitations, court rejects challenge to award of punitive damages under 42 U.S.C. § 1981 for racial harassment of employee); *Evans v. Fogarty*,

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[5] *Cooper Industries* determined that because a jury's award of punitive damages does not constitute a finding of fact, careful appellate review of a district court decision upholding the award "does not implicate" Seventh Amendment jury-trial rights. *Id.*

___ F.3d ___, 2007 U.S. App. LEXIS 20177 (10th Cir., Aug. 22, 2007) (reinstating jury's $1.35 million punitive damages award under 42 U.S.C. § 1983; declined to consider defendants' challenge to the size of award because defendants had not raised a due process challenge).

That is precisely what the Ninth Circuit did in this case. It simply declined to consider Exxon's argument that federal common law imposed limits on the size of the punitive damages award. Pet. App. 68a.[6] Exxon argued that such damages were impermissible because, in light of the $3.4 billion paid by Exxon in the aftermath of the spill, a punitive damages award would serve neither of the accepted purposes of such awards: deterrence and retribution. *Id.* While acknowledging that "Exxon's argument has some force as logic and policy," it declined to consider the argument in the absence of precedent supporting Exxon's position. *Id.* But cases of this type provide compelling circumstances for adoption of federal common law rules limiting the size of punitive damages awards. If, in fact, Exxon's prior payment of $3.4 billion meant that a punitive damages award would have little or no deterrent or retributive effect, then the appeals court should have applied federal common law to reduce or eliminate the punitive damages award in this case.

In sum, review is warranted to provide guidance to the federal appeals courts regarding federal common law limitations on the size of punitive damages awards in cases raising issues of federal law.

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[6] That federal common law argument was in addition to Exxon's arguments that both federal maritime law and the Clean Water Act prohibited *any* punitive damages. *See id.* at 80a-86a, 73a-78a.

II. REVIEW IS WARRANTED BECAUSE THE $2.5 BILLION AWARD CANNOT BE JUSTIFIED ON EITHER DETERRENCE OR RETRIBUTION GROUNDS

Review is also warranted because the overwhelming evidence indicates that the huge $2.5 billion punitive damages award cannot be justified on either deterrence or retribution grounds. Because this Court has held repeatedly that deterrence and retribution are the *only* grounds that can justify a punitive damages award, review is warranted to resolve the conflict between those decisions and the Ninth Circuit decision upholding the huge award.

Deterrence. As Justice Breyer has noted, economic theory holds generally that proper deterrence will be achieved if defendants pay the total cost of the harm they cause. *BMW*, 517 U.S. at 592-93 (Breyer, J., concurring). When tort law requires defendants to compensate for such harm, it forces them to "internalize" the harm's cost, thereby providing appropriate incentives for them to invest in precaution (or scale back activities where accidents may occur) up to the point where social welfare is maximized, *i.e.*, where the marginal cost of increased precaution equals the marginal cost of reduced accidents. *See generally*, Landes & Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987). Here, Exxon has already incurred liabilities exceeding $3.4 billion as a result of the oil spill. The Ninth Circuit's failure to give serious consideration to the deterrent impact of these liabilities already incurred by Exxon cannot be squared with this Court's precedents. It defies reason to suggest that accident costs of $3.4 billion would not induce Exxon (or any similarly situated company) to implement corrective measures.

There is only one scenario that economists cite under which compensatory damages might not fully deter unintentional torts: the so-called "underenforcement" or "undercompensation" rationale. This rationale posits that compensatory damages may deter incompletely where difficulties in detection or shortfalls in enforcement diminish the likelihood that a defendant will incur liability for the full social cost of its conduct. *See* Ellis, *Fairness & Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982). However, that scenario has no bearing to the facts of this suit, where there is no fear that the harm and attribution of liability will go undetected. Injury is evident, the defendant is known, and mass lawsuits for all compensatory damages soon follow.

Nonetheless, much judicial treatment of punitive damages, despite reliance on the deterrence objective, remains strikingly "oblivious[] to the basic point that ordinary civil damages – in the course of providing compensation – concurrently function to deter." Schwartz, *Deterrence & Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV., 133, 137 (1982). Review is warranted to provide guidance to lower courts that plaintiffs seeking punitive damages in federal-law causes of action must support their claims with evidence that a punitive damages award – over and above all compensatory awards – is necessary for deterrence purposes. If the tort system is going to hand out multi-billion dollar awards based on the ostensible need for deterrence, federal common law demands no less.

The Ninth Circuit's justified its imposition of $2.5 billion in punitive damages on Exxon's great wealth. But as Justice Breyer has pointed out, the relevance of wealth to deterrence is difficult to understand, given "the distant relation between a defendant's wealth and its responses to economic incentive." *BMW*, 517 U.S. at 591 (Breyer, J., concurring). Emphasis on wealth is particularly misguided in the case of corporations:

> For natural persons the marginal utility of money decrease as wealth increases, so that higher fines may be needed to deter those possessing great wealth. . . . Corporations[, however,] are abstractions; investors own the net worth of the business. These investors pay any punitive award (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992).

Moreover, excessive punitive damages may actually lead to "overdeterrence," a result that harms not only the defendant but society as well. Punitive damages exceeding the amount needed to fill any deterrence gap promote inefficiency and misallocation of resources. *See BMW*, 517 U.S. at 593 (Breyer, J., concurring) (larger damages can potentially "'over-deter' by leading potential defendants to spend more to prevent the activity that causes harm, say, through employee training, than the cost of the harm itself."). In sum, the overwhelming evidence before the court of appeals was that the $2.5 billion punitive damages award was unnecessary to deter future misconduct.

Retribution. Nor can the punitive damages award be justified as a means of punishing Exxon. As a practical matter, it is doubtful whether retribution could ever be substantially or meaningfully served by the assessment of punitive damages against fictitious entities such as corporations. As the Supreme Court said in *City of Newport v. Fact Concept, Inc.*, a case forbidding assessment of punitive damages against municipal corporations as a matter of law:

> Under ordinary principles of retribution, it is the [individual] wrongdoer himself who is made to suffer for his unlawful conduct. . . . A municipality, however can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the government entity itself.

453 U.S. 217, 267 (1981) (emphasis in original).

The same, obviously, is true of private corporations, particularly widely held corporations whose shareholders have no meaningful ability to manage their day-to-day affairs. The goal of retribution may be served by punishing individual corporate agents who commit blameworthy acts – as the jury did in this case by assessing punitive damages against Captain Hazelwood – but it is not served by punishing entities incapable of having malice (or any other blameworthy state of mind sufficient for punitive damages) independent of that of their separately punishable agents. As commentators have long noted, "[T]he entire notion of punishment-as-punishment becomes deeply problematic when applied to the corporate form." Schwartz, *supra* at 144.

A number of courts have made this same point, not least the Supreme Court in *City of Newport*:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. . . . Neither reason nor justice suggests that such retribution should be visited upon shoulders of blameless or unknowing taxpayers. . . . Whatever its weight, the retributive purpose is not significantly advanced, if

> advanced at all, by exposing municipalities to punitive damages.

453 U.S. at 267-68. At the very least, the fact that the award comes entirely at the expense of innocent parties precludes any sanction of the massive magnitude assessed here.

The appropriateness of a $2.5 billion award is particularly problematic when compared to the $125 million paid by Exxon in connection with criminal proceedings. That amount represented the considered judgment of officials of the United States and Alaska governments regarding the appropriate level of "punishment." There can certainly be no more legitimate measure of society's disapprobation than the penalties enforced by society's elected officials.

By contrast, there is no principled reason for allowing punitive damages juries to impose much greater sanctions, at the behest of self-interested tort victims and their lawyers, on the theory that the public interest in retribution demands more than the public's official representatives have found appropriate. Such a procedure confuses retribution – a purely public expression of social disapproval – with private revenge, a consideration that courts have never recognized as a proper purpose of punitive damages.

In sum, neither deterrence nor retribution can justify a punitive damages award anywhere near the $2.5 billion upheld by the Ninth Circuit. Review is warranted to determine whether, even if maritime law does not bar punitive damages altogether, federal common law requires a substantial reduction in the punitive damages award.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: September 20, 2007

JOINT
APPENDIX

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(18)

No. 07-219

FILED

DEC 17 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

JOINT APPENDIX VOLUME ONE
[Pages 1 - 690]

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APPENDIX A

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT DISTRICT OF ALASKA

Docket No. 89-095

2/8/1991 Fld ORDER NO. 38 re: Alyeska's mot for judg on the pleadings. cc: D. Serdahely, L. Miller, D. Ruskin, 9CCA.

* * *

12/23/1992 Fld ORDER No. 121, in A89-095, A91-102, A91-103, A91-137, re D3, D9, D11, D12, D14, D19, D20 & D21, D1, D2 & D10 mots for SJ agnst P144 in A89-095, P533 in A91-102, P726 & P734 in A91-103, and P1211 in A91-137: moving defts' mot for SJ agnst P-144 in A89-095 GRANTED except for TAPAA clm agnst D-2; moving defts' mot for SJ agnst P533 in A91-102, P726 in A91-103 & P734 in A91-103 is MOOT; moving defts' mot for SJ agnst P1211 in A91-137 GRANTED except for clm under AS46.03.822 agnst D2; crt expressly does not address question of punitive damages & does not dsms or strike punitive damages request; D2 may file mot for SJ as to pltfs' strict liability clms upon verification from fund that D2 has pd its $14 million; crt declines to grant certification under rule 54(b) FRCP but crt will entertain an application for interlocutory appeal certification under 28USC1292(b). cc L. Miller, D. Serdahely, D. Ruskin.

* * *

1/14/1993 Fld ORDER NO. 125, in A91-567 & 568, re dkt#2619 pltfs mot for leave to fle cys of charts used at O/A is GRANTED; pltfs implied mot under Rule 60(b) and implied action in equity is DENIED; A91-082CV & A91-083CV are severed from A89-095CV & are again closed; defts mot for SJ is GRANTED, P273, P1602 & P1603s' claims & complaint in A91-567CV are DISMISSED w/prej; P139, P143, P299, P300 & P301 are allowed 30 days to amend complaint in A91-568; to the extent that sport fishermen (P139, P143, P299, P300 & P301) do not allege uniquely private claims, the claims are DISMISSED; appeal of 12-17-91 Discovery Master Ord is DENIED as moot; appeal of 1-31-92 Discovery Master Ord is DENIED as moot; Alyeska's mot for partial reconsideration(dkt #2884) is GRANTED and court orders Environmental Groups to return the two allegedly stolen docs to Alyeska immediately; any pty involved in this ord who seeks review, interlocutory or otherwise, of this ord shall do so w/i

	14 days; COC to enter jmt of dsmsl in A91-567. cc: L. Miller, D. Ruskin, D. Serdahely, Cert cy: A91-082CV, A91-083CV, A91-567CV.
1/14/1993	Fld JMT, in A91-567, dismissing P273, 1602 & 1603 claims and complaint w/prej. cc: L. Miller, D. Ruskin, D. Serdahely, Cert cy: O&J #4854, A91-567CV.
1/15/1993	Fld ORDER NO. 126 re P-80's (Kodiak) claims in A91-568CV are REMANDED; P-80's claims in A89-239CV are DISMISSED. cc: L. Miller, D. Ruskin, D. Serdahely, Cert cy: AK Sup Ct, A89-239CV.
1/15/1993	Fld LIAISON CNSL FOR PLTFS, in all cases, opp to appeal of "John Doe" re DM-114 Discovery Master Ord. (FILED UNDER SEAL)
1/15/1993	Fld P3378 in A92-192, mot for reconsideration of ord dsmsg pltf P3378(Urie) w/att aff of M. Muckle in support.
1/19/1993	Fld AMENDED ORDER NO. 125, re crt orders Environmental Groups to return the two allegedly stolen docs to the party from whom they were stolen immediately. (**this line was only change from previous Ord No. 125 fld at dkt #3218**) cc: L. Miller, D. Ruskin, D. Serdahely, A91-082CV, A91-083CV, A91-567CV.

* * *

4/8/1993 Fld. ORDER NO. 139, in A89-095 and A91-137, re D2 mot for SJ in A89-095 and P1211 is GRANTED; D7 & D18 mot for SJ in A91-137 agnst P1121 is GRANTED; D7 & D18 mot for SJ in A89-095 agnst P144 is GRANTED; defts mot for Rule 54(b) jmt is GRANTED; P144's claims in A89-095 are DISMISSED; P1211 claims in A91-137 are DISMISSED: clerk shall enter FJ dismissing complaints of P144 & P1211; defts mot to lift stay and mot for ext of time to file reply are DENIED as moot. cc: L. Miller, D. Serdahely, D. Ruskin

* * *

4/15/1993 Fld D1,2,10, in all cases, mot for leave to file mot for part SJ re punitive damages

4/15/1993 Fld D1,2,10,3,9,11,12,14,19,20,21, in all cases, mot for leave to file mot for part SJ on claims for punitive damages based on TAPAA displacement of general maritime law.

* * *

4/21/1993 Fld D1,2,10,3,9,11,12,14,19,20 & 21, in all cases, mot for part SJ on claims for punitive damages based on TAPAA displacement of general maritime law w/att memo in support.

* * *

6/2/1993 Fld D3,9,11,12,14,19,20,21, in all cases, supp reply in support of mot for

SJ on punitive damages based upon TAPAA displacement of general maritime law.

* * *

7/8/1993 Fld ORDER NO. 146, in A91-568, re defts mots to dsms (dkt#3384,3385& 3386) are GRANTED; amended complaint (dkt#3284) DISMISSED w/prej; clk to enter FJ agnst P139,143,299,300 & 301 pursuant to Rule 54(b). cc: L. Miller, D. Ruskin, D. Serdahely

* * *

10/21/1993 Fld ORDER NO. 158 re defts mots for part SJ on punitive damages based upon TAPAA displacement of general maritime law (dkt#s 3462 and 3488) are DENIED. cc: L. Miller, D. Serdahely, D. Ruskin.

10/21/1993 Fld ORDER NO. 159, in all cases, re defts mots for part SJ on punitive damages based upon res judicata (dkt#s 3461, 3463 and 3489) are DENIED. cc: L. Miller, D. Serdahely, D. Ruskin

* * *

3/23/1994 4706 Fld ORDER NO. 187 re D1, 2 mot for SJ on clms of commercial fishermen based on price diminishment(dkt#4024) is GRANTED wlrespect to commercial fishermen whose fisheries were neither closed or contaminated and

	DENIED w/respect to commercial fishermen whose fisheries were contaminated and either closed or partially closed cc: L. Miller, D. Serdahely, D. Ruskin
3/23/1994 4707	Fld ORDER NO. 188 re D1,2 mot for SJ on clms of commercial fishermen based on ldiminished value of limited entry permits & fishing vessels(dkt#4137) is GRANTED /cc: L. Miller, D. Serdahely, D. Ruskin
3/23/1994 4708	Fld ORDER NO. 189 re D1,2 mot for SJ on clms by area businesses 6 municipalities on Robins Dry Dock grounds(dkt#4040) is moot and denied as to municipal pltfs du, to remand of those cases to state crt; mot for SJ is DENIED to the extent explain in this ord regarding the clms of Cook Inlet Aquaculture Assoc.(P4172), Kodiak Regional Aquaculture Assoc.(P1851) and Prince William Sound Aquaculture Corp.(PI with these exceptions D1.2 mot for SJ or part SJ regarding the remaining pltfs a listed in Tables A,B and C attached to 01.2 rply memo(dktB4407) is GRANTED; pltf mots to lift stay at dkt Us 4641 and 4665 are DENIED. cc: L. Miller, D. Serdahel D. Ruskin
3/23/1994	Fld ORDER NO. 190 re D1,2 mot for SJ on native class clms for non-economic injury (dkt#4053) is GRANTED. cc: L. Miller, D.

	Serdahely, D. Ruskin
	* * *
4/7/1994	Fld D1,2 & CO-LEAD CNSL FOR PLTFS, in all cases, third amended revised trial plan.
	* * *
6/13/1994	Fld jury special verdict for Phase I trial.
	* * *
7/26/1994	Fld. LIASON CNSL FOR PLTFS, in all cases, amended stip w/ defts re impacts for Phase III
7/27/1994	Fld ORDER, in all cases, GRANTING amended stip re impacts from Phase III. cc: L. Miller, D. Serdahely, D. Ruskin
	* * *
8/11/1994	Jury Special Verdict for Phase II-A Trial.
8/11/1994	Jury Special Verdict for Phase III Trial.
	* * *
2/7/1995	D1,2, in all cases, motion for certain discovery (FILED UNDER SEAL).
	* * *
6/14/1995	HRH Order No. 290 re D1,2 motion for certain discovery (dkt#6251); sealed filings with respect to this motion or results of evidentiary hearing shall now be unsealed &

	returned to public file; transcripts of 6-13 and 6-14, 1995, evidentiary hearing may be filed in public file when presented by the court reporter. cc: L. Miller, D. Serdahely, D. Ruskin (THE FOLLOWING DOCUMENTS ARE UNSEALED PURSUANT TO THIS ORDER: memo in support of dkt#6246, memo in support of dkt#6247, dkt#s 6251, 6252, 6260, 6270, 6288, 6289, 6325, 6330, 6331, 6334, 6347, 6350, 6355, 6356, 6358, 6359, 6360, 6361, 6362, 6363, 6381, 6383, 6391 and 6392)
	* * *
9/18/1996	HRH Extended Summary Judgment, in all cases, re judgment entered in favor of D1,2,7 and against all plaintiffs listed in Attachments A through J of the judgment; claims of plaintiffs in Attachments A through J are dismissed w/prejudice pursuant to previously entered orders of this court as stated in judgment; terminating in light of this order: motion for entry of orders implementing Phase IV settlement (6838-1). cc: L. Miller, D. Serdahely, D. Ruskin, O&J #9928 (judgment w/o atts) (ATTACHMENTS IN SEPARATE FOLDER NEXT TO FILE VOLUME)
	* * *

9/24/1996 HRH Final Judgment, in all cases, re members of subclasses listed in Exh A and direct action plaintiffs listed in Exh B are awarded compensatory damages against D1,D2 & D7 in the amount of $19,590,257.00 with prejudgment interest in the amount of $37,981,673.18; the mandatory punitive damages class is awarded punitive damages against D7 in the amount of $5000.00 and against D1 & D2 in the amount of $5,000,000,000.00; awards shall bear interest from and after date of entry of judgment in accordance with 28 USC 1961; plaintiffs shall recover their costs of this action with the exception of costs attributable to Phase IV; all claims of all parties not otherwise adjudicated in paragraphs 1,2,3,4 and 5 of judgment are dismissed. cc: L. Miller, D. Serdahely, D. Ruskin, O&J #9932, cert cy: all open member cases in consolidated action. (REDISTRIBUTED 1-21-97 WITH AMENDMENTS AS TO PREJUDGMENT INTEREST AND EXHIBIT B PER ORDER NO. 332 FLD 1-17-97 AT DKT #6960) (PER MO AT DKT #6965 AMENDED JUDGMENT ENTERED 1-30-97 AT DKT #6966)

* * *

1/17/1997 HRH Order No. 332, in all cases, granting in part and denying in part D1,2 motion to alter or amend judgment (6922-1); judgment shall be amended to incorporate revised Exhibit B lodged with Exxon's reply brief; judgment shall be amended to award prejudgment interest in the amount of $37,971,043.91; motion to amend judgment is denied as it relates to punitive damages and costs; mandatory punitive damages class as a whole prevailed on the punitive damages issue. cc: L. Miller, D. Serdahely, D. Ruskin (AMENDED JUDGMENT ENTERED 1-30-97 AT DKT #6966 PER MO AT DKT #6965)

* * *

1/30/1997 HRH Amended Final Judgment, in all cases, re members of subclasses listed in Exh A and direct action plaintiffs listed in Exh B are awarded compensatory damages against D1,2 & 7 in the amount of $19,590,257.00 with pre-judgment interest awarded in the amount of $37,971,043.91; the mandatory punitive damages class is awarded punitive damages against D7 in the amount of $5,000.00 and against D1 & D2 in the amount of $5,000,000,000.00; awards shall bear interest from and after 9-24-96 in accordance with 28 USC 1961; plaintiffs shall recover their costs of this action with the exception of costs

	attributable to Phase IV; all claims of all parties not otherwise adjudicated in paragraphs 1,2,3,4 and 5 of judgment are dismissed; costs are taxed in favor of plaintiffs and against defendants in the amount of $415,354.66. cc: L. Miller, D. Serdahely, D. Ruskin, O&J #9997
	* * *
2/12/1997	D-1 and D-2, in all cases, appeal to 9CCA of (6911-1) filed 09/24/96, (6966-1) filed 01/30/97. cc:cnsl, Judge, 9CCA w/CADS 97-35191
	* * *
9/23/1997	PLTFS' LIAISON COUNSEL motion to lift stay, w/atch memo (to allow filing of motion - atch'd).
	* * *
6/12/2002	DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award w/att memo & notice of fax declaration of Robert T. Deacon
6/17/2002	Original declaration of Robert T. Deacon re: DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award (7487-1)
6/17/2002	Cy declaration of Richard T. Harvin re: DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award

	(7487-1)
	* * *
7/17/2002	PLFS' LEAD/LIAISON CNSLS' opposition to DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award (7487-1), w/excerpts of record vol 1 & vol 2, and declaration of David Oesting (w/exhs) (oversized documents in accordian folders by file - video/audio tapes returned, no order).
	* * *
9/13/2002	DEF 1-2 Notice of filing original declaration of John F. Daum in support of D1 & D2's reply re: DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award (7487-1).
	* * *
10/15/2002	HRH Court Minutes [ECR: Elisa Singleton] o/a on renewed mot for reduction (#7487); under advisement; Mr O'Neill to notify crt re number of defs involved by 10/16/02
	* * *
12/6/2002	Vacated per Order #364 at dkt 7835) HRH Order order #358 granting motion (renewed) for reduction or remittitur of punitive damages award (7487-1); punitive damages award reduced to $4 billion. cc: cnsl

	* * *
1/27/2003	HRH Order granting motion to file sur-reply memo re mot for entry of jmt (7586-1); court's judgment of 12/10/02 at 7566 is deemed final for purposes of Rule 54(b); granting mot for R54(b) finality determination or, in alternative, an interlocutory appeal (7569-1). cc: cnsl
	* * *
2/24/2003	DEF 1-2 appeal to 9CCA of (7589-1) filed 01/27/03. cc:cnsl, Judge, 9CCA
	* * *
9/30/2003	D1 & D2 LEAD CNSLS' motion (2d renewed) for reduction or remittitur of punitive damages award w/att memo
	* * *
10/31/2003	ZZZ 1-2 opposition to D1 & D2 LEAD CNSLS' motion (2d renewed) for reduction or remittitur of punitive damages award (7753-1) w/att memo.
	* * *
1/28/2004	HRH ORDER #364 that this court concludes that a $5 billion punitive damages award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of fair notice--its right to due process. This conclusion is based on the court's findings as stated. The court of appeals did not just remand this case for application of BMW, Cooper

Industries, and State Farm. It means resolving the conflict between its conclusion and the direction of the court of appeals. Exxon's motion for reduction or remittitur of the punitive damages award is granted. The sum of $500 million of the $5 Billion jury award is reduced to $4.5 billion. The clerk shall enter an amended partial judgment accordingly. All plfs' lead counsel's mot for Rule 54(b) determination as to the punitive damages judgment is reinstated as is Exxon's opposition to the mot. The court concludes there is no just reason to delay entry of final judgment. The court's judgment as to the $4.5 billion punitive damages award is deemed final for puruposes of Rule 54(b) FRCP. In the alternative the court concludes that the interlocutory appeal under 28 U.S, C.1292(b) is appropriate. All plfs' lead counsel's mot for Rule 54(b) finality determination or, in the alternative, an interlocutory appeal, is granted. Court granted mot (2d renewed) for reduction or remittitur of punitive damges award (7753-1). Order #358 at docket 7835 is vacated. Exxon's second renewed mot for reduction of punitive damages at dkt 7487 is denied as moot. cc: cnsl Signed by Judge H. Russel Holland on 01/28/04. (SMF) (Entered: 01/26/2006)

1/28/2004 HRH Amended Partial Judgment that punitive damages are awarded for the plfs and against the defs Exxon Mobile Corp (D-1) and Exxon Shipping Co (D-2), jointly and severally, in the amount of $4.5 billion. Interest on the reduced award of punitive damges shall accrue from 9/24/06, in accordance with 28:1961. cc: cnsl, O& J 11463, redistributed 2/12/04 w/corsts taxed.Signed by Judge H. Russel Holland on 1/28/04. (SMF) (Entered: 01/26/2006)

* * *

2/26/2004 NOTICE OF APPEAL as to [7835] Order by EXXON Corporation, EXXON Shipping Company. (SMF) (Entered: 01/26/2006)

APPENDIX B

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 97-35191

3/3/1997	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. (Refer to MOATT to set briefing schedules) [97-35190, 97-35191, 97-35192, 97-35193] (mhf) [97-35190 97-35191 97-35192 97-35193]
	* * *
4/1/1997	Filed aplts' motion to advance appeal for disposition with motion for stay and to vacate briefing schedule; [97-35191] served on 3/31/97 to (MOATT). [3201210] [97-35191] (jr) [97-35191]
4/11/1997	Filed order MOATT (SL) Aples' unopposed oral request for an ext of time to file an opposition to aplts' 4/1/97 motion for stay is GRANTED. Aples' opposition is due 4/30/97. The briefing schedule in appeal no. 96-36098 is STAYED pending disposition of the motion for stay. The briefing schedule in appeal no. 97-35191 shall be set by separate order. [96-36098, 97-35191] (hh) [96-36098 97-35191]
4/16/1997	Filed order MOATT (SL) On 4/7/97, a case management conference was con-

ducted by motions atty Stephen Liacouras. Defts were represented by John F. Daum. Plntfs were represented by David W. Oesting, Brian B. O'Neill, and David C. Tarshes. The parties agreed to the following matters: If aplts have not already done so, within 14 days of the date of this order they shall designate the transcripts for their appeal in the dc. The dsgn shall indicate that the rts have already been prepared. Appeal no. 97-35190 shall be consolidated with consolidated appeal nos. 96-36038 and 97-35036. The consolidated briefing schedule in appeal nos. 96-36038 and 97-35036 shall govern appeal no. 97-35190. In cons appeal nos. 96-36038 and 97-35036, the opening brief was filed on 2/10/97 and the answering brief was filed on 3/24/97. In order to indicate that these briefs also serve as the principal brfs in appeal no. 97-35190, the clerk shall write "appeal no. 97-35190" on the 2/10/97 opening brief and the 3/24/97 ans brf. Aplts in appeal no. 97-35191 stated in their NOA that they intended to raise as issues in appeal no. 97-35191 the dc's refusal to enforce a settlement agreement between Exxon Corp. and certain seafood processors and the court's refusal to allocate any share of the punitive damages award to certain seafood processors. However, those issues have been briefed in consolidated appeal nos. 96-36038, 97-35036, and 97-35190, and will not be briefed a second time in appeal no. 97-

35191. Appeal nos. 97-35193 and 97-35235 are consolidated. The following cross-appeal briefing schedule shall govern appeal nos. 97-35191, 97-35192 and consolidated appeal nos. 97-35193 and 97-35235. The opening brief of Exxon Corp. ("Exxon") in appeal no. 97-35191, and Joseph Hazelwood ("Hazelwood") in appeal no. 97-35192, are due 6/26/97. If Exxon wants to file an oversized brief, it shall file a motion pursuant to 9th Cir. R. 32(g) by 6/19/97. The motion to exceed the brief lengths shall be accompanied by a copy of the proposed opening brfs in both appeal nos. 97-35191 and 97-35192. In consolidated appeal nos. 97-35193 and 97-35235, aplts (hereinafter "plaintiffs") shall file the second cross-appeal brf by 8/19/97. The second xap brief shall serve as plntfs' opening brief in cons appeal nos. 97-35193 and 97-35235, and the ans brf in appeal nos. 97-35191 and 97-35192. If plntfs want to file an oversized brf, they shall file a motion pursuant to 9th Cir.R. 32(g) by 8/12/97. The motion to exceed the brf lengths shall be accompanied by a copy of plntfs' proposed second xap brf. The third xap brfs shall be filed by Exxon and Hazelwood by 10/14/97. The third xap brfs shall serve as Exxon's reply brief in appeal no. 97-35191 and Hazelwood's reply brf in appeal no. 97-35192, and Exxon and Hazelwood's ans brfs in cons appeal nos. 97-35193 and 97-35235. If Exxon wants to file an oversized third xap brf...The fourth xap brief shall be filed by plntfs by 11/11/97. The fourth xap brf shall serve as plntfs' reply brief in cons appeal nos. 97-35193 and 97-35235. If plntfs want to file an oversized fourth xap brf...The clerk shall not grant any extensions of time absent extraordinary circumstances. These appeals shall be calendared together. (FAXED TO ATTYS OESTING AND DAUM) [96-36038, 97-35036, 97-35190, 97-35191, 97-35192, 97-35193, 97-35235] (hh) [96-36038 97-35036 97-35190 97-35191 97-35192, 97-35193, 97-35235]

* * *

6/26/1997 Rec'd amicus' (American Tort Reform) brief in 15 copies of 39 pages; deficient: motion to file pending MOATT; served on 6/26/97. Motion in front of brief [97-35191] (jr)[97-35191]

6/26/1997 Received Amicus Pacific Merchant Shipping Association's brief in 15 copies of 38 pages; deficient: motion to file pending; served on 6/26/97 [97-35191] (sm) [97-35191]

6/26/1997 Filed Pacific Merchant Shipping Association's motion for leave to file brief of amicus curiae; served on 6/26/97 [3256051] (MOATT) [97-35191] (sm) [97-35191]

6/30/1997 Filed original and 15 copies Exxon Corporation and Exxon Shipping's first brief on cross-appeal, (Informal: n) of 94 pages and 6 excerpts of record; served on

	6/26/97 [97-35191, 97-35190] (sm) [97-35190 97-35191]
6/30/1997	Filed Washington Legal Foundation's motion for leave to file brief as amicus curiae; served on 6/26/97 [3257053] (MOATT) [97-35191] (sm) [97-35191]
6/30/1997	Received Amicus Washington Legal Foundation's brief in 15 copies of 48 pages; deficient: motion to file pending; served on 6/26/97 [97-35191] (sm) [97-35191]
7/25/1997	Filed order MOATT (SL) the motions of the American Tort Reform Association, rec'd 6/26/97, the Washington Legal Foundation, rec'd 6/30/97, and the Pacific Merchant Shipping Association, rec'd 6/26/97, for leave to file briefs as amicus curiae in support of aplts, is referred for disposition to the merits panel. [3257053-1], [3257056-1], [3255123-1], [3256042-1], [3256051-1] [97-35191] (jr) [97-35191]

* * *

8/13/1997	Received from plaintiff, copy of proposed brief, served on 08/12/97. (MOATT with motion) [97-35191, 97-35192, 97-35193] (sm) [97-35191 97-35192 97-35193]
8/15/1997	Filed order MOATT (Appellate Commissioner) The court is in receipt of the mtn of pltfs/aplts in consolidated appeal nos. 97-35193 and 97-35235 ("plaintiffs") to file an ovszd xap2 brf. In support of the mtn, pltfs have submitted a draft of the

opening brf containing 56,219 words. The court is mindful that the proposed brf serves as both the opening brf in consolidated appeal nos. 97-35193 and 97-35235, as well as the ans brf in appeal nos. 97-35191 and 97-35192. The court is also aware that the opening brfs in appeal nos. 97-35191 and 97-35192 contain a total of 33,125 words, and that several mtns for leave to file amicus brfs have been filed. However, pltfs' proposed brf is too long. Accordingly, pltfs' mtn to file an oversized second brf is granted in part and denied in part. Pltfs shall file a second xap brf not exceeding 45,000 words by 8/29/97. The cross-briefing schedule established in this court's 4/16/97 order is revised to indicate that pltfs' second xap brf is due 8/29/97. In all other respects the briefing sched established in the court's 4/16/97 order shall remain in effect. (FAXED TO CNSL 2:45 P.M.) [97-35191, 97-35190, 97-35192, 97-35193, 97-35235] (gail) [97-35191 97-35192 97-35193 97-35235]

9/2/1997 Filed original and 15 copies aples/x-aplts Grant Baker, et al., aplts Daniel R. Calhoun, et al., second brief on cross-appeal (Informal: n) of 210 pages and 5 excerpts of record in 7 volumes; served on 8/29/97 [97-35191, 97-35192, 97-35193] (hh) [97-35191 97-35192 97-35193]

* * *

10/31/1997 Filed joint motion for limited remand

	[97-35191]; served on 10/3/97 to (MOATT). [3334075] (jr) [97-35191]
10/31/1997	Filed original and 15 copies Exxon Corporation & Exxon Shipping's 3rd brf on x-appeal (Informal: no) of 95 pages and 4 copies excerpts of record in 2 vols; served on 10/14/97. Csl notified to submit 1 copy each of vol. 1 & 2 of excerpt. [97-35191, 97-35193] (jr) [97-35191 97-35193]
11/4/1997	Rec'd original and 15 copies Hazelwood's substitute 3rd x-appeal brf of 12 pages; served on 10/14/97 to (PRO MO with motion to file). [97-35191, 97-35192, 97-35193] (jr) [97-35191 97-35192 97-35193]

* * *

11/13/1997	Filed original and 15 copies plaintiffs' (in 97-35193) reply brief (Informal: no) 31 pages; served on 11/12/97. [97-35191, 97-35192, 97-35193] (jr) [97-35191 97-35192 97-35193]
1/5/1998	Filed order (Appellate Commissioner) the parties' jt motion for limited remand to allow the DC to entertain a post-jdgment motion is granted. [3334075-1] in 97-35191 Within 60 days of this order or 7 days of the DC's ruling on the post-jdgment motion, whichever occurs earlier, defendants Exxon Corporation and Exxon Shipping Company (Exxon) shall file with this court a status rpt or any appropriate motions. Aplt Hazelwood's motion for leave to file a substitute brf is granted. [3338801-1] The clk shall replace the answering/rpy brf previously

	filed by aplt Joseph Hazelwood with the brf rec'd on 11/4/97. in 97-35191, 97-35192, 97-35193, Plaintiffs' motion for leave to file UNDER SEAL volume 8 of plaintiffs' supp'l excerpts of record is granted. [3306891-1] The documents placed under seal by this order are the same documents subject to the DC's protective order(s). Brfing is completed in these appeals. in 97-35192, 97-35191, 97-35193, The appellate proceedings are stayed pending the limited remand. [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]
1/5/1998	Filed original and 15 copies substitute 3rd x-appeal brf of Hazelwood of 12 pages & supp'l excerpt of record in 1 vol; served on 10/14/97. [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]
	* * *
2/19/1998	Filed order MOATT (SH) the court continues the stay of appellate proceedings pending the limited remand. Within 60 days of this order or 7 days of the DC's ruling on the post-judgment motion, whichever occurs earlier, Exxon shall file with this court a status rpt or any appropriate motions. [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]
	* * *

7/10/1998 Filed order MOATT (SH) within 7 days of the DC's ruling on the post-jdgment motion, Exxon shall notify this court of the DC's decision and move for appropriate rlief. Exxon shall file status rpts with this court every 60 days from this order until the DC rules on the post-jdgment motion. [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]

* * *

9/11/1998 Filed order (Appellate Commissioner) the stay of appellate proceedings imposed by this court's 1/5/98 order is lifted. [3367840-2] in 97-35191, 97-35192, 97-35193, 97-35235. The opposed motion of Exxon and defendant Joseph Hazelwood for consolidation of appeal # 98-35796 with appeal #s 97-35191 & 97-35192 is granted to the extent that these appeals will be calendared together. [3504787-1] Brfing is completed in appeal #s 97-35191, 97-35192, 97-35193 & 97-35235. [3513499-1] in 97-35192 In appeal # 98-35796, the opening brf and excerpts of record are due 10/13/98, the answering brf is due 11/18/98; and the optional rpy brf is due within14 days after service of the answering brf. The clk shall not grant any further extension of time to file brfs absent extraordiary circumstances. In appeal # 988-35796, the clk shall enter David W. Oesting, Brian B. O'Neill, James vanR. Springer, and David C. Tarshes as csl for plaintiffs

Grant Baker, et al. (MOATT) [97-35191, 98-35796] (jr) [97-35191 97-35192 97-35193 97-35235 98-35796]

* * *

10/2/1998 Filed order (Appellate Commissioner) defendant Joseph Hazelwood's motion to clarify this court's 9/11/98 order is granted. In appeal # 98-35807, the following brfing schedule governs: the opening brf and excerpts of record are due 10/13/98, the answering brf is due 11/13/98; and the optional rpy brf is due within 14 days after service of the answering brf. The clk shall not grant any further extension of time to file brfs absent extraordinary circumstances. All the above captioned appeals shall be calendared together. (MOATT) [97-35191, 97-35192, 97-35193, 97-35235, 98-35796, 98-35807] (jr) [97-35191 97-35192 97-35193 97-35235 98-35796 98-35807]

11/23/1998 Filed order MOATT (SH) in appeal # 98-35807, defendant Joseph Hazelwood's motion for an extension of time to file the rpy brf is granted. [3565390-1] The optional rpy brf is due 12/2/98. In appeal #s 98-35796 & 98-35807, the clk shall file the answering brf rec'd on 11/16/98. The answering brf shall be deemed filed in both appeals. The court sua sponte consolidates the protective appeal filed 9/23/98 by defendants Exxon Shipping & Exxon Corp. with appeal # 98-35796. The court sua sponte consolidates the protective appeal filed 9/28/98 by defendant Joseph Hazelwood with appeal # 98-35807. Brfing will be completed upon filing of the optional rpy brfs in appeal #s 98-35796, 98-36087, 98-35807 & 98-36117. All the above captioned appeals shall be calendared together as soon as practicable. [97-35191, 97-35192, 97-35193, 97-35235, 98-35796, 98-35807, 98-36087, 98-36117] (jr) [97-35191 97-35192 97-35193 97-35235 98-35796 98-35807 98-36087 98-36117]

12/2/1998 Filed order (Appellate Commissioner) in appeal #s 98-35796, 98-36087, 98-35807, & 98-36117, aplts' unopposed motion to unseal the opening brf filed on 10/15/98 is granted. The clk shall UNSEAL the opening brf. The excerpts of record filed with the opening brf shall REMAIN UNDER SEAL. (MOATT) [97-35191, 97-35192, 97-35193, 97-35235, 98-35796, 98-35807, 98-36087, 98-36117] (jr) [97-35191 97-35192 97-35193 97-35235 98-35796 98-35807 98-36087 98-36117]

* * *

4/2/1999 Filed order (Deputy Clerk: eu) The motions of the American Tort Reform Association, the Pacific Merchant Shipping Association, and the Washington Legal Foundation (collectively, the "Movants") for each of the movants to file a brief amicus curiae in support of defendant-appellant, are hereby GRANTED. The briefs received are ordered filed. SO OR-

DERED. [3257053-1], [3256051-1] [97-35191] (sm) [97-35191]

4/2/1999 Filed original and 15 copies Washington Legal Foundation's brief of 48 pages; served on 6/26/97, pursuant to order of 04/02/99. [97-35191] (sm) [97-35191]

4/2/1999 Filed original and 15 copies American Tort Reform Association's brief of 39 pages; served on 6/26/97, pursuant to the order dated 04/02/99. [97-35191] (sm) [97-35191]

4/2/1999 Filed original and 15 copies Pacific Merchant Shipping Association's brief of 38 pages; served on 6/26/97 pursuant to order of 04/02/99. [97-35191] (sm) [97-35191]

* * *

5/3/1999 ARGUED AND SUBMITTED TO James R. BROWNING, Mary M. SCHROEDER, Andrew J. KLEINFELD [97-35191, 97-35192, 97-35193, 97-35235] (jc) [97-35191 97-35192 97-35193 97-35235]

* * *

11/22/1999 Filed order (James BROWNING, Charles E. WIGGINS, Andrew J. KLEINFELD,): The motion to consolidate related appeals is GRANTED in part and DENIED in part. The motion is granted insofar as it requests that the new appeal, 99-35898, be assigned to this panel. The motion to consolidate the appeals is denied without prejudice. [99-35898, 96-36038, 97-35191] (hh) [96-

	36038 97-35191 99-35898]
	* * *
3/13/2000	Filed order (Deputy Clerk: aw) Due to the death of Judge Wiggins, Judge Schroeder has been drawn to replace him on the panel. [97-35191, 97-35192, 97-35193, 97-35235] (gail) [97-35191 97-35192 97-35193 97-35235]
	* * *
11/7/2001	FILED OPINION: AFFIRMED in part, VACATED in part, and REMANDED... Each party to bear its own costs. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING; Mary M. SCHROEDER; Andrew J. KLEINFELD, author) FILED AND ENTERED JUDGMENT. [97-35191, 97-35192, 97-35193, 97- 5235] (jr) [97-35191 97-35192 97-35193 97-35235]
	* * *
11/28/2001	Filed original and 50 copies plaintiffs' petition for rehearing with suggestion for rehearing en banc 18 pages; served on 11/28/01 to (PANEL & ALL ACTIVE JUDGES). [97-35191, 97-35192] (jr) [97-35191 97-35192]
1/9/2002	Filed order (Mary M. SCHROEDER, James R. BROWNING, Andrew J. KLEINFELD): The petition for rehearing is DENIED. [4308504-1] [97-35191, 97-35192, 97-35193, 97-35235] (sm) [97-

35191 97-35192 97-35193 97-35235]

1/17/2002	MANDATE ISSUED [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]
6/26/2002	RECORD RETURNED. (See control card for details.) (jay) [97-35191]

APPENDIX C

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 04-35182

3/8/2004	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 3/8/04; appellee's designation of RT is due 3/17/04; appellant shall order transcript by 3/29/04, ; court reporter shall file transcript in DC by 4/27/04,; certificate of record shall be filed by 5/4/04; appellant's opening brief is due 6/14/04; appellees' brief is due 7/13/04, appellants' reply brief is due 7/27/04. [04-35182] (gar) [04- 182]
	* * *
3/8/2004	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting cross appeal briefing schedule as follows: first cross-appeal brief is due 6/14/04 (Exxon); second cross-appeal brief is due 7/26/04 (Baker); third cross-appeal brief is due 8/25/04 (Exxon); optional cross-appeal reply brief is due 9/8/04 (Baker). [04-35183, 04-35182] (gar)

[04-35182 04-35183]

* * *

3/10/2004 Filed notice of appearance of David W. Oesting, Brian O'Neill, James van R Springer & David C. Tarshes for plaintiffs/aples. [04-35182] (dg) [04-35182]

3/11/2004 Filed plaintiffs' motion to consolidate appeals, to denote appeals as a comeback case, and to establish a schedule that allows swift appellate resolution, served on 3/9/04 (MOATT by promo) [04-35182, 04-35183] (dg) [04-35182 04-35183]

* * *

3/19/2004 Filed Exxon Mobile Corp & Exxon Shipping Co.'s memorandum in response to cross-appeal motion to consolidate cases and denote appeals as comeback case, and in opposition to plaintiffs' motion for expedited briefing [5008005-1] served on 3/18/04 (MOATT by promo)

3/25/2004 Filed reply to response to motion to consolidate cases, to denote appeals as a comeback case, and to establish a schedule that allows swift appellate resolution [5008005-1]; served on 3/23/04 (MOATT by promo) [04-5182, 04-35183](dg) [04-35182 04-35183]

* * *

6/14/2004 14 day oral extension by phone to file

	Appellant Exxon Mobile Corp in 04-35182, Appellee Exxon Mobile Corp in 04-35183's cross-appeal brief. [04-35182, 04-35183] first cross-appeal brief due 6/28/04 in 04-35182, in 04-35183[Exxon]; second cross-appeal brief due 8/9/04 [Baker]; third cross-appeal brief due 9/8/04 [Exxon]; optional cross-appeal reply brief is due 14 days after service of third cross-appeal brief [Baker]. (lw) [04-35182 04-35183]
6/14/2004	14 day oral extension by phone to file Appellant Exxon Shipping Co. in 04-35182, Appellee Exxon Shipping Co. in 04-35183's cross-appeal brief. [04-35182, 04-35183] first cross-appeal brief due 6/28/04 in 04-35182, in 04-35183 [Exxon Shipping]; second cross-appeal brief due 8/9/04 [Baker] ; third cross-appeal brief due 9/8/04 [Exxon Shipping]; cross-appeal reply brief is due 14 days after service of third cross-appeal brief [Baker.] (lw) [04-35182 04-35183]
6/22/2004	Filed notice of joint xap1 brief by defs Exxon Mobile Corp & Exxon Shipping Co. Briefing schedule is now as follows: Five additional pages or 1,400 words are authorized for xap1 brief only. No exts of time requested and the oral exts rcv'd on 6/14/04 will govern. (CASE-FILE) [04-35182, 04-35183] (dg) [04-35182 04-35183]

6/29/2004	Received original and 15 copies Exxon Mobile Corp & Exxon Shipping Co. 1st cross-appeal brief, (Informal: no) of 59 pages, with 4 vols excerpts of record, served on 6/28/04 deficient: excerpts contain trial exhibits, documents from other cases & the covers are tan instead of white. Notified counsel. [04-35182, 04-35183] response to brief deficiency notice due 7/13/04 (dg) [04-35182 04-35183]
7/9/2004	Filed Appellants Exxon Mobile Corp & Exxon Shipping Co.'s motion to file joint opening brief & excerpts of record (excerpts rejected by deputy clerk because they contain documents not found on district court docket) served on 7/8/04 [5123030] (MOATT by promo) [04-35182, 04-35183] (dg) [04-35182 04-35183]
7/21/2004	Filed original 4 copies Grant Baker et al partial joinder of Exxon's mtn to file jt opn br and EOR , served on 7/19/04 MOATT VIA PROMO [04-35182, 04-35183] (crw) [04-35182 04-35183]
8/2/2004	Filed notice of joint xap2 brief by . Briefing schedule is now as follows: xap2 brief due 8/30/04 for plaintiffs; xap3 brief due 9/29/04 by defs; the reply brief is due 14 days from service of 3rd brief. Five additional pages are authorized for xap2 brief only. (CASE-FILE) [04-35182, 04-35183] (dg) [04-

	35182 04-35183]
8/5/2004	Filed Exxon Mobile Corp's response in opposition to motion for leave to file amicus brief, served on 8/4/04 (MOATT by promo) [04-35182, 04-35183] (dg) [04-35182 04-35183]
8/13/2004	Filed Amicus W. Findlay Abbott reply to defs and aplts opposition to mtn for leave to file amicus brief, served on 8/9/04 MOATT VIA PROMO [04- 5174, 04-35182, 04-35183] (crw) [04-35174 04-35182 04-35183]
8/31/2004	Received original and 15 copies plaintiffs' 2nd cross-appeal brief (Informal: no) 68 pages and 7 vols of exerpts of record (videotape, CD & 1 audiotape trial exhibit);served 8/30/04 deficient: xap1 brief not filed. [04-35182, 04-35183] (dg) [04-35182 04-35183]
9/21/2004	Filed notice of joint third brief on cross-appeal by aplts/x-aples Exxon Mobile Corp. and Exxon Shipping Co. Briefing schedule is now as follows: xap3 brief due 10/20/04 for Exxon Mobile Corp. and Exxon Shipping Co. The optional reply brief is due 14 days from service of the joint xap3 brief. Five additional pages or 1,400 words are authorized for xap3 brief only. (CASE-FILEs) [04-35182, 04-35183] (hh) [04-35182 04-35183]

* * *

10/21/2004	Received original and 15 copies Exxon Mobile Corp, Exxon Shipping Co. 3rd cross-appeal brief, (Informal: no) 59 pages and 1 excerpts of record, served on 10/20/04 deficient: XAP1, XAP2 briefs not filed. 7/9/04 mtn to file referred to MOATT [04-35182, 04-5183] (crw) [04-35182 04-35183]
10/27/2004	Filed order (Appellate Commissioner) Aples/x-aplts mtn to consolidate these x-appeals is denied. These cross appeals, as well as 4-35174, relate to Baker v. Exxon Corp, CITE, and shall be assigned to the pno that heard that prior appeal (MMS,JRB,AJK) Aplts/x-aples mtn to dismiss cross appeal 4-35183 is denied w/o prejudice to renewing the arguments in the merits brief. CITE. W. Findlay Abbot's mtn for leave to file an amicus brief is denied. Aplts/cross aples mtn to submit jt x-appeal briefing is granted. The clk is directed to file the jt XAP1 br rcvd 6/29/04. The clk is also directed to file the XAP2 br rcvd 8/31/04 and the XAP3 br rcvd 10/21/04. The opt rpy br is due 14 days from svc of this order. Aples/x-aplts mtn for expedited decision is denied. These cross appeals shall be calendared with related appeal 4-35174 upon the completion of briefing in all three appeals. MOATT/ES) [04-35182, 04-35183] (crw) [04-35182 04-35183]

10/27/2004 Filed original and 15 copies Exxon Mobil Corp, Exxon Shipping Co. first brief on cross-appeal, (Informal: no) of 59 pages and 4 excerpts of record; served on 6/28/04 [04-35182, 04-35183] (crw) [04-35182 04-35183]

10/27/2004 Filed original and 15 copies pltfs second brief on cross-appeal (Informal: no) of 68 pages and 7 excerpts of record; served on 8/30/04 [04-35182, 04-35183] (crw) [04-35182 04-35183]

* * *

10/27/2004 Filed original and 15 copies Exxon Mobile Corp, Exxon Shipping Co. third brief on cross-appeal (Informal: no) of 59 pages and 5 copies 1 excerpts of record; served on 10/20/04 [04-35182, 04-35183] (crw) [04-35182 04-35183]

10/27/2004 Filed notice of joint xap brief by Appellee Grant Baker in 04-35182, Appellee Sea Hawk Seafoods in 04-35182, Appellee Cook Inlet Processor in 04-35182, Appellee Sagaya Corp. in 04-35182, Appellee William McMurren in 04-35182, Appellee Patrick L. McMurren in 04-35182, Appellee William W. King in 04-5182, Appellee George C. Norris in 04-5182, Appellee Hunter Cranz in 04-35182, Appellee Richard Feenstra in 04-5182, Appellee Wilderness Sailing in 04-35182, Appellee Seafood Sales, Inc. in 04-35182, Appellee Rapid Systems Pacific in 04-35182, Appellee Nautilus

Marine Ent. in 04-35182, Appellee W. Findlay Abbott in 04-35182, Appellant Grant Baker in 04-35183, Appellant Sea Hawk Seafoods in 04-35183, Appellant Cook Inlet Processor in 04-35183, Appellant Sagaya Corp. in 04-35183, Appellant William cMurren in 04-35183, Appellant Patrick L. McMurren in 04-35183, Appellant William W. King in 04-35183, Appellant George C. Norris in 04-35183, Appellant Hunter Cranz in 04-35183, Appellant Richard Feenstra in 04-35183, Appellant Wilderness Sailing in 04-35183, Appellant Seafood Sales, Inc. in 04-35183, Appellant Rapid Systems Pacifi in 04-35183, Appellant Nautilus Marine Ent. in 04-35183, Appellant W. Findlay Abbott in 04-35183. Briefing schedule is now as follows: xap reply brief due 12/15/04 for Grant Baker in 04-35182, for Sea Hawk Seafoods in 04-35182, for Cook Inlet Processor in 04-35182, for Sagaya Corp. in 04-5182, for William McMurren in 04-35182, for Patrick L. McMurren in 04-35182, for William W. King in 04-35182, for George C. Norris in 04-35182, for Hunter Cranz in 04-35182, for Richard Feenstra in 04-35182, for Wilderness Sailing in 04-35182, for Seafood Sales, Inc. in 04-35182, for Rapid Systems Pacifi in 04-35182, for Nautilus Marine Ent. in 04-35182, for W. Findlay Abbott in 04-35182, for Grant Baker in 04-35183, for Sea

Hawk Seafoods in 04-35183, for Cook Inlet Processor in 04-35183, for Sagaya Corp. in 04-35183, for William McMurren in 04-35183, for Patrick L. McMurren in 04-35183, for William W. King in 04-35183, for George C. Norris in 04-35183, for Hunter Cranz in 04-35183, for Richard Feenstra in 04-35183, for Wilderness Sailing in 04-35183, for Seafood Sales, Inc. in 04-35183, for Rapid Systems Pacifi in 04-35183, for Nautilus Marine Ent. in 04-35183, for W. Findlay Abbott in 04-35183 Five additional pages are authorized for xap4 brief only. (CASEFILE) [04-35182, 04-35183] (sf) [04-35182 04-35183]

11/8/2004 Filed order (Deputy Clerk: JES) The briefing schedule for these cross-appeal is amended as follows: Appellees/corss-appellants optional reply brief is due 11/24/04. These cross-appeals shall be calendared with related appeal no. 04-35174 upon the completion of briefing in all three appeals. [04-35182, 04-35183] (sf) [04-35182 04-35183]

11/22/2004 Filed original and 15 copies Plaintiffs reply brief, excerpts in one volume. (Informal: no) of 32 pages; served on 11/19/04 [04-35182, 04-35183] (sf) [04-35182 04-35183]

11/22/2004 Rec'd errata to brief from Plaintiffs/Cross-Appellants re: errata sheet to 8/30/04 brief of Plaintiffs (original plus fifteen copies) served 11/19/04 (RECORDS) [04-35182, 04-35183] (sf) [04-35182 04-35183]

* * *

1/4/2005 Rec'd errata to 11/19/04 reply brief of plaintiffs/Cross Appellants brief. served 12/28/04 (RECORDS) [04-35182, 04-35183] (sf) [04-35182 04-35183]

1/7/2005 Filed order MOATT (JES) Briefing in these cross-appeal is complete. These appeals are ready for calendaring before Chief Judge Schroeder, Judge Browning, and Judge Kleinfeld. [04-35182, 04-35183] (sf) [04-35182 04-35183]

* * *

1/27/2006 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, James R. BROWNING, Andrew J. KLEINFELD [04-35182, 04-35183] (gb) [04-35182 04-35183]

* * *

12/22/2006 FILED PER CURIAM OPINION: VACATED AND REMANDED (Terminated on the Merits after Oral Hearing; Other; Written, Signed, Published. Mary M. SCHROEDER; James R. BROWNING, dissenting; Andrew J. KLEINFELD.) FILED AND ENTERED JUDGMENT. [04-35182, 04-35183] (crw) [04-35182 04-35183]

* * *

1/8/2007	Filed order (Deputy Clerk: jr) Granting appellee's motion to extend time to file a petition for rehearing. The petition for rehearing is due 1/12/07. (PHONED AT 4:30PM) [04-35182] (sf) [04-35182]
1/12/2007	Filed original and 50 copies Appellant Exxon Mobile Corp and Appellant Exxon Shipping Co. petition for panel rehearing and petition for rehearing en banc. (PANEL AND ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) 20 pages, served on 1/12/07 [04-35182, 04-35183] (sf) [04-35182 04-35183]

* * *

2/13/2007	Filed order (Mary M. SCHROEDER, James R. BROWNING, Andrew J. KLEINFELD): The plaintiff-Appellees are requested to file a response to the Defendant-Appellants petition for rehearing and Rehearing En Banc by March 2, 2007. (PHONED AT 12:50 PM) [04-35182, 04-35183] (sf) [04-35182 04-35183]
3/2/2007	Filed Appellees response to Exxon's petition opposing petition for enbanc rehearing or rehearing en banc. served on 3/1/07 (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [04-35182, 04-35183] (sf) [04-35182 04-35183]

5/23/2007	FILED ORDER AND AMENDED PER CURIAM (MARY SCHRODER; R. BROWNING, Andrew J. KLEINFELD) (Orig. opinion id: [6042913-1] in 04-35182, [6042913-1] in 04-35183) . . . The petition for panel rehearing is DENIED. ... The petition for rehearing en banc is DENIED. [Vols. I & II] [6059727-1][04-35182, 04-35183] (gva) [04-35182 04-35183]
5/29/2007	Filed Appellant Exxon Mobile Corp, Appellant Exxon Shipping Co. motion to stay the mandate. (PANEL) [04-35182, 04-35183] served on 5/29/07 [04-35182, 04-35183] (sf)[04-35182 04-35183]
6/11/2007	Filed order (Mary M. SCHROEDER, James R. BROWNING, Andrew J. KLEINFELD, JJ.): granting appellant's motion to stay the mandate [6189797-1] It is ordered that the mandate is stayed pndg the filing of the pet for writ of cert in the Supreme Court. The stay shall continue until final disp by the Supreme Court. [6189797-1] [04-35182, 04-35183] (gar)[04-35182 04-35183]
11/7/2007	Filed Supreme Court order, certiorari denied on 10/29/07. Supreme Court No. 07-276 [04-35183, 04-35182] (gva) [04-35182 04-35183]
11/7/2007	Received letter from the Supreme Court dated 10/29/07 re: The petition for a writ of certiorari is granted lim-

ited to Questions 1,2, and 3(1) presented by the petition. Justice Alito took no part in the consideration or decision of this petition. (PANEL) [04-35183,04-35182](gva)[04-35182 04-35183]

11/14/2007 NO ORIGINAL RECORD (jay) [04-35182]

APPENDIX D

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF) No. A90-015-CR
AMERICA,)
)
Plaintiff,) GOVERNMENT'S
) MEMORANDUM
v.) IN AID OF
) SENTENCING
EXXON CORPORATION AND)
EXXON SHIPPING)
COMPANY,)
)
Defendants.)
)

I. INTRODUCTION

The United States, Alaska, Exxon and Exxon Shipping Company have entered into one of the largest and most comprehensive settlements in the history of law enforcement that resolves all criminal and civil litigation between the federal and state governments and the defendants arising out of the Exxon Valdez oil spill. The value[1] of these comprehensive settlements exceeds $1.1 billion and is set forth in two separate documents, namely a plea agreement and a consent decree. In addition, the United States and Alaska have entered into agreements with the Native Groups and the private plaintiffs that will assist in resolving their pending civil litigation for damages caused by the oil spill.

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife.

Consequently, the United States in the plea agreement seeks imposition of the largest criminal fine by far, $150 million, in an environmental case to date. This fine reflects the seriousness of the conduct that caused the grounding of the Exxon Valdez, and the resulting environmental injury, and sends a strong message that companies that violate criminal environmental statutes face serious punishment. Almost half of this fine would go into a fund to be used to carry out wetlands conservation projects throughout North America.

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[1] Among other things, this plea agreement includes an assessed fine that is 50% above the fine proposed to be assessed in the prior plea agreement filed in March 1991, it doubles the amount of compensatory payments and has a cash value that is 25% greater than the prior plea agreement.

In addition, the plea agreement provides for immediate payment of $100 million to the State of Alaska and to the United States--double the restitution contained in the prior plea agreement. This payment will provide immediately needed funds for the rehabilitation of Prince William Sound and other areas affected by the spill. The entire amount of this payment is to be used exclusively for restoration projects within the State of Alaska relating to the Exxon Valdez oil spill. The restitutionary components of a sentence for an environmental crime cannot be understated. Unlike other economic crimes in which it is possible to compensate the victim years after the offense occurs by, e.g., adding interest to the payments, in environmental cases, the victim of the crime--the environment--must be aided more quickly through in kind efforts funded by restitutionary payments.

This plea agreement, however, addresses more than punishment and compensation. It also acknowledges that the defendants made substantial efforts, at a cost of approximately $2.5 billion, to rectify the consequences of their conduct by financing oil spill clean-up efforts and engaging in other responsible action following the spill. Consequently, the plea agreement does not ask that either defendant be placed on probation, and provides that all but $25 million of the fine be remitted. It thus provides the government with a necessary prosecutorial tool by sending a message to the public that the government will take into account steps voluntarily taken by responsible parties to correct the consequences of acts that constitute environmental crimes. In this case, for every $20.00 voluntarily spent by Exxon to rectify the consequences of their conduct, the government has agreed to provide a $1.00 remission of the fine.

This criminal prosecution and the resulting plea agreement cannot resolve all the issues relating to the oil spill. However, the government believes that the purposes of criminal prosecution -- conviction of the guilty, just punishment for wrongful conduct, deterrence of future criminal conduct, and the need to provide compensation to victims -- coupled with the conduct of the defendants since the spill, are effectively addressed by the plea agreement, and the United States respectfully urges the Court to approve it. By any measure, the fine in this case is off the charts.

II. FACTUAL BACKGROUND

Most of the significant facts that underlie the criminal charges in this case have been set forth in prior pleadings.[2] In addition, attached hereto and made a part hereof is the Government's Statement of Factual Basis for Defendants' Guilty Plea that was filed on March 22, 1991.

III. THE PLEA AGREEMENT

Pursuant to the plea agreement, Exxon Corporation has pled guilty to a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a), and Exxon Shipping has pled guilty to violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1)(A); the Refuse Act, 33 U.S.C. §§ 407 and 411; and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a). The total maximum statutory fines that the court could impose for these violations as to both defendants is $420,000.00, unless the loss-doubling provision of 18 U.S.C. § 3571(d) is applied. However, in the plea agreement, the defendants have agreed to the imposition of a fine of $150 million. In addition to the agreed-upon fines, the defendants have agreed to make compensatory payments of $100 million to the State of Alaska and the United States. The parties have agreed that the provisions of Rule 11(e)(1)(C), Fed. R. Crim. P., apply to the plea agreement.

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[2] See e.g., Bill of Particulars, July 31, 1990; Government's Consolidated Opposition to Motions of Exxon Corporation to Dismiss Counts One, Two, Three, Four and Five, Sept. 20, 1990; Government's Opposition to Motion of Exxon Shipping Company to Dismiss Count Four for Failure to Charge an Offense, Sept. 20, 1990; Factual Basis for Guilty Plea of Exxon Shipping Company, March 22, 1991.

IV. FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE

The relevant sentencing factors set forth in 18 U.S.C. § 3553 are discussed below.

A. § 3553(a)(1) - The nature and circumstances of the offense

The government incorporates by reference the factual background set forth in Section II of this Plea Agreement.

B. § 3553(a)(2)(A) - The need of the sentence to reflect the seriousness of the offense

The Exxon Valdez oil spill is the largest oil spill in United States history. So too is the proposed sanction. As an aid to the Court in determining whether the sentence set forth in the plea agreement is appropriate, the United States filed a "Summary of Effects of the Exxon Valdez Oil Spill on Natural

Resources and Archaeological Resources" on April 8, 1991. Although the injuries were serious, Prince William Sound and the affected areas are on the road to recovery. This is in large part because of the multi-billion dollars expended by Exxon and the two governments in clean up efforts, natural recovery, and the restoration that will be possible with the $1 billion that will be available if this plea agreement and the consent decree – are approved. The government firmly believes that the $1.1 billion provided in the consent decree and the plea agreement will provide sufficient funds for the restoration of Prince William Sound and the Gulf of Alaska.

C. § 3553(a)(2)(A) - The need of the sentence to promote respect for the law

More than any other case in environmental litigation, this case has riveted the attention of the nation, and has been a sobering lesson that the environment is a vulnerable victim that requires great care in the conduct of environmentally hazardous activities. Acceptance of the plea agreement should heighten the business community's and the public's awareness of, and respect for, laws designed to protect the environment. Indeed, as outlined below, Exxon has taken, and will continue to take, a number of actions since the spill that demonstrates its commitment in this regard. The remitted portion of the fine will also promote respect for the laws. It is only because of Exxon's voluntary efforts, cooperation, and responsible action that remission is appropriate. As noted earlier, for every $1.00 of the fine remitted, Exxon spent $20.00 correcting the harm created by the spill. Nonetheless, must still pay a fine of $25 million cash, which will be one of the largest criminal fines ever paid into the federal treasury in the history of the United States and certainly eclipses all prior environmental fines.

D. § 3553(a)(2)(A) - The need of the sentence to provide just punishment for the offense

The maximum statutory penalties allowable for the crimes to which the defendants have pled guilty total $420,000.00. The fine proposed in this plea agreement is $150 million, with $25 million paid immediately. Both amounts represent the largest criminal fine ever imposed in an environmental criminal case. A fine of this magnitude is warranted in light of the conduct of the defendants' employees and agents, and of the harm to the environment and the people of Alaska. In addition, the unremitted amount of the fine is sufficient to provide punishment and deterrence for the unintentional conduct in question.

There is no question that Exxon has paid dearly for this oil spill. Not only did Exxon spend in excess of $2.5 billion in response to the spill, but is also committing to pay in excess of $1.1 billion pursuant to these comprehensive settlement agreements. As a result, the total amount of the penalties, compensatory payments and voluntary expenditures will exceed $3.5 billion.

E. § 3553(a)(2)(B) - The need of the sentence to afford adequate deterrence to criminal conduct

Criminal violations of environmental statutes have the potential to, and often do, result in enormous injury. Accordingly, adequate deterrence is essential to future avoidance. The United States believes that the sentence imposed in this case must, and would, if approved, send a strong message to businesses and individuals alike. As the government's evidence would have shown, the discharge of nearly 11 million gallons of crude oil was directly related to criminally negligent conduct by Exxon Shipping in failing to exercise the high standard of care required in transporting crude oil through a pristine environment. Imposition of the statutory fines that would apply in this case, amounting to no more than $420,000.00, would utterly fail to send that message. For that reason, the United States believes that 18 U.S.C. § 3571(d) should be applied to raise the amount of the fine otherwise permissible for the offenses set forth in the plea agreement. The fines and restitution contained in the plea agreement are of a magnitude that should deter future corporate carelessness with the environment.

F. § 3553(a)(3) - The kinds of sentences available

Only two sanctions apply to an organization convicted of a crime. Those sanctions - a fine or a term of probation -are set forth in 18 U.S.C. S 3551(c). In considering whether to impose a fine and the amount of the fine, the court should consider, in addition to the factors set forth in § 3553(a) and described elsewhere in this sentencing memorandum, the factors set forth in 18 U.S.C. § 3572. Those factors, which are discussed below, amply support imposition of the fines set forth in the plea agreement.

The first of those factors is whether the defendant is an organization. If so, the Court should consider its size. Exxon Corporation, including its affiliates, is one of the largest and most profitable organizations in the world. This proposed sentence is one of the largest in the world.

The next factor to be considered is any measure taken by the organization to discipline any employee responsible for the offense. In this case, Exxon Shipping fired Captain Hazelwood for his conduct of using alcohol four hours before assuming duty and for his leaving the bridge during a hazardous maneuver. Mr. Cousins was reassigned to the status of AB as disciplinary action for his role on the grounding.[3]

The last factor the court should consider in determining the amount of the fine is any measures taken by the defendants to prevent a recurrence of the offense. Since the grounding, Exxon Corporation has revised its substance abuse policy substantially. Specifically, employees who have had or are found to have a substance abuse problem will not be permitted to work in safety sensitive positions and employees who have returned from rehabilitation will be required to participate in an aftercare program. The policy subjects persons in safety sensitive positions to unannounced periodic or random drug and alcohol testing and permits the defendants to conduct unannounced searches for drugs and alcohol on property owned or controlled by the defendants.

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[3] Following the grounding, Mr. Cousins' license was suspended for nine months by the USCG.

In addition, the defendants have created the position of loading mate in the Ports of Valdez and San Francisco. The loading mate has the responsibility of loading and unloading cargo from tanker vessels in port. The creation of this position should eliminate a significant source of fatigue. The National Transportation Safety Board concluded that the third mate's fatigue and excessive workload contributed to the grounding of the Exxon Valdez. It should also be noted that Exxon will spend $1.6 billion in 1991 on capital projects to enhance environmental and safety performance apart from the expenditures relating to the spill. Exxon also has committed to contribute $50 million to fund improvement of the response capabilities of the oil industry to deal with large-scale oil spills.

In addition, since the date of the spill, the defendants have spent more than $40 million to improve vessel operating safety, personnel training and oil spill capability. Exxon Shipping has established a new environmental affairs group and hired two former Coast Guard captains with oil spill experience. Exxon's division for U.S. oil and gas operations has created a New Environmental and Safety Department to review and coordinate management of environmental and safety concerns. A primary reason the government would request a term of probation in this case would be to serve as a vehicle for the Court to order restitution as a condition of probation. Since the terms of the plea agreement and consent decree include payments of in excess of $1 billion in compensatory payments to the State of Alaska and the United States by the defendants, the United States does not believe probation is required in this matter.

G. § 3553(a)(6) - The need to avoid unwarranted sentence disparities among defendants guilty of similar conduct

There have been only a few other prosecutions for negligent oil spills, and none have involved environmental harm as widespread as that caused by the Exxon Valdez spill. The only other case that approaches this one is United States v. Ashland Oil Co., No. 88-146 CR (W.D. Penn. 1988), where the court imposed a fine of $2.25 million for a negligent spill of about 700,000 gallons of diesel oil into the Monongahela River. That spill, at the time, was the largest inland oil spill in U.S. history, forcing more than a million people in five states to go without water, or to sharply curtail their use of it. The governors of Pennsylvania and Ohio issued emergency proclamations imposing mandatory restrictions on water use in affected communities. Numerous schools, churches and businesses were forced to close, some for more than a week. As the 20-mile-long oil slick moved down the Monongahela and Ohio Rivers, authorities in five states raced to find alternative water supplies or to find a means of removing diesel fuel from their drinking water.

The present case involves a spill many times larger than the Ashland spill, and Exxon is several times larger than Ashland. Thus, it is appropriate that the fine in this case be proportionally larger than in Ashland, in light of all of the circumstances. The government believes that the record $125 million to be paid in this case, more than 50 times the amount paid in the Ashland criminal case, when coupled with the other terms and conditions of this plea agreement, appropriately reflects the seriousness of the offenses to which defendants have pled guilty. It must be stressed, however, that in and of itself, the net fine proposed in this plea agreement is far greater than the aggregate of all previously imposed fines for violations of the Clean Water Act since it became law.[4]

H. § 3553(a)(7) - The need to provide restitution to any victim of the offense.

While restitution is an important consideration, the criminal sentence cannot provide relief to every victim of the oil spill. However, many of those injured by the spill have been compensated or will be compensated. For example, the plea agreement provides $100 million in compensatory payments to the State of Alaska and to the United States and a separate civil settlement requires the defendants pay up to $900 million over the next ten years, and possibly an additional $100 million if reopener conditions are met, for the restoration of Prince William Sound and other areas affected by the spill. The defendants have already paid more than $300 million to third parties in settlement of claims resulting from the oil spill and there are presently pending, in federal and state court, a multitude of claims requesting various forms of relief. It would be extremely complicated, in light of all the pending litigation, for this Court to fashion an order of restitution for all those who claim to have suffered losses resulting from the oil spill.

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[4] Attachment B is an Environmental Crimes Penalty History chart that illustrates how the proposed sentence is off the chart when compared to the penalties ordered in other criminal cases from 1983 to 1990.

Under 18 U.S.C. S 3663(d), the Court may decline to make a restitution order if the Court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution outweighs the need to provide restitution to any of the victims. A protracted hearing to determine restitution for every victim of the oil spill may run afoul of Fed. R. Crim. P. 32(a)(1), which generally requires that sentence shall be imposed without unnecessary delay. Consequently, the agreed upon disposition will satisfy the loss to the environment and will avoid the time consuming, complex, and uncertain task of assessing unrestituted losses to the federal and state natural resource trustees.[5]

The United States strongly believes that the $1.1 billion in restitution and damage payments provided for in the plea agreement and consent decree is far preferable to the alternative: years of litigation with an uncertain result. That alternative is best illustrated by the Amoco Cadiz case, which involved an oil spill in 1978 that was five times larger than the Exxon Valdez spill. See In re: Amoco Cadiz, 20 Envt. Rep. Cas. 2041 (N.D. Ill. 1984). Thirteen years after that spill, the case is still being litigated. Should the plaintiffs prevail on appeal, the damages paid will be less than $150 million. The United States believes that the restoration of Prince William Sound and the Gulf of Alaska should not await years of legal battles over damages and liability.

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[5] No court has ever ruled upon the valuation issues inherent in natural resource damages. Only one court has ever even considered the specific cost of the clean up of an environmental crime in a sentencing hearing. In that case, United States v. Boaas (N.D. Ohio), the parties spent five days in a sentencing hearing litigating whether a clean up effort cost $350,000.

V. LEGAL AUTHORITY TO IMPOSE THE FINE SET FORTH IN THE PLEA AGREEMENT AND TO THEREAFTER REMIT A PART OF THE FINE

The plea agreement calls for imposition of a $125 million fine on Exxon Shipping, and a $25 million fine on Exxon Corporation. The Court's authority to impose these fines rests on 18 U.S.C. § 3571(d), which permits a fine of up to double the gross pecuniary loss to persons other than the defendant caused by the offense. If sentencing under this statute were litigated, the government would be prepared to prove that the offenses to which the defendants have entered pleas of guilty caused pecuniary losses to others in excess of $75 million, providing a basis for a fine of $150 million. In the plea agreement at page 4, defendants agree that there is a legal basis for the Court to impose the agreed fines.

The plea agreement calls for remission of $105 million of Exxon Shipping's fine, and 520 million of Exxon Corporation's fine, in recognition of defendants' conduct following the spill. The Court has the authority to order remission of part of a fine it has imposed, because the Court has the inherent authority to reduce a sentence it has imposed. In United States v. Benz, 282 U.S. 304 (1931), the Supreme Court upheld a district court's reduction of a defendant's prison sentence after it began, stating:

> The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made.

> They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court. The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented.

Id. at 306-07 (citations omitted). More recent decisions of the Supreme Court on sentencing authority have cited the rule laid down in Benz without question. See United States v. DiFrancesco, 449 U.S. 117, 138 (1980). Lower courts following Benz have distinguished between a court's power to reduce a sentence, which is inherent, and a court's power to suspend execution of a sentence, which a court may do only by imposing probation. See United States v. Ellenbogen, 390 F.2d 537, 540-41 (3d Cir. 1968), cert. denied 393 U.S. 918.

The distinction between reduction and suspension is logical: reduction of a sentence is unconditional, while a suspended sentence may be reimposed at some future date. A defendant whose sentence is suspended is entitled to be placed on a term of probation with a definite ending date and express conditions, so that he knows what conduct, during what period, will subject him to reimposition of his sentence. A defendant whose sentence is reduced without condition has no such need.

VI. CONCLUSION

This prosecution was brought after investigation determined that criminal conduct was involved in the grounding of the Exxon Valdez. In the plea agreement submitted to the Court for approval, both defendants have offered guilty pleas and have agreed to pay fines totaling $150 million, $125 million of which would be remitted, and have agreed to pay $100 million in compensatory payments to the State of Alaska and to the United States. The government believes that this would be a just resolution of the criminal charges, and respectfully urges the Court to accept the plea agreement.

All state and federal trustees of the natural resources affected by the oil spill are in complete and total support of this plea agreement. They are satisfied that the $1 billion in restitutionary and compensatory payments to be made no later than 30 days after the acceptance of the plea agreement and on the schedule set forth in the consent decree will ameliorate the harm caused by the spill. They have authorized counsel to urge the Court, on their behalf and for the benefit of Prince William Sound and the Gulf of Alaska, to approve this plea agreement.

The fine amount will be placed into good use. The parties have agreed that all of Exxon's fine and greater than one third of Exxon Shipping's fine should be imposed for violation of the Migratory Bird Treaty Act. Consequently, by operation of law, Title 16, United States Code, Section 4406(b), $12 million of the fine will be directed to the North American Wetlands Conservation Fund to be used solely to carry out approved wetlands conservation projects in the United States, Canada and Mexico. The remaining part of the fine will be directed to the Victims of Crime Act (VOCA) account of the United States Treasury to assist victims of crime.

As a result, of the $125 million of actual dollars required to be paid by the defendants pursuant to this plea agreement, $112 million will go directly to the environment. The total amount of payments due pursuant to the plea agreement and consent decree is a just remedy for the nation's largest oil spill.

The Government believes that this plea agreement is in the best interest of justice and strongly urges this Honorable Court to give its approval.

Respectfully Submitted,

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Acting Assistant Attorney General
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By: s/ [illegible] Dated: Sept. 30, 1991
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

In re) No. A89-095 Civil
) (Consolidated)
the EXXON VALDEZ)
)

RE: ALL CASES

MOTION OF EXXON DEFENDANTS (D-1, D-2 and D-10) AND ALYESKA DEFENDANTS (D-3, D-9, D-11, D-12, D-14, D-19, D-20 and D-21) FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS FOR PUNITIVE DAMAGES BASED ON TAPAA DISPLACEMENT OF GENERAL MARITIME LAW

The Exxon defendants and the Alyeska defendants hereby move for partial summary judgment on claims for punitive damages asserted against them in each and every of the cases comprising this consolidated litigation on the ground that the Trans-Alaska Pipeline Liability Act, 43 U.S.C. § 1653, displaces general maritime law with respect to punitive damage claims relating to spills of North Slope oil from the Trans-Alaska Pipeline System and from vessels transporting oil from the Valdez Marine Terminal of the Trans-Alaska Pipeline System.

This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that, as a matter of law, plaintiffs may not recover punitive damages. The Exxon defendants and the Alyeska defendants have filed herewith a memorandum of law in support of this motion.

Dated at Anchorage, Alaska this ____ day of April, 1993.

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Douglas J. Serdahely

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re) No. A89-095 Civil
) (Consolidated)
the EXXON VALDEZ)
)

RE: ALL CASES

MEMORANDUM OF EXXON DEFENDANTS (D-1, D-2 and D-10) AND ALYESKA DEFENDANTS (D-3, D-9, D-11, D-12, D-14, D-19, D-20 and D-21) IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PUNITIVE DAMAGE CLAIMS BASED ON TAPAA DISPLACEMENT OF GENERAL MARITIME LAW

* * *

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The above-identified defendants move for partial summary judgment dismissing with prejudice all punitive damage claims asserted against them in all spill-related actions pending in this Court. By enacting the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-56 ("TAPAA"), Congress has prescribed a comprehensive remedial scheme for TAPS oil spills which leaves no room for punitive damage claims. This conclusion follows inescapably from well-established principles governing legislative displacement of judge-made maritime law:

First, as we show in Part II(A), courts consistently have held that where Congress has legislated a statutory remedy in an area formerly governed by judge-made federal law, judge-made remedies purporting to afford relief over and above that provided by statute cannot stand. More specifically, cases in the maritime area establish that where Congress has enacted a remedial scheme providing for compensatory damages only, courts may not "supplement" that scheme by awarding punitive damages under general maritime law.

Second, as we show in Part II(B), both this Court and the Ninth Circuit have recognized that TAPAA establishes a comprehensive remedial scheme for TAPS oil spills. That scheme, which creates strict liability up to specified limits for harm caused by a spill of TAPS oil, provides only for compensatory relief and manifestly does not contemplate punitive damages.

Third, as we show in Part II(C), all punitive damage claims asserted in these consolidated cases, no matter how denominated, are governed by federal maritime law. Punitive damages are a purely judge-made adjunct of the maritime claims plaintiffs seek to assert. As such, they cannot be sustained. Judges administering maritime law (whether sitting in federal or state courts) may not alter the balance struck by Congress. Since TAPAA indisputably applies to the EXXON VALDEZ spill, all punitive damages claims must be dismissed.

II. ARGUMENT

A. Where Congress Has Legislated a Comprehensive Remedial Scheme Providing for Compensatory Damages Only, Courts May Not "Supplement" That Scheme by Awarding Punitive Damages Under the General Maritime Law

The relevant principles governing Congressional displacement of judge-made federal law originate with *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). There, the Supreme Court considered whether the "pecuniary loss" limitation of the Death on the High Seas Act, 46 U.S.C. §§ 761-67 ("DOHSA"), left room for recovery for loss of society in a wrongful death cause of action pleaded alternatively under general maritime law. The Court refused to permit such an award, holding that to allow recovery of non-pecuniary damages under judge-made maritime law would undermine the legislative policy judgment expressed in DOHSA. The Court emphasized that it was Congress' prerogative to make such judgments, and that once Congress had done so, the courts were not free to alter those judgments under the rubric of creating general maritime law: "[W]e need not pause to evaluate the opposing policy arguments [for or against allowing non-pecuniary recoveries]. Congress has struck the balance for us." 436 U.S. at 623. The Court further made clear that courts could not circumvent this principle by construing Congress' failure to mention non-pecuniary damages as an invitation to "supplement," or "fill gaps" in, the statutory scheme. Emphasizing that DOHSA "speaks directly to [the] question" of recoverable damages, *id.* at 625, the Court reiterated that "we have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Id.* at 625-26.

In a subsequent decision, the Court made equally clear that courts could not circumvent DOHSA's pecuniary loss limitation by "importing" non-pecuniary wrongful death remedies available under state law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). Citing *Higginbotham*, the Court again held that Congress' policy judgment on the measure of recoverable damages was conclusive. *Id.* at 232.

The Ninth Circuit applied the rule of *Higginbotham* to punitive damages in *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir. 1989). At issue in *Bergen* was whether the estates of seamen killed on the high seas could recover punitive damages under (1) DOHSA, (2) the Jones Act, 46 U.S.C. App. § 688, or (3) general maritime law. The Ninth Circuit answered all three questions in the negative. Citing an earlier ruling that "[p]unitive damages are non-pecuniary damages unavailable under the Jones Act,"[1] the court held that the same was necessarily true under DOHSA. 816 F.2d at 1347. Finding *Higginbotham* and *Tallentire* controlling, the court further held that courts could not "supplement" the limited statutory remedies with punitive damages under general maritime law. *Id.* at 1348.

The Ninth Circuit expressly rejected the argument that Congress had not "spoken to" the issue of punitive damages when it enacted the limited compensatory remedies embodied in DOHSA:

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[1] *See Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir. 1984).

> Plaintiffs argue that DOHSA is a remedial statute and that punitive damages fill a "gap left by Congress' silence." It is true that punitive damages have nothing to do with losses suffered. Their purpose is punishment and deterrence.... Nonetheless, *Higginbotham* and *Tallentire* make it clear that Congress intended DOHSA to preempt anything but pecuniary damages where DOHSA applies. "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements." [*Higginbotham*, 436 U.S. at 625.] The pecuniary remedies available under DOHSA therefore cannot be supplemented by punitive damages under the general maritime law.

Id. at 1348-49. The court also rejected the argument that the DOHSA plaintiffs alternatively could recover punitive damages as a general maritime law supplement to their parallel Jones Act claims. "If all those actions could be supplemented by the general maritime law, DOHSA's preemption of maritime law would be nullified." *Id.* at 1349.

Bergen technically left unanswered whether a court could permissibly supplement the remedies of a Jones Act plaintiff whose claims were not also cognizable under DOHSA. *Id.* at 1349 n.3. The Supreme Court recently put that question to rest, however, in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), a decision that broadly reaffirms the *Higginbotham* principle that a Congressional remedy supplants any purportedly more expansive judge-declared maritime remedies.

In *Miles,* the Court considered the general maritime law remedies available to a Jones Act wrongful death plaintiff who had no claim under DOHSA because the death occurred on territorial waters rather than the high seas. At issue was whether a court could award general maritime law damages for (1) loss of society or (2) the decedent's lost future earnings, despite the unavailability of either remedy under the Jones Act itself. The Court answered both questions in the negative:

> [W]e must ... keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

498 U.S. at 27. Citing *Higginbotham*, the Court emphasized that "to sanction more expansive remedies in a judicially-created cause of action" would be "inconsistent with our place in the constitutional scheme." *Miles*, 498 U.S. at 32.

In the wake of *Miles*, the Sixth Circuit and multiple district courts, including this Court and at least four others from this Circuit, have applied the Supreme Court's reasoning to disallow punitive damages for general maritime law personal injury or death claims also cognizable under the Jones Act.

Miller v. American President Lines, Ltd., 1993 U.S. App. LEXIS 5538 (6th Cir., Mar. 23, 1993); *Jackson v. Unisea, Inc.*, A91-606 (D. Alaska, Sept. 23, 1992) (Holland, CJ.); *La Voie v. Kualoa Ranch and Activity Club, Inc.*, 797 F. Supp. 827 (D. Hawaii 1992); *In re Aleutian Enterprise, Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991).[2] As stated in *Aleutian Enterprise*:

> *[Miles and Higginbotham]* emphasize[] that federal courts sitting in admiralty should respect the pronouncements of Congress.... [T]he reasoning of *Miles* is inescapable in its application here. The remedies provided by Congress in the Jones Act do not encompass punitive damages. The claimants ask this Court to supplant Congress' judgment in this regard by awarding punitive damages under the general maritime law. That is not the proper function of this Court within our system of governance.

777 F. Supp. at 795-96.

Miles thus makes clear that the rule established in *Higginbotham* and applied by the Ninth Circuit in *Bergen* is one of general application. Where Congress has legislated a remedial scheme providing only for compensatory relief, courts may not-supplement that scheme with more expansive relief--including punitive damages--under general maritime law.

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[2] *Accord, Shearer v. Vonmar Trawlers, Inc.*, A91-125 (D. Alaska, Mar. 5., 1993) (Sedwick, J.); *Ortega v. Oceantrawl, Inc.*, A91-174 (D. Alaska, Oct. 8, 1992) (von der Heydt, J.); *Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *In re Cleveland Tankers, Inc.*, 791 F. Supp. 679 (E.D. Mich. 1992); *In re Waterman S.S. Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Haltom v. Lykes Bros. S.S. Co.*, 771 F. Supp. 179 (E.D. Tex. 1991); *In re Mardoc Asbestos Case Clusters 1, 2, 5 & 6*, 768 F. Supp. 595 (E.D. Mich. 1991); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991).

This principle is underscored in cases applying *Higginbotham* in the context of federal pollution statutes such as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 ("FWPCA"), and the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-45 ("MPRSA"). The leading decision is *Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), in which the Supreme Court considered the effect of the FWPCA's National Pollution Discharge Elimination System ("NPDES") permitting scheme on the federal common law of nuisance. The case arose from a dispute between the State of Illinois and the City of Milwaukee over the latter's discharge of sewer effluents into Lake Michigan. In *Illinois v. Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), the Court had recognized a nuisance remedy under "federal common law" for interstate water pollution. Only a few months later, however, Congress enacted the 1972 Amendments to the FWPCA, which established the NPDES permitting scheme. Milwaukee thereafter obtained effluent discharge permits, but at the same time, Illinois proceeded to judgment in its *Milwaukee I* nuisance suit and obtained injunctive relief imposing effluent limitations more stringent than those imposed under Milwaukee's NPDES permits. When the case again reached the Supreme Court, Milwaukee argued that the NPDES scheme necessarily displaced the preexisting federal common law remedy for nuisance.

In a broadly-worded opinion, the Court upheld

Milwaukee's defense. Citing *Higginbotham*, the Court reiterated that judicial deference to Congressional legislative policy judgments is mandated by core notions of separation of powers that underlie our democratic system of government:

> In *[Higginbotham]*, the Court refused to provide damages for "loss of society" under the general maritime law when Congress had not provided such damages in the Death on the High Seas Act.... [T]he question was whether the legislative scheme "spoke directly to a question" -- in that case the question of damages -- not whether Congress had affirmatively proscribed the use of federal common law. Our "commitment to the separation of powers is too fundamental" to continue to rely on federal common law "by judicially decreeing what accords with 'common sense and the public weal'" when Congress has addressed the problem.

Milwaukee II, 451 U.S. at 315 (citations omitted).

The Court further made clear that, unlike state law, judge-made federal law is *not* entitled to an initial "presumption" of continuing validity in the face of a Congressional enactment addressing the same subject matter. On the contrary, the Court held that where Congress has spoken in an area formerly governed by judge-made federal law, there is a presumption of displacement:

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that

> employed in deciding if federal law preempts state law. In considering the latter question "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ... Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present "we start with the assumption" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

Id. at 316-17 (citations omitted).

The Court had little difficulty concluding that the enactment of the NPDES scheme foreclosed federal common law nuisance claims. Congress had spoken to the subject of effluent limitations in the 1972 legislation. As in *Higginbotham*, judicial imposition of a different and potentially more expansive scheme of regulation through judge-made remedies would have both usurped Congress' legislative role and impermissibly undermined the policy balance struck by Congress:

> [T]he problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations

> than those imposed under the regulatory regime by reference to federal common law ... [¶] The question is whether the field has been occupied, not whether it has been occupied in a particular manner.

Id. at 320-24.

In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass 'n*, 453 U.S. 1 (1981), the Court applied *Milwaukee II* to federal common law nuisance claims asserted by coastal fishermen who claimed that governmental entities had damaged fishing grounds by discharging and dumping sewage and other wastes into coastal waters in violation of the FWPCA and the MPRSA. The plaintiffs alleged "tangible economic injuries" from the alleged nuisance and sought both compensatory and punitive damages. 453 U.S. at 5, 12. Rejecting those claims, the Court held that "the federal common law of nuisance is entirely preempted by the more comprehensive scope of the FWPCA [and the MPRSA]," even though neither statute afforded a private damage remedy. *Id.* at 13-18, 21-22. *Sea Clammers* thus reiterates that when Congress enacts a statute that "speaks to" a given subject area without providing for private recovery of damages, no such recovery may be awarded under federal common law.

Lower federal courts have not hesitated to apply *Milwaukee II* and *Sea Clammers* to foreclose preexisting judge-made remedies purporting to afford relief more expansive than that afforded under federal pollution statutes. In *Conner v. Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), the First Circuit confirmed that the reasoning of *Milwaukee II* and *Sea Clammers* applies equally to federal common law claims alleged specifically to arise under federal *maritime* law. In *Conner*, Massachusetts fishermen sought damages under the maritime common law of nuisance for injuries suffered when coastal pollution discharges caused the state to restrict commercial fishing. 730 F.2d at 836. The court held that the FWPCA displaced the maritime common law nuisance claims even though the Act itself did not provide a compensatory damages remedy for private parties:

> The Act does not provide a compensatory remedy for losses of the type complained of here. It does authorize the government to remove hazardous substances discharged into navigable waters and to recover at least part of the cost. 33 U.S.C. § 1321(c)(1) and (f)(2). Present plaintiffs allege that the damage is irreversible, and the cleanup provisions may thus provide no relief. [¶] The Supreme Court has emphasized, however, the comprehensiveness of the policy implemented in FWPCA rather than the adequacy of the implementation. "*The lesson of Milwaukee II is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution.*"

730 F.2d at 840-41 (emphasis added) (quoting *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478

(7th Cir. 1982)).[3] *See also National Audubon Soc'y v. Department of Water*, 869 F.2d 1196, 1200 (9th Cir. 1988) ("[t]he Court's statement [in *Sea Clammers*] that federal common law nuisance claims for water pollution are preempted by the FWPCA is unequivocal ...").

Finally, in *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981), the Second Circuit held that these same principles apply fully to traditional maritime negligence claims as well as maritime nuisance claims. *Oswego* involved not the FWPCA's NPDES permitting scheme, but rather the separate provision of that Act dealing with federal government recovery of oil spill cleanup costs from owners of discharging vessels. The cleanup cost provision gives the government a strict liability remedy against the vessel owner up to a specified limit, with additional liability thereafter contingent on a showing of "willful negligence or willful misconduct within the privity and knowledge of the owner." 33 U.S.C. § 1321(f)(1); *see also Oswego*, 664 F.2d at 333 & n.8. At issue in *Oswego* was whether the liability limits specified for the government's statutory remedy foreclosed the government's pursuit of the vessel owner for additional compensatory relief under judge-made maritime remedies for negligence or nuisance. *Id.* at 333-34.

Even before *Milwaukee II*, several courts had examined this issue and concluded that to sanction such non-statutory cleanup cost recoveries would impermissibly nullify the statutory liability limits .[4] *Oswego* is noteworthy for Judge Newman's scholarly opinion, which exhaustively analyzed the issue under the broad separation of powers rationale of *Milwaukee II* and *Sea Clammers.* The court began by observing that, "as [*Milwaukee II*] instructs, ... the doctrine of separation of powers creates a *presumption* that legislation preempts the role of federal judges in developing and applying federal common law ..." 664 F.2d at 339 (emphasis added). While noting that this presumption sometimes may apply "less forcefully" in the maritime area in light of the greater "law-creating functions for federal courts," the court emphasized that "statutory ... preemption of maritime law has occurred both as to prior judge-made law and the authority to fashion new law." *Id.* at 337. Citing *Higginbotham*, the court concluded that the "presumption of legislative preemption" applies to judge-made maritime law. *Id.* at 337-38.

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[3] Foreshadowing the later decisions of the Supreme Court in *Tallentire* and the Ninth Circuit in *Bergen*, the *Conner* court further held that a court could not circumvent such statutory displacement of maritime remedies by "borrowing" analogous remedies available under state law. 730 F.2d at 842.

The court further enumerated the relevant factors to consider in determining whether that presumption may be overcome in any given case:

> Ultimately determining whether non-statutory maritime law, as to both liabilities and remedies, survives enactment of a statute requires careful analysis of several

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[4] *See United States v. Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979); *United States v. Tug J.P. McAllister*, 1981 A.M.C. 780, 789-91 (D.P.R. 1980); *United States v. M/V Big Sam*, 480 F. Supp. 290 (E.D. La. 1979), *rev'd in part on other grounds*, 681 F.2d 432 (5th Cir. 1982), *reh'g denied*, 693 F.2d 451 (5th Cir. 1982).

> factors that the Supreme Court has considered relevant in assessing whether the presumption of preemption has been overcome. Any terms of the statute explicitly preserving or preempting judge-made law are of course controlling, as is clear evidence of Congressional intent to achieve such results. In the absence of clearly expressed legislative intent, legislative history may provide useful guidance.... A judgment must be made whether applying judge-made law would entail "filling a gap left by Congress' silence" or "rewriting rules that Congress has affirmatively and specifically enacted." ... The detail and comprehensiveness of a statute will frequently aid this determination. Finally, Congress is less likely to have intended preemption of "long-established and familiar principles" of "the common-law or the general maritime law."

Id. at 339 (citations omitted).

Applying these factors, the court readily concluded that the "comprehensive remedial scheme" embodied in the FWPCA's cleanup cost provision precluded the government from pursuing potentially broader remedies under general maritime law:

> Without any doubt the FWPCA legislates on the subject of recovery by the United States of its costs of cleaning up oil spilled into American waters. Section 1321(f) establishes a comprehensive remedial scheme providing for both strict liability up to specified limits and recovery

> of full costs upon proof of willful negligence or willful misconduct within the privity and knowledge of the owner. *We must therefore start with a presumption that non-FWPCA maritime liabilities and remedies for oil spill clean up costs of the United States have been preempted.*

Id. at 339-40 (emphasis added). The court found nothing to rebut this presumption in either the statute or the legislative history. Focusing principally on the language of several savings clauses included in the cleanup cost provision,[5] the court pointedly observed that none of those clauses preserved any preexisting non-statutory right to recoup cleanup costs:

> [I]t would be ... anomalous for Congress to have drafted express language to preserve [other non-statutory] remedies ... while leaving the preservation of [non-statutory cleanup cost] remedies against shipowners to be inferred by courts. *Once Congress legislates comprehensively on the subject of Government remedies for oil spill clean up costs, the responsibility lies with Congress to spell out expressly what, if any, role remains for courts to fashion and apply non-statutory remedies.* None of the savings clauses of the Act preserves the non-statutory remedies the Government is asserting in this case.

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[5] *See* 33 U.S.C. § 1321(h)(2) (preserving government's rights against third parties); 33 U.S.C. § 1321 (o)(1) (preserving claims for property damage).

Id. at 341 (emphasis added).[6] After reviewing the other relevant factors noted above, the court concluded, as in *Higginbotham*, that judicial supplementation of the government's express statutory remedies would be inappropriate. "To permit a judge-made remedy so significantly different from the one Congress has expressly provided would amount to rewriting the rule that Congress has enacted." Oswego, 664 F.2d at 344.[7]

We now turn to the single question crucial to the application of *Higginbotham* and its progeny to this case; that is, whether TAPAA provides a comprehensive remedy that displaces judicial supplementation.

B. TAPAA Displaces the General Maritime Law of Punitive Damages

TAPAA was intended "to facilitate the development and delivery of oil and gas and, at the same time, to protect the environment." *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1476 (9th Cir. 1992) (quoting *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 873 (9th Cir. 1981)). "[T]o deal with the environmental risks of the pipeline," Congress enacted a comprehensive regime of strict liability for pipeline-related oil spills in § 1653. *Slaven*, 973 F.2d at 1476 (quoting *Heppner*, 665 F.2d at 868). Section 1653(a) imposes strict liability on the holders of the pipeline right-of-way for damages resulting from environmental accidents along the right-of-way. *Heppner*, 665 F.2d at 874. Section 1653(c)--with which this Court is by now very familiar--covers spills from vessels carrying TAPS oil.

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[6] *Accord, Dixie Carriers*, 627 F.2d at 739-42; *Steuart Transp. Co.*, 596 F.2d at 615-19.

[7] Since *Oswego* was decided, numerous other courts have followed its reasoning, favorably citing Judge Newman's separation of powers analysis and reaching similar results. *See, e.g., Conner*, 735 F.2d at 839; *United States v. M/V Big Sam*, 681 F.2d 432, 442 (5th Cir. 1982), *reh'g denied*, 693 F.2d 451 (5th Cir. 1982); *Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader*, 760 F. Supp. 174, 175-78 (W.D. Wash. 1991).

As this Court has acknowledged, § 1653(c) creates "a comprehensive liability scheme for marine spills of Trans-Alaska Pipeline System (TAPS) oil." *In re the Glacier Bay*, 741 F.Supp. 800, 802 (D. Alaska 1990), *aff'd*, 944 F.2d 577 (9th Cir. 1991). The statute imposes strict liability, up to a maximum of $100 million per incident, for "all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil" from vessels carrying TAPS oil. 43 § U.S.C. 1653(c)(1),(3). The first $14 million of such liability falls on the owner and operator of the vessel and the remainder falls on the Trans-Alaska Pipeline Liability Fund ("the Fund"). *Id.* § 1653(c)(3).

In the event the total claims allowed exceed $100 million, the Fund must reduce all payments proportionately, and the claimants may assert claims for the unpaid portions of allowed claims against any responsible party under other applicable federal or state law. *Id.* § 1653(c)(3). Upon payment of allowed claims, both the Fund and the vessel owner become subrogated to the rights of the claimants under applicable federal or state laws for purposes of litigating fault with each other or third parties. *Id.* § 1635(c)(8). In the event the Fund brings a subrogation claim against the vessel owner and the vessel owner fails to satisfy it, the Fund may recover from any "affiliate" of the vessel owner. *Id.* § 1653(c)(8),(11).

Congress clearly intended the foregoing provisions to operate as a "comprehensive remedial scheme" for TAPS oil spills. The Ninth Circuit emphasized that very point at length in its decision in *Glacier Bay*. Affirming this Court's holding that TAPAA impliedly repealed the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. §§ 181-89, the court characterized § 1653(c) as "a comprehensive liability scheme, which includes, as necessary elements, both strict liability and negligence principles." 944 F.2d at 582.

The Ninth Circuit then went on to explain the workings of that scheme in great detail. Turning to the strict liability component first, the court emphasized the statute's overriding compensatory purpose:

> TAPAA establishes a comprehensive liability scheme applicable to damages resulting from the transportation of trans-Alaska pipeline oil.... The vessel owner and the Fund must initially pay $100,000,000 of liability regardless of fault. This strict liability provision ensures that trans-Alaska oil spill victims receive prompt compensation without resort to prolonged litigation....

Id. at 580-82. The court further explained that in addition to imposing strict liability for damages sustained by injured parties, the statute was intended to assure, through potential subrogation actions by the parties *against* whom strict liability was imposed, that any party whose negligence caused such a spill could ultimately be held responsible for such damages:

> [I]n TAPAA, Congress did not simply create a strict liability statute. Congress did not intend the owner and Fund to pay for damages caused by either the unseaworthiness of the vessel or negligence. It therefore included the subrogation section, allowing, for example, the Fund to seek reimbursement of its strict liability contribution from the owner in the event that owner negligence caused the spill. The effect of the subrogation section is clearly to provide those involved in the transportation of trans-Alaska oil an incentive to operate in a safe manner....

Id. at 582. Summing up Congress' overall design, the Ninth Circuit concluded:

> TAPAA is intended to operate as a whole, not as independent parts. After an oil spill, innocent victims receive prompt compensation. Then, the parties involved with the transportation of the spilled oil and the Fund litigate fault. Ultimately, the costs of the spill are borne by the responsible party.... *The comprehensive nature of TAPAA cannot be overemphasized....*We can only conclude that TAPAA was designed to supersede any conflicting law; by TAPAA's nature, it was intended to become *the* controlling statute with regard to trans-Alaska oil.

Id. at 582-83 (first emphasis added). *Accord, Slaven,* 973 F.2d at 1473-76 ("[T]he purpose of section

1653(c) is to make the producers of Alaskan crude fully bear the risks and environmental costs of transporting oil.... [The statute represents] Congress's dedicated effort to enact a 'comprehensive remedial' scheme for [TAPS] oil spills").

Given TAPAA's comprehensive nature, the *Milwaukee II* "presumption of preemption" clearly applies. To paraphrase *Oswego*, "[w]e must therefore start with the presumption that non-[TAPAA] ... maritime liabilities and remedies for oil spill[s] ... have been preempted." 664 F.2d at 340. If Congress, having enacted the comprehensive remedial scheme embodied in TAPAA, did not expressly authorize or preserve punitive damage claims, then to allow them under the general maritime law would directly contravene the Supreme Court's "admonition [in] *Miles* that courts are not to 'sanction more expansive remedies in a judicially-created cause of action than Congress has allowed....'" *La Foie*, 797 F. Supp. at 831. As stated in *Oswego*, "[o]nce Congress legislates comprehensively on the subject of ... remedies for oil spill[s] ..., the responsibility lies with Congress to spell out expressly what, if any, role remains for the courts to fashion and apply non-statutory remedies." 664 F.2d at 341.

In the case of TAPAA, nothing in the statute suggests *any* role for private punitive damage claims. At the outset, it is clear that there is no claim for punitive damages under the Act itself. Section 1653(c)(1) expressly limits liability to "damages ... sustained by [the claimant] ... as the result of" an oil spill. This language on its face excludes punitive damages. As has been held by courts construing similar language defining recoverable damages in commercial air crash cases: "[t]he term ... 'damage sustained' is entirely compensatory in tone.... Punitive damages are intended to penalize the wrongdoer in order to benefit society, and as such are not 'sustained' by the victim." *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1486 (11th Cir. 1989), *rev'd in part on other grounds,* 111 S. Ct. 1489 (1991) (Warsaw Convention's provision for recovery of "damage sustained" did not authorize recovery of punitive damages)[8]

Similarly, no provision of TAPAA authorizes or otherwise preserves claims for punitive damages under other applicable law. While the Act contains several provisions that contemplate the possibility of non-statutory claims for *compensatory* damages, none is drafted broadly enough to encompass non-statutory claims for *punitive* damages. The most obvious example is the proration provision, § 1653(c)(3), which provides in pertinent part:

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[8] *Accord, In re Korean Airlines Disaster of September 1, 1983,* 932 F.2d 1475, 1485-86 (D.C. Cir. 1991); *In re Air Disaster at Lockerbie, Scotland,* 928 F.2d 1267, 1280-82 (2d Cir. 1991) (both holding that Warsaw Convention's reference to "damages sustained" did not encompass punitive damages).

TAPAA's implementing regulations further confirm this fact. Consistent with §1653(c)(1)'s restriction of liability to "damages ... sustained by" the claimant, the regulations define "damages" to mean "any economic *loss*, arising out of or directly resulting from an incident, ..." 43 C.F.R. § 29.1(e) (emphasis added). This formulation likewise forecloses any claim for punitive damages. *See Bergen*, 816 F.2d at 1349 ("punitive damages have nothing to do with losses suffered"). And, as the Ninth Circuit recently held in *Slaven*, courts should "accord [TAPAA's implementing] regulations 'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute'"). 973 F.2d at 1476 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

> If the total claims allowed [by the Fund] exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

On its face, this provision speaks only to the "unpaid portion of any claim" that is "allowed" by the Fund but "reduced proportionately" because of proration. As discussed above, Fund-allowed claims--*i.e.*, strict liability claims allowed pursuant to § 1653(c)(1)--are limited to compensatory damages only. The "unpaid portion" of a prorated Fund-allowed claim therefore could not, by definition, include punitive damages. The proration provision accordingly provides no evidence that Congress contemplated supplemental litigation of *punitive* damage claims.

A similar analysis applies to TAPAA's subrogation provision, § 1653(c)(8). That provision self-evidently preserves only the rights of parties *against* whom strict liability is imposed (such as the vessel owner or the Fund) to recover damages from parties ultimately at fault for a spill. *See Glacier Bay*, 944 F.2d at 582. It preserves no claims at all for TAPAA plaintiffs, and even as to TAPAA defendants, it would appear to preserve, at most, claims for recoupment of sums paid out to satisfy strict liability claims for compensatory damages.

Nor are punitive damages preserved by TAPAA's extremely limited savings clause, § 1653(c)(9), which is the only other provision of the Act addressing non-statutory remedies. The savings provision states only that "[t]his section shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements." The first part of this clause on its face preserves only the law of strict liability--*i.e.*, liability *without* fault--and accordingly cannot be construed to authorize supplemental punitive damage claims. The second part is limited to *state*-imposed requirements. Ignoring for the moment its use of the conspicuously narrow term "requirements," this phrase cannot be construed to authorize the imposition of anything, in the nature of a "requirement" or otherwise, under *federal* maritime law. Since federal maritime law is the only possible source of punitive damages in this case (see pp. 22-25, *infra*), the phrase cannot be construed to authorize supplemental punitive damages claims. Cf. Order No. 38 (Clerk's Docket No. 1178), reported as *In re the Exxon Valdez*, 767 F. Supp. 1509, 1515-16 (D. Alaska 1991) (construing § 1653(c)(9) as limited grant of permission for states to enact strict liability laws not inconsistent with TAPAA or other general maritime law).[9]

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[9] In context, the narrow term "requirements" obviously refers to financial responsibility or other substantive regulatory requirements which are properly ancillary to a strict liability scheme. *See* H.R. Conf. Rep. No. 624, 93rd Cong., 1st Sess. 28-29 (1973), *reprinted in* 1973 U.S. Code Cong. & Adm. News 2523, 2530-31 ("Conference Report"). Construing § 1653(c)(9) to authorize state-law punitive damages would contravene not only maritime choice of law principles but also the narrow reading accorded similar statutory language in analogous contexts. Cf. *United States Department of Energy v. Ohio*, 112 S. Ct. 1627, 1639-40 (1992) (federal environmental statute subjecting federal facilities to state-imposed "requirements" referred to "substantive standards" and did not authorize state imposition of "punitive measures").

In short, although TAPAA contains several provisions contemplating resort to non-statutory remedies for non-TAPAA relief, none of those provisions contains even a suggestion that Congress contemplated resort to such remedies for purposes of recovering punitive damages. Indeed, the very fact that Congress expressly contemplated and preserved such non-statutory remedies in the limited instances where it did so post-proration claims, subrogation claims and non-TAPAA strict liability claims preserved by § 1653(c)(9) is strong evidence that it did *not* intend broader preservation of more expansive judge-made remedies under general maritime law. To paraphrase *Oswego* once again, "it would [have been] ... anomalous for Congress to have drafted express language to preserve [limited compensatory claims] while leaving the preservation of [punitive damage claims] to be inferred by the courts." 664 F.2d at 341. The "presumption of preemption" is not overcome, and punitive damage claims asserted in connection with TAPS oil spills must be deemed displaced.

The narrow scope of § 1653(c)(9) is further confirmed by comparison with the broader savings clause of the FWPCA's oil spill provision. Congress modeled several of TAPAA's other provisions on the FWPCA. *See* 43 U.S.C. § 1653(c)(3) (incorporating by reference FWPCA financial responsibility requirements set forth in 33 U.S.C. § 1321(p)); Conference Report at 2530-31 (noting that TAPAA adopted FWPCA dollar limits on vessel owner strict liability). In marked contrast to its TAPAA counterpart, the FWPCA's oil spill provision specifically preserves state authority to impose "requirement[s] *or liabilit[ies]* with respect to the discharge of oil ...." 33 U.S.C. § 1321(o)(2) (emphasis added). TAPAA's conspicuous omission of additional "liabilities" (other than strict liability) as distinguished from "requirements" forecloses any interpretation of § 1653(c)(9) as authorizing punitive damages.

The remaining considerations identified in *Oswego* compel the same conclusion. The first inquiry is whether, despite all of the foregoing, allowing a judge-made punitive damages remedy would permissibly "fill[] a gap left by Congress' silence." 664 F.2d at 339. As discussed in the previous section, the Ninth Circuit's *Bergen* decision conclusively answers that question in the negative. *Bergen* flatly rejected an identical argument that Congress, by enacting a remedial statute providing for limited compensatory damages only, had not also "spoken to" the issue of punitive damages. 816 F.2d at 1348-49. It was enough that Congress had adopted a remedial scheme speaking to the tort in question--in that case, wrongful death on the high seas. Congress having done so, courts were not free to "supplement" the scheme with more expansive judge-made remedies. *Id.* It is beyond dispute that "[w]hen Congress enacted TAPAA, Congress spoke directly to the issue of TAPS oil spills." Order No. 38, 767 F. Supp. at 1515. *Bergen* is therefore controlling and any "gap filling" argument must be rejected. *Accord, Milwaukee II*, 451 U.S. at 324 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner"); *Conner*, 730 F.2d at 841 ("The lesson of *Milwaukee II* is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution").[10]

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[10] For the same reason, any argument that a court may "import" or "borrow" a supplemental punitive damages remedy from state law must be rejected as well. The argument is

Nor can it credibly be argued that, as of TAPAA's 1973 enactment, punitive damages constituted "long-established and familiar principles" of general maritime law which Congress should not lightly be presumed to have abandoned. *Oswego*, 664 F.2d at 339. Prior to 1973, no reported federal appellate decision had ever affirmed an award of punitive damages under general maritime law.[11] While a few early maritime cases discussed the possibility of awarding "vindictive" damages for what amounted to intentional misconduct,[12] they virtually never did so in practice.[13] By opting not to authorize punitive

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foreclosed entirely by the decisions in *Tallentire, Bergen*, and *Conner*, all discussed in the previous section.

[11] The first federal appellate decision to do so was *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973). *Robinson* awarded punitive damages against a shipowner for willful failure to pay "maintenance and cure" to an injured seaman. Twenty years later, however, courts still disagree on the threshold issue of whether punitive damages should be available for such conduct. *See La Voie*, 797 F. Supp. at 831-32 & nn.3-4.

[12] *See, e.g., The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) (unlawful boarding and plundering of neutral ship); *Pacific Packing & Nav. Co. v. Fielding*, 136 F. 577 (9th Cir. 1905) (wrongful imprisonment of ship's purser by ship's master); *The Normannia*, 62 F. 469 (S.D.N.Y. 1894) (fraud on steamship passenger); *Gallagher v. The Yankee*, 9 F. Cas. 1091 (N.D. Cal. 1859) (No. 5196) (unlawful deportation of United States citizen); *Ralston v. The State Rights*, 20 F. Cas. 201 (E.D. Pa. 1836) (No. 11,540) (use of icebreaker to ram vessels of competing steamship line).

[13] *See, e.g., The Amiable Nancy*, 16 U.S. at 558-59; *Pacific Packing*, 136 F. at 579-80; *The Normannia*, 62 F. at 479-80; *Ralston*, 20 F. Cas. 201. The only reported 19th Century federal maritime decision in which punitive damages were actually awarded appears to have been *Gallagher*, 9 F. Cas. 1091, in which the court assessed punitives of $3,000 against a ship's

damages for oil spills from TAPS vessels, Congress departed from no "long-established and familiar principles" of maritime law. On the contrary, Congress' treatment of punitive damages in TAPAA conformed precisely to the *de facto* treatment of punitive damages in admiralty for the preceding 200 years.

Moreover, allowing punitive damages would have *undermined* TAPAA's central aims. Congress intended TAPAA both to promote early development of North Slope oil and to provide prompt compensation for spill victims through a strict liability scheme with limits keyed to, *inter alia*, the availability of marine insurance.[14] Punitive damages inhibit development, increase uncertainty, impair insurability and prolong litigation. *Cf. Korean Air Lines*, 932 F.2d at 1489-90; *Lockerbie*, 928 F.2d at 1287-88 (both holding punitive damages incompatible with Warsaw Convention objectives analogous to those of TAPAA). Given their unpredictable character and potentially devastating impact, punitive damages would impermissibly disrupt the balance struck by Congress.

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master who knowingly transported a United States citizen to the Sandwich Islands in furtherance of an unlawful "sentence" of deportation by a shoreside "vigilance committee."

[14] *See* 43 U.S.C. § 1651(a) ("[t]he early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and an increasing dependence on insecure foreign sources"); Conference Report at 2530-31 ($14 million limit intended to avoid "too heavy an insurance burden" on vessel owners).

C. Judge-Made Federal Maritime Law Governs All Punitive Damage Claims in This Case

The last issue posed is a simple one: Do the prayers for punitive damages in these cases have any source other than judge-made federal law? This Court has repeatedly held that they do not; they can only arise under federal common law, *i.e.*, the general maritime law. The EXXON VALDEZ spill was a maritime tort and is governed by federal maritime law. *See* Order No. 38, 767 F. Supp. at 1511-13 (citing cases).[15] As this Court explained:

> "[W]hen a common law action is brought, whether in a state or in a federal court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied by an admiralty court--that is, the general maritime law, as declared by the Supreme Court of the United States, or as modified from time to time by act of Congress."

767 F. Supp. at 1513 (citation omitted); *accord, Unigard Security Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 366 n.1 (9th Cir. 1992) ("Substantive maritime law controls tort claims

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[15] *See also* Order No. 109 (Clerk's Docket No. 3161) at 12 ("[O]il spills from tank vessels ... are maritime torts"); Order No. 121 (Clerk's Docket No. 3194) at 7 ("[T]he oil spill and the resulting damages constituted a maritime tort .... Regardless of the forum, state or federal, the substantive law to be applied is federal maritime law"); Order re Motion to Dismiss or Stay (filed Nov. 13, 1992 in *Exxon Shipping Co. v. Airport Depot Diner*, No. A91-222 Civil) at 8 ("[T]he issues [in this case] are governed by federal maritime law, not state law").

arising on navigable waterways of the United States with a sufficient nexus to traditional maritime activity, whatever the forum or asserted basis of jurisdiction").

Punitive damages can be available in this case *only* to the extent that they are recognized and awarded as a matter of federal maritime law. As the Ninth Circuit expressly has held, "federal law, rather than state law, controls the damages issue when the cause of action arises under maritime law." *Protectus Alpha Nav. Co. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985) (punitive damage claim for maritime tort arose under general maritime law). Further, punitive damages under maritime law are without dispute a purely judicial invention. And even as a judge-made remedy, "punitive damages are not a favorite of the law and are never awarded as of right." *Id.* In short, it would be difficult to imagine a judge-made federal remedy more clearly and appropriately subject to the doctrine of statutory displacement than the punitive damage claims asserted by plaintiffs here. Under *Higginbotham* and its progeny (including *Miles*, *Milwaukee II*, *Sea Clammers*, *Bergen* and *Oswego*), the enactment of TAPAA displaced this disfavored remedy and left no room for any award of punitive damages in this case.

III. CONCLUSION

For all the reasons stated above, TAPAA displaces the general maritime law of punitive damages, and all punitive damage claims pending against the Exxon and Alyeska defendants should be dismissed.

Dated at Anchorage, Alaska this 15th day of

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re) No. A89-095 Civil
the EXXON VALDEZ) (Consolidated)

ORDER NO. 158

Motions for partial summary judgment
Punitive damages: TAPAA displacement

The Exxon defendants[1] and the Alyeska defendants,[2] collectively "defendants", filed a motion for partial summary judgment,[3] seeking to dismiss plaintiffs' prayers for punitive damages.[4]

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[1] Comprised of Exxon Corporation (D-1), Exxon Shipping Company (D-2), and Exxon Pipeline Company (D-10).

[2] Comprised of Alyeska Pipeline Service Company (D-3), George Nelson (D-9), Amerada Hess Corporation (D-11), Arco Transportation Alaska, Inc. (D-12), Mobil Alaska Pipeline company (D-14), BP Pipelines (Alaska), Inc. (D-19), Phillips Alaska Pipeline Corporation (D-20), and Unocal Pipeline Company (D-21).

[3] Clerk's Docket No. 3462.

[4] Punitive damages are a form of relief, not a cause of action. Dr. Franklin Perkins Sch. v. Freeman, 741 F.2d 1503, 1524 (7th Cir. 1984).

Defendants argue that the Trans-Alaska Pipeline Authorization Act ("TAPAA"), 43 U.S.C. §§ 1651-56, displaces general maritime law. Cousins (D-8) joins in the motion.[5] Plaintiffs oppose the motion.[6] Defendants filed a reply,[7] with the Alyeska defendants additionally filing another reply.[8]

Joseph Hazelwood (D-7) filed his own motion for partial summary judgment based upon the TAPAA displacement.[9] Hazelwood relies upon the motion filed by the Alyeska defendants and the Exxon defendants.[10] Plaintiffs oppose, relying upon their

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> A punitive damage claim is not an independent cause of action or issue separate from the balance of a plaintiff's case. It is part and parcel of a liability determination and does not have any independent being until a jury has decided, based on the preponderance of the evidence, that not only was a defendant's conduct negligent, but that it was gross, willful, wanton or malicious.

Mason v. Texaco, Inc., 948 F.2d 1546, 1554 (10th Cir. 1991), cert denied, 112 S.Ct. 1941 (1992); accord Elliott v. State Farm Mut. Auto. Ins. Co., 786 F. Supp. 487, 491 (E.D. Pa. 1992).

[5] Clerk's Docket No. 3584.

[6] Clerk's Docket No. 3541.

[7] Clerk's Docket No. 3594.

[8] Clerk's Docket No. 3595. This reply does not comply with the Local Rules. Rule 6(D)(1) requires double spacing. Moreover, both replies do not comply with the spirit of the Local Rules. Both use smaller than normal type, which is dizzying to read, especially coupled with the lack of margins on the right-hand side of the page. Rule 6(E) requires clear and legible documents. These replies fall short of that mark. Similar documents in the future will be rejected.

[9] Clerk's Docket No. 3488.

[10] Clerk's Docket No. 3462.

opposition in the Alyeska and Exxon motion.[11] However, plaintiffs represented by the law firm of Faegre & Benson submit their own memorandum in opposition on behalf of all plaintiffs in cases removed from the state court, notwithstanding that Faegre & Benson does not represent all plaintiffs removed to this court, to focus upon the availability of punitive damages under state law.[12] Hazelwood replied,[13] relying upon the replies of the Alyeska defendants and the Exxon defendants.[14] Thus, the TAPAA displacement motions are fully briefed and are ready for decision by this court.[15] Oral argument has been heard and the court now renders its decision.

Plaintiffs suggest that this court defer a decision on these motions until after the Ninth Circuit resolves the pending interlocutory appeal dealing with this court's denial of remand motions. This court declines to defer its decision, finding that a decision on the availability of punitive damages needs to be made regardless of the Ninth Circuit's decision on the remand question.

This is a motion for partial summary judgment and the standards provided in Rule 56, Federal Rules of Civil Procedure, apply. No inquiry into facts is necessary to decide this motion. It is purely a legal question whether TAPAA displaces general maritime law and the availability of punitive damages. This court may grant partial summary judgment, dismissing all punitive damages, if defendants show that they are "entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.[16]

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[11] Clerk's Docket No. 3541.

[12] Clerk's Docket No. 3552.

[13] Clerk's Docket No. 3586.

[14] Clerk's Docket Nos. 3594 & 3595.

[15] Because defendant Cousins joined in the motion so late, this court did not allow additional briefing by him. Clerk's Docket No. 3582.

Defendants argue that when Congress "speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 and 625 (1978) (construing the "pecuniary loss" limitation of the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-767,[17] to deny loss of society damages because "Congress has struck the balance for us"). This is because "[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." Mobil Oil, 436 U.S. at 625; accord Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 233 (1986) (finding that DOHSA preempts state statutes because the Court "defer[s] to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas, an area where the federal interests are primary"); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (construing the Jones Act, 46 U.S.C. § 688, to disallow nonpecuniary damages because the Jones Act incorporates the Federal Employees' Liability Act ("FELA"), which contains an explicit pecuniary loss limitation). The Miles court stated:

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[16] Plaintiffs submit that typical summary judgment standards do not apply because defendants' motion rests upon plaintiffs' allegations. Plaintiffs submit that the court ought to treat defendants' motion as a motion for judgment on the pleadings, which is governed by the same standard as a motion to dismiss. See e.g., Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1387 n.6 (9th Cir. 1987), appeal dismissed and cert. denied, 486 U.S. 1040 (1988). Under either standard, however, the result is the same.

[17] Title 46 U.S.C. § 762 provides that: "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought".

> In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.

Miles, 498 U.S. at 27. Defendants argue that in enacting TAPAA, Congress has set the boundaries. Defendants argue that TAPAA does not provide for punitive damages, that this court may not "supplement" TAPAA by reference to common law because "Congress has struck the balance", and, therefore, punitive damages are not recoverable by plaintiffs. See Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993) (finding that Miles precluded "wives of injured mariners [from] ... recover[ing] for loss of society and loss of consortium in their own actions filed under the Jones Act or under general admiralty law"); Bergen v. F/V St. Patrick, 816 F.2d 1345 (9th

Cir. 1987), modified on other grounds, 866 F.2d 318 (9th Cir.), cert. denied, 493 U.S. 871 (1989) (disallowing punitive damages because DOHSA displaces punitive damages recoverable under general maritime law); Kopczynski v. The Jacqueline, 742 F.2d 555 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985); In re Aleutian Enter., Ltd., 777 F. Supp. 793 (W.D. Wash. 1991); Jackson v. Unisea, Inc., 824 F. Supp. 895 (D. Alaska 1992).

The court must make clear what it is deciding. The court is deciding whether Congress intended TAPAA to displace federal common law, not whether Congress intended TAPAA to preempt state law.[18] "[T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law." City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981) ("Milwaukee II") (citing judicial deference to Congressional legislative judgments, the Court found that the Clean Water Act amendments displaced the federal common law nuisance remedy). An intent to displace federal common law can be ascertained by assessing the scope of the legislation and determining whether the legislation addresses a problem formerly governed by federal common law. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981) (citing the comprehensive nature of the federal statute displacing the federal common law).

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[18] This court has had occasion to discuss TAPAA's preemptive effect upon state law. The court found that TAPAA preempted AS 46.03.822, the Alaska statute providing for strict liability for oil spills, to the extent that the Alaska statute was inconsistent with TAPAA. In re the Exxon Valdez, 767 F. Supp. 1509, 1515 (D. Alaska 1991) ("Order No. 38"). This is because "states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not actually conflict with federal law or interfere with the uniform working of the maritime legal system." Pacific Merchant Shipping Ass'n v. Aubry, 918 F.2d 1409, 1422 (9th Cir. 1990), cert. denied, 112 S.Ct. 2956 (1992) (detailing three instances when Congress' intent is to preempt: when Congress expressly states; when Congress legislates so comprehensively that no room is left for state regulation; or when state law conflicts with federal law).

> Ultimately determining whether non-statutory maritime law . . . survives enactment of a statute requires a careful analysis of several factors that the Supreme Court has considered relevant in assessing whether the presumption of preemption has been overcome. Any terms of the statute explicitly preserving or preempting judge-made law are of course controlling, as is clear evidence of Congressional intent to achieve such results. In the absence of clearly expressed legislative intent, legislative history may provide useful guidance. The "scope of the legislation" must be assessed....A judgment must be made whether applying judge-made law would entail "filling a gap left by Congress' silence" or "rewriting rules that Congress has affirmatively and specifically enacted." . . . The detail and comprehensiveness of a statute will frequently aid this determination. Finally, Congress is less likely to have intended preemption of "long-established and familiar principles" of "the common law or the general maritime law."

In re Oswego Barge Corp., 664 F.2d 327, 338-39 (2nd Cir. 1981) (footnotes omitted and citations omitted); National Audubon Soc'y v. Dep't of Water, 869 F.2d 1196, 1200-01 (9th Cir. 1988); Conner v. Aerovox, Inc., 730 F.2d 835 (1st Cir. 1984), cert. denied, 470 U.S. 1050 (1985); Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 618 (4th Cir. 1979).[19]

The obvious starting point in determining whether TAPAA was intended to displace federal common law is the statute itself. An intent to displace federal common law can be ascertained by assessing the scope of the legislation and determining whether the legislation addresses a problem formerly governed by federal common law. Middlesex County, 453 U.S. 1. TAPAA unquestionably addresses a problem formerly governed by federal common law. The real issue concerns the scope of TAPAA.

Title 43 U.S.C. § 1653(c)(1) provides:

> Notwithstanding the provisions of any other law ... the owner and operator of the vessel ... shall be strictly liable ... for

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[19] The Steuart court stated:

> We therefore conclude that § 1321(f)(1) [of the Clean Water Act] was designed to replace, rather than to supplement, the judicial remedies developed in the absence of a comprehensive statute. Since the judicial remedies are inconsistent with the statute, the statute provides the sole means for the federal government to recover oil removal costs.

Steuart, 596 F.2d at 618; accord United States v. M/V Big Sam, 681 F.2d 432, 442 (5th Cir. 1982), cert. denied, 462 U.S. 1132 (1983); Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader, 760 F. Supp. 174, 175-78 (W.D. Wash. 1991).

> all damages ... sustained ... as the result of discharges of oil from such vessel.

(emphasis added). However, "[s]trict liability ... shall not exceed $100,000,000." 43 U.S.C. § 1653(c)(3). Because of this dollar limit, TAPAA provides that "[t]he unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law." 43 U.S.C. § 1653(c)(3).

TAPAA further provides that "[t]his subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements." 43 U.S.C. § 1653(c)(9). Any party upon whom strict liability is imposed may recover the damages it paid in strict liability against any negligent party. 43 U.S.C. § 1653(c)(8).

TAPAA is only concerned with strict liability and the subrogation rights of those entities held strictly liable. TAPAA does not discuss punitive damages. Defendants submit that plaintiffs cannot take much solace in TAPAA's failure to expressly discuss punitive damages. Defendants argue that the reference in § 1653(c)(1) to "all damages", which are "sustained" necessarily limits TAPAA's contemplated damages to compensatory damages only. The argument of defendants is that punitive damages are not "sustained". Punitive damages are imposed by law as punishment. See e.g., Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1486 (11th Cir. 1989), rev'd on other grounds, 499 U.S. 530 (1991) (holding that the phrase " 'damage sustained' is entirely compensatory in tone "); accord Rein v. Pan Am World Airways, Inc. (In re Air Disaster at Lockerbie Scotland), 928 F.2d 1267 (2nd Cir.), cert. denied, 112 S.Ct. 331 (1991); In re Korean Air Lines

Disaster, 932 F.2d 1475 (D.C. Cir.), cert. denied, 112 S.Ct. 616 (1991).

The difficulty with defendants' argument is that TAPAA is not intended to occupy the entire field of trans-Alaskan oil spills. TAPAA is certainly a comprehensive, remedial statute. Kee Leasing v. McGahan (In re the Glacier Bay), 944 F.2d 577, 583 (9th Cir. 1991); accord Slaven v. BP America, Inc., 973 F.2d 1468, 1476 (9th Cir. 1992). However, TAPAA was intended to provide plaintiffs with a new strict liability remedy.

TAPAA does not deal with liability based upon fault as between the injured party and the vessel owner or operator, except to the extent that TAPAA expressly preserves other remedies. 43 U.S.C. § 1653(c)(3) & (c)(9). Reading TAPAA to displace those other federal and state remedies would be to disregard Congress' plain language. TAPAA's silence as to punitive damages does not preclude plaintiffs' requests for punitive damages.[20]

This result is confirmed by inferences that can be drawn from the legislative history. Congress, in enacting TAPAA, stated:

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[20] The Department of Interior promulgated regulations under TAPAA. 43 U.S.C. § 1653(c)(4). These "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

The regulations define "damages" as "economic loss". 43 C.F.R. § 29.1(e). There can be no doubt that punitive damages are not economic losses. Thus, the Secretary's regulations are silent as to punitive damages. Given that TAPAA is silent as to punitive damages, the Secretary's regulation is completely consistent with the statute. This, however, does not answer the distinct question of displacement.

> [T]hat existing maritime law would not provide adequate compensation to all victims ... in the event of the kind of catastrophe which might occur. Consequently, the Conferees established a rule of strict liability for damages from discharges of the oil transported through the trans-Alaska Pipeline up to $100,000,000.
>
> Strict liability is primarily a question of insurance....Since the world-wide maritime insurance industry claimed $14 million was the limit of the risk they would assume, this was the limit provided ....

H.R. Conf. Rep. No. 624, 93rd Cong., 1st Sess. 28 (Nov. 7, 1973), reprinted in 1973 U.S. Code Cong. & Admin. News 2523, 2530. The legislative history shows that Congress wanted the full burden of risk to fall upon those who transported oil and that TAPAA's strict liability scheme was intended to reach the full extent of insurance. The legislative history does not show that Congress wanted to limit the exposure of those who transport trans-Alaskan oil to the extent of their insurance. Rather, Congress envisioned TAPAA as follows:

> [TAPAA is] a landmark provision for environmental protection and one that may well mark the standard for future oil spills everywhere. It is admittedly forcing a tougher liability standard on Alaskan oil than exists for other oil, but the House has consistently maintained that the environmental risks of transporting this oil

> were significantly greater. The oil companies have, in turn, consistently promised that both the pipeline and the sea leg were safe. We are doing no more than holding them to this promise.

119 Cong. Rec. 36,606 (Nov. 12, 1973). The stated legislative purpose of forcing a tougher standard on Alaskan oil is completely at odds with radically limiting a potential plaintiffs' remedy, one that is presumably available in the context of other oil spills. See e.g., In re Sause Bros. Ocean Towing, 769 F. Supp. 1147, 1155 (D. Or. 1991). This court "'can only conclude that if Congress had intended to make such an inroad on the rights of claimants ... it would have said so in unambiguous terms' and 'in the absence of a clear Congressional policy to that end, we cannot go so far.'" Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 302 (1959) (quoting Brady v. Roosevelt S.S. Co., 317 U.S. 575, 581 & 584 (1943)). The legislative history of TAPAA thus evidences Congress' concern about compensatory damages, evidences Congress' desire to impose liability without regard to fault, and, most importantly, evidences Congress' mandate that trans-Alaskan oil producers live up to a higher standard than others.

Congress, in enacting TAPAA, was expanding recovery, not restricting recovery. Congress intended TAPAA to speed up payments to injured persons. 43 U.S.C. § 1653(c)(3) (stating that "[t]he Fund shall expeditiously pay claims"). Congress dispensed with fault, but Congress did not intend to limit the liability of vessel owners and operators. Kee Leasing v. McGahan (In re the Glacier Bay), 741 F. Supp. 800, 804 (D. Alaska 1990), aff'd, 944 F.2d

577 (9th Cir. 1991)[21]; accord Slaven v. BP America, Inc., 973 F.2d 1468, 1474 (9th Cir. 1992). Rather, Congress designed TAPAA to provide quick, and by the plain language of TAPAA, not necessarily complete, recovery to the injured party. The fact that the remedy has proved not to be quick does not alter the Congressional intent of TAPAA.

Given that Congress intended to impose stricter conditions upon the transport of Trans-Alaskan oil, it would be illogical for Congress to have also disallowed punitive damages, especially when punitive damages are available as to oil spills not involving Trans-Alaskan oil. TAPAA was not intended to supply the entire field of potential liability and indeed TAPAA refers to other substantive law. Congress intended TAPAA to be the starting point. After the terms of TAPAA have been extinguished (that is, the $100 million has been paid), general maritime law applies with all its rights and remedies. TAPAA only displaces general maritime law to the extent of TAPAA's terms.[22]

There is some disagreement as to whether the punitive damages asserted in In re the Exxon Valdez, A89-095 Civil (Consolidated), are governed by federal maritime law. This court has repeatedly held that the Exxon Valdez oil spill is a maritime tort, subject to this court's maritime jurisdiction. In re the Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991); Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 366 n.1 (9th cir. 1992). Federal law governs the damages issue when the cause of action arises under maritime law. Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985).[23]

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[21] The Ninth circuit's opinion in Kee Leasing affirmed the district court's removal of a restriction on liability, the Vessel Owners' Limitation of Liability Act, 46 U.S.C. §§ 181-87.

[22] In Order No. 121 (Clerk's Docket No. 3194), filed December 23, 1992, this court concluded that TAPAA displaced general maritime law, which includes the doctrine of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), only to the extent of the terms of TAPAA. Accord Order No. 139 (Clerk's Docket No. 3421) filed April 8, 1993; In re the Glacier Bay, 746 F. Supp. 1379, 1386 (D. Alaska 1990).

As a matter of federal law, punitive damages are available for the purpose of punishment and to deter a defendant and others from engaging in disfavored conduct. Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985) (allowing punitive damages as a matter of federal law); see also Evich v. Morris, 819 F.2d 256, 258 (9th Cir.), cert. denied, 484 U.S. 914 (1987) (allowing punitive damages under general maritime law, citing In re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981); Duplantis v. Texaco, Inc., 771 F. Supp. 787 (E.D. La. 1991). While it is true that "punitive damages are not a favorite in the law and are never awarded as of right, no matter how egregious the defendant's conduct," punitive damages may be awarded. Protectus, 767 F.2d at 1385. Punitive damages may be awarded where the defendant's conduct "manifests 'reckless or callous disregard' for the rights of others" or where the defendant's conduct "shows 'gross negligence or actual malice or criminal indifference.'" Id. (citations omitted).

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[23] Cf. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989) (stating that in a diversity action, state law determines punitive damages issues).

The motions for partial summary judgment based upon TAPAA's alleged displacement of general maritime law (Clerk's Docket Nos. 3462 & 3488) are DENIED.

DATED at Anchorage, Alaska, this 21st day of October, 1993.

/s/

United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
)

ORDER NO. 174

Motion For Summary Judgment against Seafood Wholesaler, Processor, Cannery Employee, and Tenderer Plaintiffs

Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively Exxon) have moved for summary judgment against seafood wholesaler, processor, cannery employee, and tenderer plaintiffs.[1] Plaintiffs have responded[2], and defendants have replied.[3] Having been fully briefed, the motion is ready for ruling.[4]

Exxon filed this motion for summary judgment against the above-named plaintiffs who seek purely economic losses, unrelated to physical injury, allegedly caused by the Exxon Valdez oil spill. Exxon argues that Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), precludes these plaintiffs from recovering economic losses "'absent physical damage to a proprietary interest.'" Defendants' Motion for Summary Judgment, Clerk's Docket No. 3981, at 11 (quoting IMTT-Gretna v. Robert E. Lee SS, 993 F.2d 1193, 1194 (5th Cir. 1993), cert. denied, No. 93-788, 1993 WL 462810 (U.S. Jan 18, 1994), (quoting Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1024 (5th Cir. 1989), cert. denied, 477 U.S. 903 (1986). Only commercial fishermen have been excepted from the Robins rule. Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

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[1] Clerk's Docket No. 3981.

[2] Clerk's Docket Nos. 4120, 4121, and 4112.

[3] Clerk's Docket Nos. 4085, 4246, and 4248.

[4] Exxon's request for oral argument is denied. Clerk's Docket Nos. 4249 and 4275.

Plaintiffs raise three arguments in response to Exxon's motion. First, plaintiffs argue that the Oppen exception to the Robins rule should include plaintiffs other than commercial fisher-men. Second, plaintiffs argue that they should be able to recover economic damages under Alaska's Environmental Conservation Act (the Alaska Act), AS 46.03.822, despite the Robins rule.[5] Finally, plaintiffs argue that Congress, in enacting the Trans-Alaska Pipe-line Authorization Act (TAPAA), 43 U.S.C. § 1653(c), did not intend the Robins rule to apply to claims which exceed TAPPA's $100 million claims limit.

The court has previously recognized that a plaintiff's "claims do not become transformed into claims of a commercial fisherman merely because [plaintiff] possessed a business arrangement whereby plaintiff was paid for services out of a crew's catch." Order

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[5] The Alaska Act provides for strict liability for any oil spills, including spills of oil that has been transported through the trans-Alaska pipeline.

No. 121 (Clerk's Docket No. 3194) at 5 n.10, citing Slaven v. BP America, Inc., 786 F. Supp. 853, 861 (C.D. Cal. 1992) ("Every party in a commercial transaction is dependent upon those they deal with. ...[T]he fishermen exception is intended to be a narrow exception carved out for 'the favorites of admiralty.'"). See also Matter of Ballard Shipping Co., 810 F. Supp. 359, 363 (D.R.I. 1993) ("[T]he differences between [seafood] dealers and fishermen are more compelling than the alleged similarities. The dealers are primarily commercial middlemen; their product is from the sea, but many characteristics of their job mirror those of dealers of innumerable other products."); Slaven v. BP America, Inc., 786 F. Supp. 853, 861 (C.D. Cal. 1992) (fishermen's exception to Robins does not apply to fishbrokers who suffered only financial harm) ; Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986) (relied on Robins to reject claims by wholesale and retail seafood enterprises, but not commercial fishermen, who did not sustain physical damage to property after a Mississippi River chemical spill). When creating the fishermen's exception to Robins, the Oppen court stated "it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill...." Oppen, 501 F.2d at 570. For these reasons, the court finds that the fishermen's exception to Robins applies to commercial fishermen, not to plaintiffs herein.

Regarding plaintiffs' argument that they should be allowed to recover economic damages under the Alaska Act despite Robins, the court has previously held:

> Robins Dry Dock applies to the claims under the Alaska Act to the extent that damages claimed are in excess of liability imposed by TAPAA because general maritime law would be the applicable law. State law may supplement federal maritime law, such as in the exercise of a state's police power, but state law may not conflict with federal maritime law, as it would be redefining the requirements or limits of a remedy available at admiralty.

Order No. 38 (Clerk's Docket No. 1178) at 12 (citations omitted). See Continental Oil Co. v. Bonanza Corp., 677 F.2d 455, 461 n.7 (5th Cir. 1982), vacated on other grounds, 706 F.2d 1356 (5th Cir. 1983) ("When admiralty law speaks to a question, state law cannot override it.") (citations omitted). In Order No. 36, this court stated:

> Congress may have intended for the states to be able to simply extend the strict liability provisions of TAPAA to higher limits without subjecting those higher limits to Robins Dry Dock, but Congress did not specifically do so, nor did it have the authority to grant the states permission to do so.

Order No. 38, Clerk's Docket No. 1178 at 14 (footnote omitted). For these reasons, the court finds that "Robins Dry Dock applies to limit the damages recoverable under the Alaska Act in excess of the $100 million recoverable under TAPAA." Id.

In Order No. 38, the court also addressed plaintiffs' argument that TAPAA abrogates Robins for claims extending beyond the $100 million limit. The court stated:

> When Congress enacted TAPAA, Congress spoke directly to the issue of TAPS oil spills. TAPAA imposes strict liability "notwithstanding the provisions of any other law" to the extent of $100 million. 43 U.S.C. § 1653(c). Therefore, to the extent of its coverage, TAPAA, as specific federal maritime legislation, displaces the general maritime law, including the rule of Robins Dry Dock, regarding strict liability.

Order No. 38 (Clerk's Docket No. 1178) at 11-12 (emphasis added). In Order No. 121, the court stated:

> Congress' abrogation of federal maritime law, including Robins Dry Dock, operates only to the extent of the terms of TAPAA, to the $100 million mark. After the $100 million is paid, federal maritime law, including Robins Dry Dock, once again applies, except with respect to commercial fishermen.

Order No. 121 (Clerk's Docket No. 3194) at 9-10 (emphasis added) (citations and footnote omitted). For these reasons, the court finds that Robins applies to claims which exceed TAPAA's limit.

Accordingly, Exxon's motion for summary judgment against seafood wholesaler, processor, cannery employees and tenderer plaintiffs[6] is granted.

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[6] Clerk's Docket No. 3981.

DATED at Anchorage, Alaska, this ____ day of January, 1994.

/s/
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	A89-095 CV (HRH) (Consolidated)

RE: A89-095, A89-106, A89-140, A89-147, A89-149, A89-200, A91-099, A91-136, A91-137, A91-142, A91-416

P-22, P-34, P-35, P-38,P-39, P-40, P-41, P-102, P-105, P-114, P-116, P-139, P-165, P-166, P-246, P-302, P-303, P-1194, P-1195,P-1215, P-1219, P-1221, P-1223, P-1226, P-1231, P-1235, P-1251, P-1292, P-1313, P-1316, P-1366, P-1375, P-1376, P-1384, P-1387, P-1399, P-1405, P-1412, P-1413, P-1414, P-1423, P-1440, P-1601

REPLY MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANTS AND COUNTERCLAIMANTS EXXON CORPORATION (D-1) AND EXXON SHIPPING COMPANY (D-2) TO CERTIFY MANDATORY PUNITIVE DAMAGE CLASS PURSUANT TO FED. R. CIV. P. 23(b)(1)(B)

* * *

II. THE REQUEST TO CERTIFY A MANDATORY PUNITIVE DAMAGE CLASS IS BOTH TIMELY AND FEASIBLE

* * *

Finally, it bears emphasis that the certification of a mandatory punitive damage class would not in any way disrupt the existing trial schedule or prejudice any of the parties. Certification would not alter the substantive rights of any parties or change any of the contentions to be tried commencing on May 2. As a practical matter, its only effect would be to reinstate what all parties to the negotiated trial plan (including the plaintiffs now before the state court) contemplated as of December 20, 1993--a consolidated trial in this Court, binding on all plaintiffs and defendants alike, of all punitive damage claims arising from the EXXON VALDEZ oil spill.

III. THE COURT HAS DISCRETION TO CERTIFY A MANDATORY PUNITIVE DAMAGE CLASS PURSUANT TO RULE 23(B)(1)(B)

* * *

Under the general standard for (b)(1)(B) certification set forth in Dalkon Shield, it follows that a court may properly certify a mandatory punitive damage class where by reason of such consideration, "separate punitive damage claims necessarily will affect later claims." 693 F.2d at 852.

Plaintiffs' various arguments that this is not such a case are equally unpersuasive. Plaintiffs initially argue that any limitations on the amount of permissible punishment can be dealt with in post-trial motions in the later-tried cases. This argument only highlights, however, the need for a mandatory class. The primary rationale for (b)(1)(B) certification is to permit equitable treatment of competing claimants to the limited fund. Deferring enforcement of limitations on permissible punishment only guarantees that the later claimants will be disadvantaged.[6] * * *

* * *

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[6] Plaintiffs argue that they are willing to take this risk, and sarcastically state that they have no need for Exxon's "help" or "magnanimity." It is not only the interests of the named plaintiffs presently before the federal and state courts that are at stake, however. Also at stake are the interests of the thousands of absent members of the various classes and subclasses on whose behalf the class action plaintiffs are asserting punitive as well as compensatory claims in this Court. These unnamed plaintiffs, whose interests must also be considered, stand to suffer real prejudice absent mandatory class certification. The state court plaintiffs are engaged in an obvious race to judgment. In addition to pressing for the rescheduling of a simultaneous trial, they are pressing the state courts to impose arbitrary time and evidence restrictions on defendants' case. If successful, such measures will increase the likelihood that the state cases will go to judgment first. As discussed *infra,* any punitive damages awarded in such a judgment will necessarily impair the interests of the plaintiffs before this Court. * * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
)

ORDER NO. 187

MOTION FOR SUMMARY JUDGMENT ON CLAIMS OF COMMERCIAL FISHERMEN BASED ON PRICE DIMINISHMENT

Defendants Exxon Corporation (D-1) and Exxon shipping Company (D-2) (collectively Exxon) have moved for summary judgment on claims of commercial fishermen based on price diminishment.[1] Plaintiffs oppose the motion[2] and Exxon has responded.[3] The court has considered the briefs and has heard oral argument.

Exxon seeks summary judgment on the claims of commercial fishermen that the 1989 oil spill caused a price decrease for salmon they harvested in 1989 and subsequent years. Exxon argues that even if the commercial fishermen could prove that the oil spill affected salmon prices, the alleged effect on prices cannot be considered a direct impact of the oil spill, thus precluding recovery.[4]

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[1] Clerk's Docket No. 4024.

[2] Clerk's Docket Nos. 4165, 4129, and 4112.

[3] Clerk's Docket Nos. 4085, 4248 and 4267.

Exxon divides the commercial fishermen into two categories. The first category includes fishermen who hold permits in areas that were not closed to fishing in 1989. As an example, Exxon refers to the "Bristol Bay plaintiffs" who do not allege that the oil spill either reached Bristol Bay or caused Bristol Bay fishing season closures. Rather, they allege that the oil spill caused the price of Bristol Bay salmon to decrease in 1989 and certain succeeding years.

The second category of commercial fishermen includes those fishermen who hold permits in areas closed or partially closed to fishing in 1989, but reopened after 1989. These fishermen claim damages based on higher prices they allegedly would have received for the salmon in the years following the 1989 spill. These fishermen include Upper Cook Inlet driftnetters and Kodiak area purse seiners.

Essentially, both categories of commercial fishermen allege that the oil spill created a "taint" on Alaska salmon which negatively impacted salmon prices throughout Alaska, including areas untouched by oil.

Resolution of the issues raised by Exxon centers around the application of the commercial fishermen's exception to Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings, an injured person must have suffered direct physical harm to recover economic losses. A limited exception to this rule was created for commercial fishermen who may recover economic damages without accompanying physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

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[4] Exxon's motion does not address damages attributed to lost harvests. Clerk's Docket No. 4024 at 10 n.15.

Regarding the "Bristol Bay plaintiffs," Exxon argues that the commercial fishermen's exception to Robins Dry Dock does not apply to areas which did not suffer a direct impact from the oil spill. It is undisputed that Bristol Bay was neither oiled nor closed to fishing due to the 1989 spill.

Based upon Oppen and related cases, the court holds that the commercial fishermen's exception applies to fisheries that were actually oiled and closed to fishing. Oppen contemplated "[t]he right of commercial fishermen to recover for injuries to their businesses caused by pollution of public waters...." Oppen, 501 F.2d at 570. The court in Louisiana ex rel. Guste v. M/V Testbank, 524 F. Supp. 1170 (E.D. La. 1981), aff'd, 728 F.2d 748 (5th Cir. 1984), cert. denied, 477 U.S. 903 (1986), interpreted the commercial fishermen's exception to include "commercial fishing areas" into which pollutants or contaminants. were introduced. Id. at 1173 (emphasis added). The court in Testbank dismissed claims of commercial fishermen "allegedly affected in areas other than those specifically closed by the Coast Guard...." Id. at 1174.

In a similar situation, this court considered whether the Trans-Alaska Pipeline Liability Fund could consider claims beyond the geographic proximity of the spill. The court stated:

> From the so-called "environmental impact" requirement recognized by the Benefiel court and from other authorities discussed by the Fund, the court concurs with the Fund's

> determination that Congress meant to require that losses have a geographic proximity to the spill. Geographic proximity is an appropriate and useful aspect of the required proof of causation.

Case No. T92-1000-CV, Clerk's Docket No. 95, at 12-13. The court further stated "[g]iven the environmental impact requirement, geographic proximity to a spill is a logical requirement." Id. at 22.

The commercial fishermen's exception was intended to protect those areas which suffered diminished aquatic life from the introduction of contaminants. Oppen, 501 F.2d at 570. No such loss of aquatic life occurred in Bristol Bay. To expand this particular, special, and limited exception to open and uncontaminated fisheries where fishermen were not prohibited from plying their trade would be an unauthorized[5] extension of Oppen. Accordingly, the court grants Exxon's motion for summary judgment regarding commercial fishermen's claims for price diminishment in areas which were neither contaminated nor closed following the 1989 Exxon Valdez oil spill.

A further word of explanation may be in order here for the non-lawyers who will review this ruling. There is no question but that the Exxon Valdez grounding impacted, in one fashion or another, far more people than will ever recover anything in these proceedings. There is an understandable public perception that if one suffers harm which is perceived to be a result of the conduct of another, the harmed person should be compensated. That perception does not always square up with the institutional guidelines (statutes and case law) under which the court must operate. It is the function of both Congress and the courts (principally the courts of appeal and supreme courts) to determine the extent to which public expectations with respect to financial responsibility are to be realized. Legal liability does not always extend to all of the foreseeable consequences of an accident. In the area of harm to one's body, the reach of what is recoverable is very great. Where one's property is injured, the extent of legal liability is considerable, but not to the same extent as with bodily injury. Where pure economic loss is at issue–not connected with any injury to one's body or property, and especially where that economic loss occurs in a marine setting–the reach of legal liability is quite limited except as to commercial fishermen.

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[5] Essentially, Oppen expands Robins Dry Dock only slightly, so that a commercial fisherman may seek recovery only when his injury flows directly from the action of escaping oil on life in the sea. Oppen, 501 F.2 at 569.

In making this and other related decisions, the court applies the rules of law provided to it by Congress and the appellate courts. This court has no power to change those rules. The court is obligated to apply those rules as they currently exist.

The foregoing should not be viewed as an apology for the current state of the law. Indeed, the court defends it. Were it otherwise, we would have a form of organized anarchy in which no one could count on what rule would apply at any given time or in any given situation. In the terminology of the day, both the plaintiffs and the Exxon defendants are entitled to a "level playing field" where, over relevant time, the rules of law applicable to a given situation are stable. Thus it is that commercial fishermen must demonstrate that the alleged harm flows directly from the contamination of fisheries in which they fish. Such was not the case in Bristol Bay.

Exxon next argues that the commercial fishermen whose season was closed in whole or in part in 1989 "are not entitled to recover damages for any effect on prices allegedly attributable to a public perception of a 'stigma' attaching to salmon they actually harvested in 1989 or later years." Clerk's Docket No. 4024 at 10 (footnote omitted). Exxon argues that under Oppen, commercial fishermen may recover losses that flow directly from the 1989 interruption of fishing, but cannot recover losses incurred in later years when spill-related fishing restrictions were removed.

Oppen extended to commercial fishermen "[t]he right ... to recover for injuries to their businesses caused by pollution of public waters...." Oppen, 501 F.2d at 570. This right is not limited to the extent Exxon suggests, but applies to those injuries "established in the proceedings." Id. As stated in Oppen, "[a]ll that we do here is to permit the plaintiffs to attempt to prove their case.... " Id. Oppen does not preclude commercial fishermen from pursuing a claim for price diminishment during 1989 or subsequent years.

Exxon also argues that the commercial fishermen's claim fails under Benefiel v. Exxon Corporation, 959 F.2d 805 (9th Cir. 1992). In Benefiel, California gas purchasers asserted a cause of action under the Trans-Alaska Pipeline Authorization Act because of increased gasoline prices allegedly caused by the Exxon Valdez oil spill.

The Ninth Circuit found that a series of independent intervening events caused the price increase and affirmed dismissal for failure to state a claim. Benefiel, 959 F.2d at 807-808.

Exxon argues that the claims of the commercial fishermen herein are factually similar to the claims raised in Benefiel. In each case, Exxon argues, an intervening chain of events affected the price of the product. However, Exxon argues, in neither case did a direct relationship exist between the oil spill and the alleged economic loss. Here, Exxon argues that Japanese fish buyers and processors employed tactics to exploit negative publicity and perceived fears of contamination, resulting in diminished fish prices. Thus, Exxon argues, the commercial fishermen's claims depend upon intervening forces instead of a direct impact, and proximate cause cannot be established.

As stated in Benefiel, proximate cause "presents an issue for the trier of fact to resolve." Benefiel, 959 F.2d at 808. Only when "causation cannot reasonably be established under the facts alleged by a plaintiff" does the question of proximate cause become one for the court. Id. Such a situation is not presented here.

In In re the Glacier Bay, 746 F. Supp. 1379 (D. Alaska 1990), the court permitted Cook Inlet commercial fishermen to pursue claims for price diminishment. Exxon argues that Glacier Bay did not consider claims for depressed prices in the years following the 1987 Glacier Bay spill. The issue, however, remains one of proximate cause, and the court finds that commercial fishermen in oiled areas which were closed or partially closed due to the 1989

Exxon Valdez oil spill must be permitted to attempt to prove their claim that fish caught in 1989 and subsequent years were devalued in the market because of the spill. This is not the kind of remote or speculative claim of economic loss dealt with in Benefiel. We deal here with the price of raw fish from the impacted area, not a subsequent product such as roe or other secondary markets for fish or fish products. We deal here with the sale of fish from the impacted area, not secondary businesses such as the sale of fishing gear. It is for a jury to decide whether any diminishment of fish prices was caused by the Exxon Valdez oil spill or whether it was, as Exxon argues, the result of groundless fears or market manipulation. Accordingly, Exxon's motion for summary judgment on claims of price diminishment for commercial fishermen whose fishing grounds were contaminated by oil or season was closed or partially closed is denied.

In summary, Exxon's motion is granted in part and denied in part. Exxon's motion is GRANTED with respect to commercial fishermen whose fisheries were neither closed nor contaminated.[6] Exxon's motion is DENIED with respect to commercial fishermen whose fisheries were contaminated and either closed or partially closed.

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[6] Individual causes of action and court numbers are listed in Appendix 1 attached to Clerk's Docket No. 4024 and Appendix 1 attached to Clerk's Docket No. 4267.

DATED at Anchorage, Alaska, this 23 day of March, 1994.

/s/ [illegible]
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
)

ORDER NO. 188

Motion For Summary Judgment on Claims of Commercial Fishermen Based on Diminished Value of Limited Entry Permits and Fishing Vessels

Exxon Corporation (D-1) and Exxon Shipping (D-2) (collectively Exxon) have moved for summary judgment on claims of commercial fishermen based on the diminished value of limited entry permits and fishing vessels.[1] Plaintiffs oppose the motion[2] and Exxon has replied.[3] The briefs have been considered and the court has heard oral argument.

Resolution of the issues raised by Exxon centers around the application of the commercial fishermen's exception to Robins Dry Dock 6 Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings, an injured person must have suffered direct physical harm to recover economic losses. A limited exception to this rule was created for commercial fishermen who may recover economic damages without accompanying physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

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[1] Clerk's Docket No. 4137.

[2] Clerk's Docket No. 4276.

[3] Clerk's Docket No. 4383.

In a motion for summary judgment, the standards provided in, Rule 56, Federal Rules of Civil Procedure, apply. No inquiry into facts is necessary to decide the instant motion. The motion presents purely legal issues, and the court can grant summary judgment if Exxon shows that it is "entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

Exxon seeks judgment on the claims of commercial fishermen that are based on allegations that the 1989 oil spill resulting from the grounding of the Exxon Valdez caused the value of their salmon and herring limited entry permits and commercial fishing vessels to diminish. Oppen created a particular, special, and limited exception to the Robins Dry Dock rule that, in the maritime setting, there could be no economic recovery without physical harm. Oppen did not open the door to any and all claims by commercial fishermen who were affected by pollution of public waters. Rather, Oppen limited those claims to situations in which "the oil spill did in fact diminish aquatic life, and that this diminution reduced the profits the plaintiffs would have realized from their commercial fishing in the absence of the spill. "This reduction of profits must be established with certainty and must not be remote, speculative or conjectural." Oppen, 501 F.2d at 570 (emphasis added). Oppen permits recovery to commercial fishermen when their injury–loss of profits–"flows directly from the action of escaping oil on the life in the sea[.]" Id. at 569 (citation omitted). Because Oppen is a limited exception to Robins Dry Dock, nothing more should be read into the exception. Thus, the sole injury for which commercial fishermen may recover, absent physical harm, is for loss of profits which they would have realized but for the spill. Oppen, 501 F.2d at 570.

Based upon its interpretation of Oppen, the court denied Exxon's motion for summary judgment for potentially provable future lost profits attributable to sockeye over-escapement into the Kenai River.[4] The court has also issued an order denying Exxon's motion for summary judgment on certain commercial fishermen's claims for lost profits in years following the 1989 spill. Thus, the court has consistently followed Oppen's ruling that commercial fishermen may pursue claims for lost profits which are directly related to the oil spill.

Absent physical harm, commercial fishermen have a limited right to pursue lost profits. Without such line-drawing, "a court could plausibly decide that wave upon wave of successive economic consequences were foreseeable." Getty Refining & Marketing Co. v. M/T Fadi B, 766 F.2d B29, 833 (3d Cir. 1985). At a time when the continuing validity of Oppen is in question (East River Steamship Corp. v. Transamerica Delaval. Inc., 476 U.S. 858 (1986)), it would be inappropriate to expand Oppen to include recovery beyond lost profits. Oppen did not eliminate entirely the Robins Dry Dock physical harm requirement for commercial fishermen. Rather, Oppen created a narrow and limited exception for commercial fishermen. As stated above, that exception allows commercial fishermen to pursue lost profits even though they may not have suffered physical harm. No other claimant has that option.

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[4] Order No. 172, Clerk's Docket No. 4434.

Plaintiffs' claims for reduced permit and vessel values are not damages contemplated by Oppen. Plaintiffs do not claim–the court does not here deal with–physical damage to any vessel or any preclusion or limitation of plaintiffs' use of their limited entry permits. Plaintiffs' claims are, in the language of Oppen quoted above, "remote, speculative, and conjectural." The boats and permits in question have not been sold. We do not know when, or if they will ever be sold. When and if they are sold, we have no way of ascertaining what the market for permits or boats will be. The court does not question that there is a market for both limited entry permits and Alaskan fishing vessels. The problem is that the plaintiffs have never entered that market.[5] The court also does not doubt that the going price for limited entry permits and Alaskan fishing vessels dropped significantly when the full impact of the Exxon Valdez grounding was realized. Again, however, that tells us nothing about whether plaintiffs' limited entry permits or vessels will ever be exposed to the relevant market, or what their value will be at some unknowable future date.

Finally, this is not a case of plaintiffs who paid too much for an asset based upon fraud or misrepresentation with respect to the value of the asset at the time of its purchase. Plaintiffs have not pleaded claims for fraud or misrepresentation.

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[5] This motion, and the court's ruling on it, have no application to a plaintiff who has in fact sold a limited entry permit or vessel at a loss at a time relevant to the Exxon Valdez grounding.

For the above stated reasons, Exxon's motion for summary judgment on claims of commercial fishermen based on diminished value of limited entry fishing permits and fishing vessels is granted.[6]

DATED at Anchorage, Alaska, this 23 day of March, 1994.

/s/
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

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[6] To the extent that plaintiffs argue that their claims are cognizable under TAPAA or Alaska law, those arguments are rejected pursuant to this court's Order No. 174, Clerk's Docket No. 4444.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
)

ORDER NO. 189

MOTION FOR SUMMARY JUDGMENT ON CLAIMS BY AREA BUSINESSES AND MUNICIPALITIES ON ROBINS DRY DOCK GROUNDS

Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively Exxon) have moved for summary judgment or partial summary judgment on claims by area businesses and municipalities.[1] Plaintiffs oppose the motion,[2] and Exxon has replied.[3] The court has considered the briefs of the parties and has heard oral argument.

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[1] Clerk's Docket No. 4040. Exxon's motion was originally directed against the seven municipal plaintiffs: City of Cordova, Kodiak Island Borough, City of Larsen Bay, City of Old Harbor, City of Ouzinkie, City of Port Lions, and City of Seward. The court remanded these cases to state court (Order No. 166, Clerk's Docket No. 4277) and the motion is moot and is denied as to these municipal plaintiffs.

[2] Clerk's Docket Nos. 4205, 4207, 4208, 4265, 4283, and 4112.

[3] Clerk's Docket Nos. 4407, 4085, and 4248.

In a motion for summary judgment the moving party must "bear the initial responsibility of informing the district court of the basis for its motion, and . . . demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 317. Additionally, Rule 56(e), Federal Rules of Civil Procedure, provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Plaintiffs argue that Exxon's motion fails to satisfy the prerequisites of Rule 56(e). The court finds, however, that the motion, and the box-load of well-indexed exhibits, which the court has perused, meet the requirements of Rule 56(e). On the other hand, the vast majority of plaintiffs did not submit affidavits or other evidence to refute Exxon's arguments.[4] Apparently, these plaintiffs have chosen to "rest upon the mere allegations . . . of [their] pleadings. . . ." Id.

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[4] A day prior to oral argument on this motion, and long after the court had done its initial work-up of this motion, certain plaintiffs in consolidated cases No. A92-0198-CV and No. A92-0203-CV moved the court to lift its stay on further

Exxon moves for summary judgment on the economic claims of area businesses arising from the 1989 Exxon Valdez oil spill. Exxon argues that these claims are barred by Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings, an injured person must have suffered direct physical harm to recover economic losses. A limited exception to this rule was created for commercial fishermen who may recover economic damages without accompanying physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

In Order No. 174,[5] the court granted Exxon's motion for summary judgment against seafood wholesaler, processor, cannery employee, and tenderer plaintiffs. These plaintiffs suffered economic damages without physical harm from the oil spill. In entering this order, the court noted the following: "When creating the fishermen's exception to Robins, the Oppen court stated 'it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by

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motion practice to allow four plaintiffs to move for leave to file supplemental affidavits. (Clerk's Docket No. 4641). With trial less than two months away, motion practice has to be at an end. The physical impact rule which the court employs is not new–it is very old law which plaintiffs must have known of when they first opposed Exxon's motion. The motion to lift stay is denied.

[5] Clerk's Docket No. 4444.

the oil spill. . . .'" Order No. 174 (Clerk's Docket No. 4444) at 4, quoting Oppen, 501 F.2d at 570. The court will be guided by the above principle in deciding the instant motion.[6]

In making its motion, Exxon argues that Robins not only bars recovery of plaintiffs who did not suffer physical damage, but also bars recovery of plaintiffs who had physical contact with oil but whose economic losses are unrelated to such oiling. In Naviera Maersk Espana, S.A. v. Cho-Me Towing, Inc., 782 F. Supp. 317, 320 (E.D. La. 1992), the court stated "to be recoverable, the economic loss claimed must flow directly from the alleged physical damage to plaintiff's property." Id., citing Nicor Supply Ships Associates v. General Motors Corp., 876 F.2d 501 (5th Cir. 1989). The court in In re oriental Republic of Uruguay, 821 F. Supp. 934 (D. Del. 1993), reached a similar conclusion which bears quoting at length:

> Obviously the number and variety of different forms of economic harm arguably resulting from ... discharge of oil into the Delaware River are limited only by the boundaries of human imagination. The Robins rule of preclusion prevents this unending chain of potential tort liability for economic losses by setting forth a bright line rule of limitation which discards traditional precepts of foreseeability and . . . relies instead on whether the alleged pecuniary loss resulted

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[6] In Order No. 174, the court rejected arguments that seafood wholesalers, etc., should be allowed to recover damages under the Alaska Act and TAPAA despite Robins Dry Dock. For the reasons stated in Order No. 174, the court rejects the same arguments raised by plaintiffs herein.

> from physical harm arising from the defendant's negligence. If, however, any party who sustained some form of physical damage as a result of the defendant's alleged negligence were entitled to seek relief in tort for any and all economic losses incurred in connection generally with the defendant's negligence, irrespective of whether said economic damage had any relation to the physical harm sustained, then the Robins rule of limitation largely would be eviscerated. For example, the restaurant owners, boat owners and shipping concerns . . . could easily circumvent the Robins rule by merely demonstrating that they incurred some amount of physical property harm . . . as a result of the . . . spill. . . . [T]hese parties would be entitled to recover (in negligence) all their economic loss damages arising generally from the oil spill, irrespective of how insubstantial their physical property damage might be and without regard for whether their pecuniary losses were related to said property damage to any extent whatsoever. Accordingly, the Court rejects [a] broad construction of the physical harm exception and concludes that the physical harm exception to the Robins rule will apply only where the alleged economic harm derives directly from the plaintiff's physical property damage.

Republic of Uruguay, 821 F. Supp. at 939-40 (footnote omitted).

Thus a plaintiff who claims economic damage due to oiled property must show a direct relationship between the alleged physical and economic damages. Essentially, the issue remains one of proximate cause, and the court finds that a plaintiff survives a motion for summary judgment under Robins if the plaintiff makes a reasonable showing that the economic damages were related to physical damages.[7]

In support of its motion, Exxon has submitted excerpts of depositions, interrogatory answers, and responses to requests for admission of 95 area business whose economic claims, according to Exxon, do not derive from commercial fishing or oiled property. Exxon arranged its evidence into two groups: (1) plaintiffs who had no physical contact with oil (Appendix A); and (2) plaintiffs who had physical contact with oil but claim unrelated economic losses (Appendix B).[8]

The court has painstakingly reviewed the evidence relating to the 95 area business plaintiffs. The evidence shows that, except for a select few which the court will discuss later in this order, the area businesses are not entitled to recover economic damages under Robins Dry Dock. It is either undisputed that the businesses did not have oiled property or, if they did have oiled property, there was no causal connection between the property damage and their economic loss. Approximately one-fourth of the 95 area businesses which were listed in Exxon's motion submitted opposing evidence in the form of affidavits. The majority of the affidavits did not establish a claim under Robins Dry Dock.

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[7] In responding to Exxon's argument, the area businesses refer the court to Shaughnessy v. PPG Indus., Inc., 795 F. Supp. 193 (W.D. La. 1992), in which the court permitted fishing and hunting guides to recover economic damages without physical harm following contamination of certain wetlands, estuaries, and marshes. Shaughnessy is distinguishable from the case at bar in that it involved a land-based plaintiff and a land-based polluter, and the case proceeded under non-maritime theories. Regardless, this court has already ruled that only commercial fisherman are excepted from Robins. Clerk's Docket No. 4444.

[8] "Appendices" A and B are part of the box-load of exhibits which accompany Clerk's Docket No. 4040. They should not be confused with "Attachments" A, B, and C which are stapled to Clerk's Docket No. 4040, or "Tables" A, B, and C which are stapled to Clerk's Docket No. 4407.

Among those plaintiffs who submitted opposing evidence are certain guides for sport fishermen and nature lovers. According to these plaintiffs, their affidavits establish that:

> Their businesses are dependent upon the condition of the waters and the fish in areas impacted by the EXXON VALDEZ spill. When the availability of salmon and other fish and the attractiveness of the marine environment were impaired by the spilled oil, these plaintiffs lost revenues because existing reservations were canceled and potential patrons were discouraged from booking new reservations. Some had their activities directly disrupted by the presence of oil in waters where they would have fished or observed wildlife with their clients.

Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205) at 6 (footnotes omitted).

Upon review of the evidence, the court finds the plaintiff guides have failed to show that their economic claims were related to any physical damage to property owned by the plaintiffs. Under the court's interpretation of Robins Dry Dock and Oppen, the plaintiff guides are not entitled to recover for their claimed damages.

Certain suppliers of goods and services to commercial fishermen also responded to Exxon's motion with affidavits. Plaintiffs argue that the affidavits show that:

> [T]hey have lost revenues because the fishermen who would be their customers have had less need for new and repaired equipment than they would have had if the oil spill had not impaired their fishing activities. Other plaintiffs in this general category are specialists in the servicing and repair of commercial fishing boats and equipment both on land and on the water, including fishing grounds. As their affidavits testify, the reduction in fishing activity caused by the spill severely reduced the need for the repair services which are these plaintiffs' principal businesses. Still other plaintiffs provide a variety of services to the fishing industry, and the demand for those services was similarly reduced.
>
> Additionally, the reduction in fishermen's revenues impaired their ability to pay for needed goods and services, further depressing these plaintiffs' revenues and profits.

Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205) at 7-8 (footnotes omitted).

Upon review of the evidence, the court finds that these plaintiffs who offer services to commercial fishermen have alleged neither physical damages nor economic damages related to physical damages. Accordingly, under Robins Dry Dock and Oppen, these plaintiffs are not entitled to recover for their economic damage claims.

Also opposing Exxon's motion are two scientists who studied the sea otter population in Prince William Sound. These scientists seek compensation for emotional distress, loss of income from scientific activities, lost research funding, destruction of intellectual property, lost future intellectual property, and destruction of "our" study. Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205) Exhibits 16 and 17. None of these claims are compensable under Robins. These scientists also claim that they were developing a business to provide live otters to aquariums and zoos. The scientists argue that they literally fished for sea otters. Due to the oil spill, the scientists have lost their permit to remove healthy sea otters from Prince William Sound, and can no longer collect income by providing otters to zoological organizations.

The court finds that the purposes for which the scientists collected otters does not put the scientists within the commercial fishermen's exception to Robins. One of the scientists stated in his deposition as follows:

> A. My personal permit did not allow me to capture for export. It allowed me to capture literally hundreds of otters for scientific research purposes.
>
> Q. But you couldn't capture an otter and

sell it, could you?

A. No, you can't sell the otters. We could not. That's not what we were doing. We were simply providing a service where – you know, for people that had permits to hold the animals.

Deposition of Charles W. Monnett at 2, attached as Exhibit 3 to Exxon Reply Memorandum (Clerk's Docket No. 4407).

The deposition shows that the scientists were not harvesting and selling otters in the same sense that commercial fishermen "lawfully and directly make use of a resource of the sea . . . in the ordinary course of their business." Oppen, 501 F. 2d at 570. Rather, the scientists, as part of their overall research activities, captured otters "for scientific research purposes." Monnett Deposition at 2, attached as Exhibit 3 to Exxon Reply Memorandum (Clerk's Docket No. 4407).[9] Although the scientists' "economic" affairs may have been "discommoded by the oil spill," Oppen, 501 F.2d at 570, that alone does not create a Robins Dry Dock claim. Simply put, scientists are not fishermen and otters are not fish which may be lawfully taken and sold. These scientists did not earn their livelihood from the capture and sale of marine animals. Rather, they were paid principally for their scholarly endeavors.

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[9] One of the scientists specifically expressed concern over the "element of apparent profiteering." Clerk's Docket No. 4407, Exhibit 3 at 4. The scientist also spoke of an agreement with Shedd Aquarium in Chicago in which the scientists would provide otters to Shedd, and Shedd would provide "essentially a $20,000 infusion–into our program." Clerk's Docket No. 4407, Exhibit 3 at 5.

The scientists did not suffer property damage from the oil spill, are not commercial fishermen, and are not entitled to a recovery under Robins Dry Dock.

Another plaintiff who opposes Exxon's motion was developing a business of selling oil extracted from salmon carcasses for use as fishing bait. This plaintiff was not a commercial fisherman. The plaintiff bought salmon carcasses from a company in Kodiak. This plaintiff did not suffer any physical damage from the oil spill. Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205), Exhibit 18. The evidence shows that the plaintiff is not entitled to any recovery under Robins Dry Dock or Oppen.

Among the plaintiffs targeted in Exxon's motion was the Kodiak Electric Association. This plaintiff alleges that it suffered reduced power usage by processors subsequent to the oil spill. No physical damage is alleged.[10] Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205), Exhibit 19 at 3. This plaintiff is not entitled to recovery under Robins.

Plaintiffs also argue that many businesses which constitute the entire economies of certain coastal communities were dependent on the fisheries impaired by the spill. In particular, plaintiffs refer to businesses in the City of Cordova. Although not oiled, plaintiffs argue that "Exxon determined that all businesses in Cordova were 'directly impacted' and therefore entitled to compensation for lost profits resulting from the spill." Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205) at 9 (footnote omitted). Plaintiffs also argue that "[a]nother Exxon official advised the Cordova Committee of Concerned Businesses that Exxon's guidelines 'recognize that Cordova businesses were uniquely and directly impacted by the closed Prince William Sound fisheries.'" Id. (footnote omitted).

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[10] This claim is a good example of the reason for the Robins Dry Dock rule. If this claim were actionable, then why not the claims of the association's fuel suppliers? Foreseeability provides no meaningful limits on the extent of liability in a situation such as this.

As an example, plaintiffs refer to Cordova Air Service. The affidavit submitted on behalf of Cordova Air Service reveals that it did not suffer any physical damage from the oil spill. Rather, Cordova Air Service claims that it "did not receive the business it would have from the local commercial salmon and herring fishermen had there been no spill." Id., Exhibit 13 at 2.[11] Plaintiffs also submitted the affidavit of R & P Marine which specializes in the manufacture of fishermen's nets. R & P Marine alleges purely economic losses. Id., Exhibit 8. A similar purely economic claim is established in the affidavit of Viking Net Supply Company of Cordova. Id., Exhibit 7. Plaintiffs argue that "[t)here is also evidence sufficient, at a minimum, to raise a genuine issue of fact as to the similar dependence on the entire economies of other coastal communities, including particularly Kodiak, on the fisheries impaired by the spill. Id., at 9 (footnote omitted).

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[11] Cordova Air Service did not suffer any real property damage from the spill. Clerk's Docket No. 4040, Appendix B, Exhibit 7 at 95-96. Certain aircraft belonging to Cordova Air Service were oiled, but the oil was washed off and Cordova Air Service is not making a claim for oiled aircraft. Id. at 153.

None of plaintiffs' evidence, however, is sufficient to satisfy the Robins Dry Dock requirement that physical harm must have been suffered before economic damages may be recovered. Acknowledgement by certain Exxon officials that the businesses of Cordova and other communities were directly impacted by the closed fisheries, does not, in and of itself, create a claim under Robins Dry Dock.[12]

A further word of explanation may be in order here for the non-lawyers who will review this ruling. There is no question but that the Exxon Valdez grounding impacted, in one fashion or another, far more people than will ever recover anything in these proceedings. There is an understandable public perception that if one suffers harm which is perceived to be a result of the conduct of another, the harmed person should be compensated. That perception does not always square up with the institutional guidelines (statutes and case law) under which the court must operate. It is the function of both Congress and the courts (principally the courts of appeal and supreme courts) to determine the extent to which public expectations with respect to financial responsibility are to be realized. Legal liability does not always extend to all of the foreseeable consequences of an accident. In the area of harm to one's body, the reach of what is recoverable is very great. Where one's property is injured, the extent of legal liability is considerable, but not to the same extent as with bodily injury. Where pure economic loss–not connected with any injury to one's body or property is at issue, and especially where that economic loss occurs in a marine setting–the reach of legal liability is quite limited except as to commercial fishermen.

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[12] Exxon officials may have had the Trans-Alaska Pipeline Liability Fund in mind in making the statements to which plaintiffs refer. Claims under the Fund are not restricted by Robins Dry Dock, although causation must still be proved.

In making this and other related decisions, the court applies the rules of law provided to it by Congress and the appellate courts. This court has no power to change those rules. The court is obligated to apply those rules as they currently exist.

The foregoing should not be viewed as an apology for the current state of the law. Indeed, the court defends it. Were it otherwise, we would have a form of organized anarchy in which no one could count on what rule would apply at any given time or in any given situation. In the terminology of the day, both the plaintiffs and the Exxon defendants are entitled to a "level playing field" where, over relevant time, the rules of law applicable to a given situation are stable. Thus it is that one must either qualify as a commercial fisherman or demonstrate that one has suffered harm to physical property before that individual may seek economic losses; and to be recoverable, economic losses must, in a meaningful way, flow from the physical damage. Tar from an oil spill tracked by customers onto the floor of a fishing gear store does not cause lost sales of gear.

Exxon also moved for summary judgment against five aquaculture associations: Blue Star Aquaculture; Scurvy Creek Fisheries Enhancement, Inc.; Prince William Sound Aquaculture Corporation; Cook Inlet Aquaculture Association; and Kodiak Regional Aquaculture Association. Only the latter three oppose Exxon's motion. Plaintiffs' Supplemental Opposition to Exxon Motion for

Summary Judgment (Clerk's Docket No. 4207).

Prince William Sound Aquaculture Corporation, Cook Inlet Aquaculture Association, and Kodiak Regional Association have submitted evidence which establishes that they engaged in commercial fishing. Plaintiffs' Supplemental Opposition (Clerk's Docket No. 4207) and attached exhibits. Accordingly, these three aquaculture associations are entitled to pursue their claims based upon the fishermen's exception to Robins Dry Dock. There is also evidence that Prince William Sound Aquaculture Corporation and Kodiak Regional Association suffered physical damage from the oil spill which may have resulted in economic loss. Plaintiffs' Supplemental Opposition (Clerk's Docket No. 4207) and attached exhibits. Under Robins Dry Dock, these two aquaculture associations may go forward with their claims for physical and consequential economic damages.

All three of the aquaculture associations which responded to Exxon's motion argue that, because of the spill, they were unable to collect a 2% enhancement tax levied on commercial fishermen. The commercial fishermen, who were precluded from fishing subsequent to the spill, did not pay the enhancement tax to the aquaculture associations. The failure to collect this tax did not result from the aquaculture associations' inability to engage in commercial fishing or from any physical damages they may have suffered. Accordingly, they are not entitled to recover the tax from Exxon.

Plaintiffs Rod Berg / Rod 'N Real Alaska, Tim Berg / Berg's Fishing Charters, Greg Samson / Greg's Sportfish Guide Service, and Rodney Arno / Alaska Sojourns, Inc., have stated in requests for admission that none of their personal property was oiled. These plaintiffs submitted affidavits in response to the instant summary judgment motion which contradict the requests for admission. Rule 36(b), Federal Rules of Civil Procedure, which governs the effects of admissions states that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Id. (emphasis added). At the hearing, counsel orally moved to withdraw the admissions, and now seeks leave to file a similar written motion.[13] The motion is DENIED. The court may have been inclined to grant the motion had it been made during the discovery phase of the case. The motion, however, was made long after fact discovery was to have been completed, after all briefing was submitted on the instant summary judgment motion, and very close to trial. The court will enforce Rule 36(b) as to all plaintiffs who formally admitted that no personal property was oiled. Accordingly, summary judgment is GRANTED on the claims of Rod Berg / Rod 'N Real Alaska, Tim Berg / Berg's Fishing Charters, Greg Samson / Greg's Sportfish Guide Service, and Rodney Arno / Alaska Sojourns, Inc.

Finally, plaintiff Chris Garcia states in his affidavit that he is a commercial fisherman and a distributor of "Fish Hog" long line fishing gear. Plaintiffs' Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205), Exhibit 9. He claims lost fishing income which is actionable and lost gear distribution income unrelated to physical property harm (and not flowing from his commercial fishing) which is not actionable. This plaintiff may proceed with his claim for lost fishing income, but not the claim for other economic damage.[14]

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[13] Clerk's Docket No. 4665.

In summary, Exxon's motion for summary judgment is DENIED, to the extent explained in this order, regarding the claims of: Cook Inlet Aquaculture Association; Kodiak Regional Aquaculture Association; and Prince William Sound Aquaculture Corporation. With these exceptions, the court GRANTS Exxon's motion for summary judgment or partial summary judgment regarding the remaining plaintiffs as listed in Tables A, B, and C attached to Exxon's Reply Memorandum (Clerk's Docket No. 4407).

DATED at Anchorage, Alaska, this 23 day of March, 1994.

/s/ [illegible]
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

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[14] The court notes that Exxon specifically excluded commercial fishing claims from this motion. Clerk's Docket No. 4040, at 1 n.l. Thus, Garcia's commercial fishing claim is not subject to the motion.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
)

ORDER NO. 190

Exxon's Motion For Summary Judgment on Native Class Claims for Non-Economic Injury

Defendant Exxon Shipping Company (D-2) and Exxon Corporation (D-1) have moved for summary judgment on the Alaska Native class (Alaska Native) claims for non-economic injury.[1] Plaintiffs oppose the motion,[2] and Exxon has replied.[3] The court has considered the briefs of the parties and has heard oral argument.

Exxon seeks summary judgment on all Alaska Native claims for compensatory damages for injury to "culture" or the "subsistence way of life". Specifically, the motion seeks summary judgment on the Alaska Native non-economic claims "for alleged injury to [their] 'subsistence way of life', which is said to be a 'personal, economic, psychological, social, cultural, communal and religious form of daily living' that is 'dependent upon the preservation of uncontaminated natural resources, marine life and wildlife.'" Exxon Motion for Summary Judgment at 1, Clerk's Docket No. 4053 (footnote omitted). The motion is not addressed to claims for damages measured by the economic value of any loss of subsistence harvest which were proximately caused by the Exxon Valdez oil spill.[4]

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[1] Clerk's Docket No. 4053.

[2] Clerk's Docket No. 4373 and Clerk's Docket No. 4112. Direct action Native plaintiffs represented by Richard A. Jameson & Associates join in the opposition to Exxon's motion. Clerk's Docket No. 4372.

[3] Clerk's Docket No. 4450, No. 4085, and No. 4248.

Exxon argues that the Alaska Native claims are precluded by the rule of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings an injured person must have suffered direct physical harm to recover economic losses. A limited exception to this rule was created for commercial fishermen who may recover economic damages without physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

Robins Dry Dock does not address non-economic damages of the type claimed by the Alaska Natives. Nonetheless, Robins Dry Dock offers guidance because the "Robins Dry Dock principle 'is essentially a principle of disallowance of damages because of remoteness. . . .'" Holt Hauling & Warehousing Systems, Inc. v. M/V Ming Joy, 614 F. Supp. 890, 895 n.13 (E.D. Pa. 1985) (citations omitted). Oppen is inapplicable because the instant motion does not involve commercial fishermen.

The Alaska Natives argue that their claim is cognizable as a maritime public nuisance. They argue that private individuals who can show a special injury, different in kind from that suffered by the general public, can recover damages in maritime public nuisance. Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973). This court has previously recognized that "[t]he law remains that a private litigant cannot recover damages for a public nuisance unless he or she can show a special injury different in kind from that suffered by the general public." Order No. 146 at 8, Clerk's Docket No. 3671, citing Oppen v. Aetna Ins. Co., 485 F.2d 252, 259 (9th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 721 (D. Kan. 1991); Burgess v. M/V Tamano, 370 F. Supp. 247, 250-51 (D. Me. 1973); Restatement (Second) of Torts § 821C(1). In Order No. 146, the court dismissed the sport fishermen's nuisance claim because they could not show that their claims were different from those suffered by the general public. The court noted that the "sport fishermen were unable to allege private claims because [they] suffered no private injury." Order No. 146 at 15, Clerk's Docket No. 3671.

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[4] To the extent that the Alaska Natives raise claims under Alaska law or TAPAA, those claims were rejected pursuant to this court's Order No. 174, Clerk's Docket No. 4444.

The Alaska Natives argue that the unique nature of their subsistence lifestyle is the keystone to their culture. While all Alaskans are entitled to engage in subsistence activity the Alaska Natives argue that only they engage in a centuries-old system of subsistence that is a central part of their culture and inextricably linked to the natural resources damaged by the spill.

Exxon argues that the Alaska Natives' right to hunt and fish, share fish and game with family and friends, and commune with nature does not create a private nuisance claim because all Alaskans have the same rights. Exxon argues that a fervent environmentalist who adores nature or an avid sport fisherman or hunter suffered the same injury as the Native Alaskans. Thus, Exxon argues, the Alaska Natives' nuisance claim is not different in kind from that of the general public. Exxon concedes that the Alaska Natives may practice subsistence living to a greater decree than the general public, but argues that differences in the intensity with which a public harm is felt cannot justify a private claim for public nuisance. See, Restatement (Second) of Torts § 821C, comment b ("The private individual can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same public right. It is not enough that he has suffered the same kind of harm or interference but to a greater extent of degree.").

The Alaska Natives' non-economic subsistence claims have their origins in Title VIII of the Alaska National Interest Lands Conservation Act.[5] By ANILCA, Congress found and declared that:

> (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence[.]

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[5] All aboriginal hunting and fishing rights in Alaska, including those associated with submerged lands, were extinguished by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1603(b).

16 U.S.C. § 3111. Why Congress made a distinction between Native and non-Natives by way of a reference to "cultural existence" in the case of Natives, and "social existence" in the case of non-Natives, is unclear and of no great significance here.

The court takes notice of the fact that hunting and fishing for the family table is traditional throughout all of rural America. For great numbers of those who reside in the Lower 48 states and many urban Alaskans, hunting and fishing has no doubt become more social and recreational in nature; but the hunt and the need to put food on one's table is very much a part of American culture. As quoted above, Congress has recognized that the "opportunity for subsistence uses" of fish and wildlife is vitally important to rural Alaskans, both Native and non-Native. 16 U.S.C. § 3111(1).

The Alaska Natives' non-economic subsistence claims are not "of a kind different from [those] suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement (Second) of Torts § 821C(1). Although Alaska Natives may have suffered to a greater degree than members of the general public, "differences in the intensity with which a public harm is felt does not justify a private claim for public nuisance." Clerk's Docket No. 4450 at 8. See, Restatement (Second) of Torts § 821C(1) (stating, in comment b, that it is not enough to suffer the same kind of harm, but to a greater degree). All Alaskans have the right to lead subsistence lifestyles, not just Alaska Natives.[6] All Alaskans, and not just Alaska Natives, have the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings. Neither the length of time in which Alaska Natives have practiced a subsistence lifestyle nor the manner in which it is practiced makes the Alaska Native subsistence lifestyle unique. These attributes of the Alaska Native lifestyle only make it different in degree from the same subsistence lifestyle available to all Alaskans. The Alaska Natives do not have a viable, maritime, public nuisance claim, as their claim is only different in degree, but not in kind, from that suffered by the general population of Alaska.[7]

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[6] McDowell v. State, 785 P.2d 1 (Alaska 1989) , rejected the rural preference contained in ANILCA (16 U.S.C. § 3113), and

The Alaska Natives cannot establish a claim for private nuisance because a claimant must have a possessory interest in the land allegedly burdened by the nuisance to support such a claim. Restatement (Second) of Torts § 821E. The oil spill from the Exxon Valdez affected the waters, beaches, and shorelines of Prince William Sound and the Gulf of

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in substance opened all state lands to subsistence hunting and fishing by all Alaskans. State lands, except "non-subsistence areas", are still open to subsistence hunting and fishing by all Alaskans. AS 16.05.258. Federal lands are subject to a preference in favor of all "rural" Alaska residents (16 U.S.C. § 3113). Whether the subsistence fishing in the waters of Prince William Sound, Upper Cook Inlet, and the territorial waters around Kodiak are subject to state or federal regulation is a subject of ongoing litigation.

[7] A private action for public nuisance will fail "when the class becomes so large and general as to include all members of the public who come in contact with the nuisance." Order No. 146, at 9 n.1 (Clerk's Docket No. 3671) (quoting Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1009 (1966)).

Alaska. Title to the submerged areas is owned by the State of Alaska and the United States. Title to adjacent upland is owned by one of the government entities or Native corporations.[8] The Native corporations are either direct action plaintiffs or members of the landowner class in the Exxon Valdez litigation. If a claim for private nuisance existed, it would belong to Native corporations and landowner plaintiffs, but not to the individual Alaska Natives. The Alaska Natives do not dispute that they cannot recover under a private nuisance theory. Such a claim is not available to the Alaska Natives.[9]

Even if the Alaska Natives could present a claim for nuisance, it is doubtful whether a claim for public nuisance can be asserted under federal common law or maritime law.[10] In Conner v. Aerovox, Inc., 730 F.2d 835 (1st Cir. 1984), cert. denied, 470 U.S. 1050 (1984), the court stated that "'the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [Federal Water Pollution Control Act].'"

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[8] ANCSA settled all aboriginal land claims in Alaska through the formation of regional and village corporations which were entitled to select and take title to some 44 million acres of federal land in Alaska.

[9] The Alaska Natives also failed to dispute Exxon's argument that they cannot recover under negligent infliction of emotional distress. The court agrees that this claim is unavailable to the Alaska Natives.

[10] Although most courts distinguish between federal common law and maritime law, at least one court has suggested that "[t]o the extent that maritime law is judge-made, it can be viewed as simply one branch of federal common law." Matter of Oswego Barge Corp., 664 F.2d 327, 333, 334 (2d Cir. 1981), cert. denied, 477 U.S. 903 (1986).

Conner, 730 F. Supp. at 842, quoting Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981). Conner held that Sea Clammers encompassed "all federal judge-made law of nuisance whether maritime or general federal law." Conner, 730 F.2d at 842. See also, Louisiana v. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1030 n.13 (5th Cir. 1985) (the Supreme Court has apparently foreclosed a federal cause of action for public nuisance claims regarding obstruction of navigable waterways) ; Marquez-Colon v. Reagan, 668 F.2d 611, 614 n.2 (1st Cir. 1981) (the Supreme Court held in Milwaukee v. Illinois, 451 U.S. 304 (1981) and Sea Clammers "that the federal common law of nuisance for interstate and coastal water pollution has been entirely preempted by [the FWPCA]"); Matter of Oswego Barge Corp., 664 F.2d 327, 338 n.13 (2d Cir. 1981) (suggesting that the Supreme Court understood in Sea Clammers that the FWPCA preempted both federal common law and maritime nuisance); Secko Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008 (E.D. La. 1993) (federal common law does not recognize a cause of action for public nuisance in a water pollution case). In Nat'l Audubon Soc'y v. Dept. of Water, 869 F.2d 1196, 1200 (9th Cir. 1988), the Ninth Circuit, while not addressing maritime nuisance, held that federal common law nuisance claims for water pollution are preempted by the FWPCA.

In the last analysis, what the Alaska Natives seek is a recovery which is not founded upon any legal theory currently recognized by maritime law. They assert that theirs is a non-market economy, and that their damages should not be measured by market economy standards.[11]

The court does not reject the notion that there are cultural differences between Alaska Natives and many non-Native Alaskans.[12] The existence of two cultures is not inconsistent with a conclusion that both have suffered injury of the same kind as a consequence of the Exxon Valdez oil spill, and that it is for the public to demand satisfaction on behalf of all of those injured.

The court is concerned that rural Alaska residents might view this decision as evidencing a lack of understanding of their commitment to a subsistence lifestyle as permitted by Title VIII of ANILCA or holding that cultural considerations are without value and/or not valued by the court. The court does neither.

This court was designated by Congress as the enforcer and protector of the rural Alaska preference as regards subsistence uses of fish and wildlife. 16 U.S.C. § 3117. In a series of decisions (some unpublished and some published),[13] this judge has presided over the development of subsistence hunting and fishing law in Alaska under ANILCA and under AS 16.05.258 (1986), § 6, ch. 52, SLA 1986, which, until the McDowell decision (see footnote 6, supra), was applicable as to both federal and state lands. See 16 U.S.C. § 3115(d). Suffice it to say, the court accepts without qualification the cultural importance of the subsistence lifestyle to residents of rural Alaska in general, and Alaska Natives in particular, in rendering this decision.

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[11] The Alaska Natives tacitly recognize that their cultural damage claim must in the end be converted to dollars. How, they do not say.

[12] Although Congress arguably dealt Alaska Native culture a heavy "hit" by using for-profit business corporations as the vehicle to settle aboriginal lands claims, Title VIII of ANILCA and some recent amendments to ANCSA (for example, 43 U.S.C. § 1636 (1988)) suggest that the oft-repeated cycle of separation (i.e., segregation or self-determination) and assimilation in federal Indian policy has now taken a turn back toward separation.

[13] See, for example, Kenaitze Indian Tribe v. Alaska, No. A86-0367-CV, Order of July 9, 1987, Clerk's Docket No. 67, rev'd on appeal, 860 F.2d 312 (9th Cir. 1988), cert. denied, 491 U.S. 905

In other related proceedings, this court has already presided over cases commenced by governmental entities which have led to the payment of over $1,000,000,000.00 from Exxon in the form of criminal sanctions and civil damages for injury to the environment and natural resources. To the extent that one might view the grounding of the

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(1989) ; and Bobby v. State of Alaska, 718 F. Supp. 764 (D. Alaska 1989). The most protracted litigation in the subsistence area has been that of Katie John and others who seek to protect their subsistence fishing traditionally done at the confluence of Tanada Creek and the Copper River at a site now abandoned but formerly known as Batzulnetas. Katie John [et al.] v. Alaska, No. A85-0698-CV, Order of Jan. 19, 1990, Clerk's Docket No. 68. The latter case terminated when the State of Alaska's fishing program fell out of compliance with ANILCA, a subject discussed in some detail in Kluti Kaah Native Village of Copper Center [et al.] v. Alaska [et al.], No. A90-0004-CV, Order of Aug. 15, 1990, Clerk's Docket No. 37. Ms. John's efforts continue in Katie John v. United States and Alaska v. Babbitt, No. A89-0488-CV (Consolidated) which raises the important questions of whether or not the State of Alaska is still entitled to regulate subsistence hunting and fishing on federal land in Alaska and, if not, whether navigable waters (such as the Copper River and Prince William Sound) are subject to state or federal regulation as regards the taking of fish for subsistence purposes.

Exxon Valdez as a clash of cultures, the segment of society which demands oil and its products has paid and will continue to pay for the grounding of the Exxon Valdez. These funds are largely in trust arrangements intended for use in restoring, rehabilitating, and augmenting the natural resources of the area affected by the Exxon Valdez oil spill. The area residents generally, and Alaska Natives in particular, should derive direct benefit from this effort. The goal is restoration of what has been lost to all cultural interests.

At the risk of making this decision too long, and at the risk of straying too far from the legal field, the court would observe that the entry of oil companies into Alaska in the late 1950s and thereafter was not the first (and likely not the last) challenge to Native culture. Who moved in on whom as between the Alutik, Indian, and Yupik/Inupiat peoples is lost in the anthropological fog of ten to fifty thousand years ago. Then came the Russians, then the American whalers, then the miners, and with them the United States Government came to Alaska.

All of these incursions have impacted and, to a lesser or greater degree affected, Native culture. Some would no doubt say that little good has come from any of the cross-cultural contacts. Be that as it may, we are powerless to prevent change; and accidents are no stranger to human existence, especially those who venture into the open waters surrounding the State of Alaska. Inattention can be, and often is, fatal. However, one's culture–a person's way of life–is deeply embedded in the mind and heart. Even catastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life.

If (and we think this is not the case) the Native culture was in such distress that the Exxon Valdez oil spill sapped the will of the Native peoples to carry on their way of life, then a Native subsistence lifestyle was already lost before March 24, 1989. Development of the Prudhoe Bay oil fields, the construction of processing facilities, and the trans-Alaska pipeline on the North Slope of the Brooks Range were, in all probability, a much greater and certainly longer-lasting incursion into Native culture than the Exxon Valdez oil spill, yet the Inupiat have thrived. The court doubts that they are less committed nor less successful in preserving their Native culture than are the Native people of Prince William Sound, Kodiak, or the Cook Inlet area. The Exxon Valdez oil spill was a disaster of major proportions, but it did not deprive Alaska Natives of their culture.

The affront to Native culture occasioned by the escape of crude oil into Prince William Sound is not actionable on an individual basis. To those who say it ought to be, the court must answer: Congress and the appellate courts make law, not this court. The loss of enjoyment of life claim (a claim roughly comparable to that which the Alaska Natives would assert) has in recent decades become recognized by appellate courts as a compensable aspect of a personal (bodily) injury claim. No personal injury claims are made in this case, so enjoyment of life damages are unavailable. The Alaska Natives' claims for non-economic losses is rejected, and the plaintiffs must find recompense for interference with their culture from the public recoveries that have been demanded of and received from Exxon.

For the above stated reasons, the court GRANTS

Exxon's motion for summary judgment on Native claims for non-economic injury.[14]

DATED at Anchorage, Alaska, this ____ day of March, 1994.

/s/ [illegible]
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

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[14] This order does not affect subsistence claims for economic injury, to the extent that such claims are proved. Alaska Natives who are commercial fishermen or who have physical injury claims or economic claims causally connected to physical damage may continue to pursue these claims. This order does not affect any claims asserted by the Native Corporations.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re:)

) A89-095-CV (HRH)

The EXXON VALDEZ) **(Consolidated)**

) **Honorable H. Russel**

) **Holland**

RE: ALL CASES

THIRD AMENDED REVISED TRIAL PLAN[1]
(Proposed)

* * *

The following plan for a phased trial is hereby adopted.[2] In the event of any inconsistency between this plan and the Local Rules of this Court or the terms of Order No. 143 herein, the terms of this plan shall control.

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[1] This pleading has been submitted and is approved by the Court without any waiver of the plaintiffs' rights to be remanded back to state court. By entering into this trial plan, plaintiffs also reserve the right to argue that there may be multiple punitive damages trials regardless of remand of the pre-1993 or September 1993 removals.

[2] This proposal anticipates consummation of the pending settlement between the Alyeska defendants and the plaintiffs. All provisions of this plan are subject to reconsideration if the settlement should fail for any reason. In addition, should the settlement be approved and should the Alyeska defendants succeed in obtaining an order barring or restricting claims for repayment, indemnity or contribution against the Alyeska defendants arising from judgments or settlements of the claims covered by this plan, defendants reserve the right to seek revision of this plan to assure reservation of defendants'

I. Trial Date

The principal trial of these consolidated cases is set for May 2, 1994 at 9:00 a.m. at Anchorage, Alaska.

II. Parties Bound by the Outcome

The following defendants shall be found by the results of this trial: Edward Murphy, Gregory Cousins, Robert Kagan, Exxon Shipping Company, Exxon Corporation[3] and Joseph Hazelwood.

All plaintiffs in this Court shall be bound by Phase I and Phase III of the trial, and those plaintiffs who appear and participate either personally or through a representative at the second phase of the trial in proving the quantification of their damages shall be bound by Phase II of the trial. All plaintiffs who appear and participate either personally or through a representative at Phase IV of the trial shall be bound by the results of Phase IV.

III. Sequential Phased Jury Trial Plan

A. Sequence of Trial.

1. Phase I – A first phase to establish the liability of defendants Murphy, Cousins, Kagan and Hazelwood for negligence; further, as to the Exxon Defendants and Hazelwood, to

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contribution or indemnity rights in light of the Alyeska settlement.

[3] Exxon Shipping Company and Exxon Corporation are hereafter referred to as the "Exxon Defendants." The parties have reached a stipulation that a single verdict will be returned as to the Exxon Defendants. See ¶ III, F, below.

establish whether there was conduct undertaken with reckless indifference to the interests, rights and safety of others and sufficiently outrageous to be deemed equivalent to actual malice ("willful misconduct")[4];

2. Phase II – A second phase to establish proximate cause and damages, if any, of the following plaintiff groups:

Phase II A – lost harvest, price, and permit valuation claims of salmon and herring fisheries in the five geographical areas most greatly affected by the Spill (PWS, Kodiak, LCI, UCI and Chignik) as well as boat valuation claims as specified in the **Stipulation and Order Concerning Commercial Fishing Subclasses' Boat Devaluation Claims**, dated as of December 20, 1993;

Phase II B – claims of the Alaska Native Class;

Phase II C – lost income claims of cannery workers.

The cases, claims and issues asserted in separate cases in this docket are hereby consolidated or severed for purposes of trial, pursuant to Rule 42 F.R.Civ.P. and in accordance with the definition of the Phases set out herein.

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[4] It is understood that use of "willful misconduct" herein is intended to define the type of aggravated misconduct necessary to justify an award of punitive damages, and that the standard will be the subject of pretrial motion practice and settlement of substantive jury instructions.

Plaintiffs whose claims are to be tried in Phase II may seek to try their individual claims in Phase IV if, and only if, written notice of request for severance of such claims from Phase II is filed and served within thirty (30) days of entry of an order approving this Plan in its current form. Any party may oppose a requested severance of claims included within Phase II by motion made within fifteen (15) days of service of the request.

3. Phase III – A third phase to determine liability for and the amount of punitive damages, if any, for all plaintiffs in this Court whether their compensatory damages are determined in Phase II or Phase IV, if the jury has determined that any defendant is liable for "willful misconduct."

4. Phase IV – A separate "cleanup" to determine proximate cause and damages, if any, for remaining plaintiffs. This cleanup phase can be tried or otherwise resolved by a new factfinder or factfinders. The plaintiffs whose claims are tried in Phase IV shall be entitled to share in the amount awarded in Phase III as punitive damages, if any. The amount allocated to Phase IV plaintiffs as punitive damages shall be that fraction of the total award established in Phase III whose numerator is the total amount of Phase IV compensatory damages and whose denominator is the total of the compensatory damages established in both Phase II and

Phase IV.

Without limiting the generality of the foregoing, the following compensatory damage claims shall be tried in Phase IV.

a. Property damage claims.

b. Commercial fishers not included in paragraph II (A) (2) above.

c. Tenderers.

d. Seafood processors, buyers or brokers.

e. Aquaculture associations.

f. Area businesses.

g. Others whose claims were not tried in Phase II.

h. Those whose claims are severed from Phase II pursuant to request as provided in paragraph III, A, 2 hereof.

5. The first three phases shall be tried by a single jury.[5] Phases I and III will be initiated by opening arguments and concluded by closing arguments and the submission of a special verdict form to the jury. In Phase II, the presentation of each plaintiff group shall be initiated by opening arguments and concluded by closing arguments and the submission of a special verdict to the jury. The provisions of this Plan establishing deadlines for designation of exhibits, depositions, witnesses and the like shall not

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[5] Defendants reserve objection to jury trial of any claim or issue as to which there is no right to trial by jury.

be applicable to proceedings reserved for Phase IV. Schedules of final pretrial of some or all of the claims reserved for Phase IV shall be established by trial planning procedures at a subsequent time.

B. Composition of the Jury.

The Court shall empanel a jury of 12. No jurors shall be designated as alternate jurors. All jurors shall be allowed to retire and deliberate, and the jurors shall be unanimous in order to return a verdict. Any verdict shall require at least six jurors.

A valid verdict on Phase I must be the unanimous verdict of all jurors to whom the Phase I issues were submitted, except for those jurors, if any, who are excused, provided that the jury must consist of at least six jurors. If, after a verdict has been returned in Phase I, jurors are excused before verdicts are reached in Phases II or III, a valid unanimous verdict may be returned by the remaining jurors for either Phase II or Phase III, so long as there are six or more jurors remaining on the jury. Nothing contained in this section is intended to waive grounds for mistrial other than the discharge of jurors due to illness or incapacity.

C. Jury Questionnaire, Preliminary Instructions and Voir Dire.[6]

1. Counsel for the parties shall attempt to develop a juror questionnaire, preliminary instructions to the jury panel and proposed

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[6] Assuming that individual defendants have not been dismissed by the time of trial, defendants maintain that appropriate accomodation will need to be made regarding the jury selection process.

questions for general voir dire by the Court by the close of business on April 8, 1994. To the extent there is disagreement about any of these matters, the court shall resolve the disagreement.

2. A jury panel of approximately 100 persons shall be called to Court by the Clerk of Court on Monday, May 2, 1994. The Clerk shall also arrange for a secondary panel, which can be called upon on short notice to supplement the initial panel should it be exhausted.

3. The Court will deliver preliminary instructions to the jury panel on May 2 regarding how the jury selection process will be carried out.

4. The Court will allow one attorney for each side to make a statement of up to 10 minutes to the entire panel for the purpose of informing them of what the case is about. These statements shall be delivered after the Court delivers its preliminary instructions; they shall not be a substitute for the formal opening statements which will precede the presentation of the evidence.

5. Jurors will then be excused to the jury room to complete the juror questionnaire. When the questionnaire is completed, panel members will be excused for the day. A copy of each completed questionnaire shall be made available to designated counsel for each side.

6. At a time which the Court considers sufficient to allow counsel an appropriate opportunity to review the completed questionnaires, the Court will meet with two

counsel for each side for the purpose of excusing those panel members as to whom there is a consensus about an excuse for cause. All jurors not so excused may then be placed in random order using a computer program managed by the jury clerk. Counsel will be provided with a print-out of the panel listing as soon as the jury clerk may reasonably do so.

7. Those jurors not excused for cause by stipulation will be recalled for general voir dire by the Court. At the conclusion of general voir dire, counsel shall be provided a brief time to assert additional challenges for cause if any appear.

8. The first 24 of the remaining jurors shall be seated in the jury box for individual voir dire by counsel. Each side shall be permitted up to 10 minutes of voir dire of each individual juror. At the conclusion of the voir dire of each individual juror by both sides, each side shall be permitted to exercise any challenge for cause. Challenges for cause and the Court's rulings on such challenges shall be conducted at the side bar. If a juror is excused for cause, that juror will be replaced with the next person on the random list. Failure to exercise a challenge for cause at the conclusion of the individual voir dire for a juror shall be deemed waiver of any ground for challenge then appearing of record. This process shall be followed as to each juror until 24 jurors have been cleared for cause.

Each side shall have six preemptory

challenges. Preemptory challenges shall be exercised by "blind strike," i.e., counsel for each side will be provided with the list of names of the 24 jurors cleared for cause, and each side will be permitted to strike six jurors from the list. The Court will take as the trial jury the first 12 jurors as set out on the list who have not been stricken by either party.

D. Trial Day.

The trial day shall run from 8:00 a.m. until 2:00 p.m. with two short breaks. Conferences may be held, if necessary, after the close of the trial day, and otherwise as may be necessary.

E. Trial Time.

The Court defers any ruling on the duration of the entire trial or any phase thereof at this time. This issue shall be taken up at a subsequent pretrial conference.

F. Preliminary Instructions.

Counsel for the parties shall attempt to develop a set of substantive preliminary instructions to be submitted to the Court by the close of business on April 8, 1994, which shall be given to the 12-person jury panel prior to opening arguments. To the extent there is disagreement, the Court shall resolve the disagreement.

G. Trial Notebook.

Each juror shall be provided with a trial notebook, which may include photographs of all witnesses. The jury shall be able to enter notes in the notebook and to take the notebooks into deliberations. Trial notebooks shall include a glossary of terms, to which the parties shall attempt to agree. To the extent they are unable to stipulate to the terms of a glossary, on or before March 1, 1994, each side shall submit their proposed glossary, or any portion thereof as to which there is disagreement, to the Court for review. These submissions may be accompanied by supporting briefs. The Court may then rule on what, if any, terms, or other submitted matter, may be included in the jurors' trial notebooks.

H. Jury View.

Any party requesting a jury view shall file a motion for such view no later than January 31, 1994, or any such application shall be deemed waived.

I. Procedures Applicable to Submission of Evidence and Verdicts as to the Liability of the Exxon Defendants.

Solely to facilitate the trial of this litigation, and for the purpose of this litigation only:

1. The contention that Exxon Corporation is liable in this litigation for the acts or omissions of Exxon Shipping Company, its agents or employees, shall not be tried by any party, but shall be deemed resolved for purposes of this litigation by this compromise, and not on the merits.

2. As to Exxon Corporation and Exxon Shipping Company, any verdict form used in this case shall provide for only a single verdict as to any claim for compensatory damages, only a single verdict as to whether or not conduct warranting an award of punitive damages under the legal standard to be

defined by the Court occurred, and, in the event of a verdict finding that such conduct occurred, only a single verdict as to the amount to be awarded as punitive damages, if any. Each such verdict shall be entered as to the "Exxon Defendants."

3. Judgment maybe entered as against Exxon Corporation and Exxon Shipping Company jointly and severally on any verdict for compensatory damages or punitive damages returned as to "Exxon Defendants."

4. Any evidence not otherwise admissible against Exxon Corporation that is an admission, business record or otherwise admissible as against Exxon Shipping Company shall be admissible to the same extent as against the "Exxon Defendants," but to no greater extent. Likewise, any evidence not otherwise admissible against Exxon Shipping Company that is admissible as against Exxon Corporation as an admission, business record or otherwise shall be admissible to the same extent as against the "Exxon Defendants," but to no greater extent.

5. The jury may be instructed, and counsel may discuss with the jury, the following: Any acts or omissions of Exxon Shipping Company or any knowledge or information chargeable against Exxon Shipping Company shall be chargeable against the "Exxon Defendants," and each of them, and any acts or omissions of Exxon Corporation or any knowledge or information chargeable against Exxon Corporation shall be chargeable against the

"Exxon Defendants," and each of them.

6. Except as provided in this subsection for the plan, any claim against or defense of law or fact that would have been available to Exxon Corporation or Exxon Shipping Company shall still be available; and specifically, (1) unless law applicable absent the special provisions of this subsection so provides, in no event shall one of the Exxon Defendants be subject to liability for acts of the other Exxon Defendant if such acts could not result in liability to such other Exxon Defendant; and (2) unless the law applicable absent the special provisions of this subsection so provides, in no event shall one of the Exxon Defendants have a defense to liability for acts of the other Exxon Defendant if such defense would not be available to such other Exxon Defendant.

J. Final Instructions.

Not later than by the close of business on April 8, 1994, both parties shall submit their respective request for final jury instructions. Such submission shall consist of joint submission of instructions requested by both sides, accompanied by individual submissions of requests for instructions as to which the parties have not been able to agree. Requests of instructions may be accompanied with supporting briefs.

K. Special Procedure for Determination of Punitive Damage Liability.

Defendants' recommended special procedures for determination of punitive damage liability, if any are withdrawn without prejudice.

IV. Specification of Factual Contentions

The issues framed by the following contentions, and only those issues, remain to be tried:

A. Specification of Phase I Contentions in the Parties' Cases in Chief.

1. Plaintiffs' Phase I Contentions.

The conduct of the Exxon Defendants concerning tanker operations in Prince William Sound was undertaken negligently and with reckless indifference to the interests, rights and safety of others and was sufficiently outrageous to be deemed equivalent to actual malice.

a. The transportation of crude oil in Price William Sound creates an extreme hazard to an environmentally sensitive area.

b. The Exxon Defendants were aware of the danger of an oil spill from tanker traffic in Prince William Sound and of the catastrophic consequences, including damage to Plaintiffs and members of the Plaintiff classes, that would result from such a spill, and acknowledged publicly their responsibility to prevent such spills.

c. The Exxon Defendants acted negligently and with reckless indifference to the interests of others in allowing the EXXON VALDEZ to run aground.

d. The Exxon Defendants acted negligently and with reckless indifference when they failed to adopt and/or implement a policy which provided for effective detection, monitoring and aftercare of a vessel master in a safety-sensitive position who had been treated for alcohol abuse, who had a history of mental and emotional problems, and who had a history of dereliction of duties.

e. The Exxon Defendants acted negligently and with reckless indifference to the interests of others when, with knowledge of Captain Hazelwood's past record, including alcoholism, dysthymia and other mental and emotional problems, and his prior dereliction of duty aboard vessels, they failed to disqualify him as a master in 198[illegible]; they returned Hazelwood to duty as a master after his admission to an alcohol abuse center; they assigned him to the EXXON VALDEZ, a vessel operating in environmentally sensitive waters; and they failed to investigate or remove him as Master of the EXXON VALDEZ after continuing reports of alcohol use, other mental and emotion problems, an continuing reports of dereliction of duties.

f. The Exxon Defendants acted negligently and with reckless indifference to the interests of others when they failed to adopt and put into effect policies and practices which would insure proper operation of, and training of Exxon Shipping personnel in the use of navigational devices aboard the EXXON VALDEZ, including, inter alia, the radar's Fairway Option (which was inoperable for some time prior to and during the March

23, 1989 voyage) and the vessel's ocean computer in the cargo control room (which had been inoperable since sea trials in 1987).

g. The Exxon Defendants acted negligently and with reckless indifference to the interests of others when they adopted a policy of inadequate manning levels in transporting their crude oil and failed to adopt and put into effect policies and practices which would insure against fatigue-impaired performance by the crew. As a result of such failures, the crew of the EXXON VALDEZ suffered from fatigue on the night of March 23-24, 1989. By way of example, Second Mate LeCain was fatigued and in bed in his cabin during his assigned watch, which began at midnight AST on the morning on March 24, 1989, and Cousins, himself fatigued, stood a second consecutive watch in place of LeCain. Chief Mate Kunkel, also fatigued, was in bed during both of the watches which Cousins stood.

h. The Exxon Defendants acted negligently and with reckless indifference to the interests of others when they failed to adopt and implement an ice-and-navigation policy where, since the early 1980s, ice was known by the Exxon Defendants to be a significant hazard to navigation. By way of example, the Exxon Defendants were advised shortly before March 24, 1989 by an Exxon master to limit transit of Prince William Sound to daylight hours because of dangerous ice conditions, which they did not do.

i. But for the reckless indifference of the Exxon Defendants, the grounding of the EXXON VALDEZ could have been avoided. After the grounding and discharge of in excess of 234,000 barrels of oil into Prince William Sound, the Exxon Defendants adopted policies and practices which they could have and should have adopted prior to the spill. These practices and policies related to, among other things, alcohol use and abuse, manning of vessels and fatigue, sailing in Prince William Sound during icy conditions and a monitoring/safety policy.

j. On late March 23, 1989, there were heavy concentrations of ice all across Valdez Arm, requiring a diligent, competent navigation watch capable of conning the vessel, watching for ice and fixing the vessel's position frequently, none of which occurred.

k. As a direct result of acts and omissions of the Exxon Defendants as set forth in paragraphs c. - j., above, the wrongful conduct set out below in paragraphs l. - n. occurred on March 23 - 24, 1989, all of which is attributable to the Exxon Defendants:

l. Hazelwood acted negligently and with reckless indifference to the interests of others throughout March 23-24, 1989. Captain Hazelwood's conduct during this period was that of an impaired master of a vessel. By way of example:

(1) Captain Hazelwood drank alcohol within four hours of the vessel getting underway from Valdez.

(2) Captain Hazelwood returned to the vessel about 42 minutes before sailing and assumed his duties in an impaired condition.

(3) Captain Hazelwood left the bridge to go to his stateroom about 15 to 20 minutes after getting underway, and the vessel proceeded through the Narrows with Captain Hazelwood off the bridge.

(4) Captain Hazelwood was off the bridge for more than one hour and had to be summoned to the bridge shortly before the Pilot disembarked. Once summoned, Hazelwood was slow coming from his cabin to the bridge.

(5) After the Pilot's departure, Captain Hazelwood reported to the Vessel Traffic Center (VTC) that the vessel was going to divert from the Traffic Separation Scheme (TSS) to the northbound (inbound) lane, alter course and reduce speed.

(6) Contrary to his report to the VTC, Captain Hazelwood did not decrease the speed of the vessel and changed the vessel course differently from that reported to the VTC to take her completely out of the TSS. Captain

Hazelwood reported none of these changes to the VTC.

(7) While on a heading to proceed out of the TSS, while the vessel was increasing to sea speed, Captain Hazelwood put the vessel's steering in auto gyro on a course heading for Bligh Reef, with hazardous ice conditions present; he thereafter increased the vessel speed.

(8) Captain Hazelwood subsequently turned the con of the vessel over to Third Mate Cousins, notwithstanding Hazelwood's knowledge (a) that Cousins was an inexperienced third mate, had no maneuvering experience in confined waters and had no pilotage for these waters; (b) that Cousins was fatigued from work; (c) that the vessel's speed was increasing to sea speed in hazardous ice conditions; (d) that the vessel's steering was in auto gyro; and (e) that Kagan, an inexperienced helmsman, needed close supervision.

(9) Captain Hazelwood instructed Cousins to turn back to the TSS at a location dangerously close to Bligh Reef.

(10) Captain Hazelwood told Cousins he would be off the bridge only a few minutes but did not return until after the grounding.

(11) Captain Hazelwood continued to act as would an impaired master after

the grounding by reason of his conduct and omissions, including but not limited to, (a) failing to sound the general alarm; (b) leaving the engine on full speed ahead; (c) failing to report promptly the grounding to the Coast Guard; and (d) continuing to attempt to dislodge the vessel from Bligh Reef despite the danger in doing so.

(12) When the Coast Guard arrived in the early morning of March 24, 1989, Captain Hazelwood smelled of alcohol and was smoking in the wheelhouse with heavy fumes present until ordered by the Coast Guard to extinguish his cigarette. Open and empty containers of alcoholic beverages, including empty cans of beer and a bottle of Jack Daniels, were observed in Hazelwood's cabin.

m. Defendant Cousins acted negligently on March 23-24, 1989. Cousins' conduct was caused principally by reason of his fatigued condition and lack of experience. By way of example:

(1) He assumed a second consecutive watch despite his fatigued condition.

(2) He continued to navigate the EXXON VALDEZ alone, despite the vessel's dangerous course and speed and the severity of ice conditions.

(3) He continued to navigate the EXXON VALDEZ without the required pilotage endorsement for Prince

William Sound.

(4) He failed to turn the vessel so as to avoid Bligh Reef.

n. Defendant Kagan acted negligently when he failed to properly maneuver the vessel as helmsman. Kagan was known by the Exxon Defendants to be an unskilled, marginal helmsman.

o. Pilot Murphy acted negligently when he failed to act after smelling alcohol on Captain Hazelwood's breath and witnessing him leave the bridge.

p. The Exxon Defendants are liable for the actions and omissions of their own employees, including defendants Hazelwood, Kagan and Cousins.

2. Defendants' Phase I Specifications.

Defendants will present a coordinated and cohesive defense without duplication of witnesses or proliferation of issues. Minor differences in contentions continue to exist, but these will not result in delay or confusion at trial.

For example, the Exxon Defendants admit that Captain Hazelwood's departure from the bridge of the EXXON VALDEZ was negligent and a proximate cause of the grounding, but they deny that Captain Hazelwood's actions were willful misconduct. Captains Hazelwood and Murphy deny that it was negligent for Captain Hazelwood to leave the bridge as the EXXON VALDEZ approached Busby Island Light and deny that this departure from the bridge was a proximate cause of the grounding. Captain Hazelwood's and Captain Murphy's evidence to this point will be identical to Exxon's evidence that Captain Hazelwood's actions were not willful misconduct.

In general, all defendants deny and will offer evidence to contradict plaintiffs' Phase I specifications set out above. Third Mate Gregory Cousins and Captain Murphy wish to state that they specifically deny that their individual actions were negligent.

Without prejudice to defendants' right to offer evidence to contradict each of plaintiffs' contentions, defendants will contend as follows:

a. Captain Hazelwood was not impaired on the night of the grounding.

b. When Joseph Hazelwood left the bridge on the EXXON VALDEZ at or about 23:53 on March 23, 1989, he left instructions which, if followed, would have steered the EXXON VALDEZ safely back to the designated traffic lanes.

c. The Sperry SRP 2000 ship control system aboard the EXXON VALDEZ appears to have malfunctioned at or about 23:53. This failure led the bridge team to believe that the ship was under hand control when it was not. This misapprehension apparently contributed to a delay in execution of Captain Hazelwood's order to turn back into the traffic lanes once the vessel came abeam of

Busby Island Light.[7]

d. The EXXON VALDEZ ran aground as the result of an accumulation of mistakes and errors on the part of numerous individuals, including Sperry Marine, Inc. and the Coast Guard personnel standing watch at the Vessel Traffic Center in Valdez.

e. No one involved in the grounding was guilty of willful misconduct.

f. Alcohol was not a proximate cause of the grounding.

g. Captain Hazelwood's actions after the grounding were reasonable and prudent under the circumstances.

h. Exxon Defendants contend that there is no evidence of the Exxon Defendants' strict complicity in the actions of Joseph Hazelwood on which plaintiffs base their claim of willful misconduct.

i. A finding of predicate acts for imposition of punitive damages on the basis of the facts cited in plaintiffs' specification of Phase I issues would have adverse economic impacts on the Alaska economy.

3. Without creating any implied expansion of the foregoing specification of issues of fact to be tried, the following issues of fact are no longer in the case for any phase, unless the

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[7] Third mate Cousins does not join in the contentions set forth in this paragraph.

Court finds that the Exxon defendants open the door:

a. Whether the tank and ballast arrangements of the EXXON VALDEZ, including the absence of a double bottom, was actionable for any reason.

b. Whether representations Exxon made concerning oil spills, oil spill preparedness or any other matter of fact or opinion germane to the grounding of the EXXON VALDEZ or the spillage of its cargo is actionable for misrepresentation.

4. Without creating any implied expansion of the foregoing specification of issues of fact to be tried, the following issues of fact are no longer in the case in Phases I or II, unless the Court finds that the Exxon defendants open the door:

a. Whether the preparedness of Exxon, Exxon Shipping or any other person to respond to the grounding or the oil spill was adequate, negligent or willfully deficient.

b. Whether the response of Exxon, Exxon Shipping or any other person to the grounding or the oil spill was adequate, negligent or willfully deficient.

B. Specification of Phase II Contentions in the Parties' Cases in Chief.

1. Plaintiffs' Phase II Specifications.

As a natural and foreseeable consequence of the Defendants' actions and omissions, the EXXON

VALDEZ oil spill caused damage to the environment of Prince William Sound and beyond and thereby caused substantial damage to Plaintiffs and members of the Plaintiff classes, who depend upon that environment for their livelihood and lifestyle.

a. On March 24, 1989, shortly after midnight AST, as a result of Defendants' negligence and reckless indifference to the interest of others, the EXXON VALDEZ ran aground on Bligh Reef in Prince William Sound, discharging at least 11,000,000 gallons of Alaska North Slope crude oil into Prince William Sound.

b. The discharge and spread of crude oil into one of the most diverse and complex ecosystems in the world, upon which the Plaintiffs and members of the Plaintiff classes depend for their livelihood and lifestyle, caused grave and long-standing direct damage to these Plaintiffs.

c. The discharge of crude oil into one of the richest marine fisheries communities in the world damaged commercial fisheries and the persons whose livelihood depends upon the health of those fisheries, including commercial fishers. The jury will be asked to answer special interrogatories at the conclusion of each sub-phase as follows:

(1) 1989 Harvest Sizes

(a) PWS pinks

(b) UCI sockeyk

(c) Other hardest sizes for PWS,

Chignik, Kodiak, LCI and UCI, to the extent the parties are unable to stipulate to harvest sizes

(2) 1989 Fish Prices (PWS, UCI, LCI, Kodiak, Chignik)

(a) PWS pinks

(b) PWS herring roe

(c) UCI sockeye

(d) The parties will attempt to stipulate to a formula for deriving the prices of other areas, by species, based upon jury findings as to a-c, so judgment can be entered on salmon and herring price claims, if any, for PWS, Kodiak, Chignik, UCI and LCI.

(3) Post-1989 Fish Prices[8]

(a) 1990 Salmon and Herring

(b) 1991 Salmon and Herring

(4) Post-1989 Harvest Sizes[9]

(a) PWS pinks in 1991, 1992 and 1993

(b) PWS herring in 1993

(5) Permit and Boat Devaluation[10]

(a) PWS salmon permit holders

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[8] Subject to Robins and causation motions to dismiss.

[9] See prior footnote.

[10] See prior footnote.

(b) PWS herring permit holders

(c) Kodiak salmon permit holders

(d) UCI salmon permit holders

(e) LCI salmon permit holders

(6) Offsets, if any

d. The discharge and spread of crude oil damaged cannery workers whose livelihood depends upon the health of affected commercial fisheries. The jury will be asked to answer special interrogatories at the conclusion of this phase to quantify lost wages in 1989 on an aggregate basis, and any offsets thereto.

e. The discharge and spread of crude oil and its consequent impact on traditional subsistence foods damaged Alaska Natives whose culture, traditions, society, beliefs and relationships are dependent upon a subsistence way of life.

> The jury will be asked to answer special interrogatories at the conclusion of this phase to quantify that damage and determine if there are any relevant offsets.

2. Defendants' Phase II Specifications.

a. Certain persons engaged in commercial fishing were damaged for the 1989 season as a proximate result of the grounding of the EXXON VALDEZ or the spillage of its cargo, but the amounts claimed by fishing plaintiffs are overstated, and alleged post-

1989 damages were not proximately caused by the Spill.

b. The Spill did not depress the price of Alaska seafood landed in 1989 or thereafter, nor was the Spill the proximate cause of any decline in the value of commercial fishing permits or fishing boats.

c. Certain cannery workers may have suffered a lose of income in 1989, but the majority of cannery workers have been compensated for losses.[11]

d. Certain Alaska Natives are entitled to compensation for out-of-pocket losses, if any, but plaintiffs' evidence fails to provide a reasonable basis for estimation of damages, if any, proximately caused by the Spill. Otherwise, Alaska Natives were not damaged in an ascertainable amount as a proximate result of the Spill.

e. The Spill caused transitory damage to land and wildlife, but this damage has not had a significant long-run effect on the commercial or subsistence use of the resources of Prince William Sound or to its shoreline.

f. The Exxon Defendants are entitled to offset sums received by plaintiffs in partial satisfaction of their claims or which were realized in discharge of plaintiffs' duty to mitigate damages.

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[11] This contention does not concede that any loss of income sustained by cannery workers is cognizable under maritime law.

C. Specification of Phase III Contentions in the Parties' Cases in Chief.

1. Plaintiffs' Phase III Specifications.

The nature and extent of the defendants' acts and the circumstances in which those acts occurred, as described above, together with the following acts and circumstances, justify the assessment of a substantial punitive damage award.

a. Defendants' financial and social condition and standing.

b. The costs of the spill to Exxon Defendants to date have had no material adverse impact on the Exxon Defendants' financial condition.

c. The risks that the defendants ignored.

d. The scope and severity of the harm caused by defendants.

e. The attitude and conduct of defendants upon discovery of the misconduct, including the cover-up of the misconduct and denial of the damages before Congress and the public.

f. In light of the great risk to society presented by acts such as those of the Exxon Defendants, the necessity to punish Exxon and to deter like acts by Exxon or others in the future.

2. Defendants' Phase III Specifications.

a. If there were evidence of willful misconduct (which there is not), it still would not be appropriate for a jury to award punitive damages against the Exxon Defendants for the following reasons:

(1) Exxon and Exxon's employees have demonstrated long-standing commitment to good corporate citizenship. This record of positive corporate behavior makes it inappropriate to punish Exxon under the circumstances of this case.

(2) Long prior to the accident, the Exxon Defendants conducted tanker operations in Prince William Sound, and in Alaska generally, with a high level of concern for the well-being of the community and the environment. Exxon was a leader in developing many procedures designed to prevent oil spills from tankers or from other oil and gas operations. The Exxon Bridge organization manual and the ExxBridge project are examples of this self-starting, forward-looking commitment to safety.

(3) Prior to the accident, Exxon Shipping had a commendable record for safety and a continuing commitment to prevent accidents; and if and when accidents did happen, they responded to such accidents quickly and effectively.

(4) Long prior to the Spill, Exxon and its affiliates demonstrated a self-starting, forward-looking concern about the need to be able to deal effectively

with marine oil spills when they occur. The Correxit line of dispersant is one example of Exxon's before-the-accident commitment to do its utmost to minimize the consequences of accidental oil spills.

(5) The Exxon Defendants accepted responsibility to clean up the Spill immediately after the accident and persevered with unprecedented skill and at unprecedented expense to remediate the effects of the Spill. As a result, the environmental and economic effects of the Spill were mitigated, and, in purely economic terms, many offsetting benefits were realized by Alaska residents and the Alaskan economy.

(6) The Exxon Defendants quickly and voluntarily undertook to pay legitimate claims for compensatory damages or to advance funds against claims to minimize the impact of the Spill on the fishing industry. They provided speedy and voluntary financial and other assistance to the governments or administrations of the affected municipalities and native communities to mitigate the effects of the Spill and to pay for an incremental level of local governmental service and support.

(7) The Exxon Defendants sincerely and publicly apologized to the people of Alaska and the public generally for the

Spill.

(8) Punitive damages are not warranted because it is obvious, as a matter of economics and common sense, that the multi-billion dollar cost of the Spill and the Cleanup are more than enough to motivate the Exxon Defendants to take additional steps to increase even further the level of care with which operations are conducted in Alaska. These steps also satisfy the exemplary purpose of punitive damages.

(9) The Exxon Defendants have, in fact, taken vigorous and precedent-setting steps to provide additional safeguards against the risk of damage to the public from Exxon's operations in Prince William Sound.

(10) The impact of punitive damages would fall on innocent shareholders and employees whose conduct before and after the accident should be encouraged, not punished.

(11) Punitive damages are not warranted on this record because an award of punitive damages would harm Alaska's economy by going far beyond the needs of deterrence.

b. If there were evidence of willful misconduct (which there is not), it still would not be appropriate for a jury to impose more than nominal punitive damages upon the Exxon Defendants for the following reasons:

(1) The Exxon Defendants' post-accident conduct proves that imposition of a huge award is not necessary to achieve the only purposes of punitive damages.

(2) The amount necessary to deter a corporation like Exxon can only be rationally determined on the basis of the revenues and profits related to the allegedly wrongful conduct, not by the total worldwide revenues realized by the Corporation. It is therefore clear that punitive damages cannot be measured, as plaintiffs contend, on the basis of Exxon's worldwide revenues and profits, but by the financial measurements actually relevant to the Exxon Defendants' decision- making. Exactly what sums were and are relevant to such decisions cannot be determined at this stage of the proceedings, but it is certain that even if the revenues and profits of all North Slope operations were to be considered, the costs and liabilities arising from the Spill already exceed any reasonable purpose for punitive damages.

(3) The amounts already paid by the Exxon Defendants as a consequence of the grounding of the EXXON VALDEZ, together with the remaining, but unresolved, liabilities for compensatory damages which the Exxon Defendants will pay, more than exceed the amount necessary to deter any conduct that

> might conceivably be relied upon for an award of punitive damages, or any amount necessary to deter willful misconduct of others. Such amounts are more than sufficient, even if judged by Exxon's worldwide revenues and total corporate assets.
>
> (4) Judged by the penalties society imposes for conduct clearly more deliberate and malicious than any conduct alleged by plaintiff, an award of more than nominal damages would be irrational.

V. Statement of Relevant Facts About Which There is No Dispute

The following facts are stipulated and may be read to the jury:

1. The Exxon Defendants admit that Captain Hazelwood was negligent in leaving the bridge of the EXXON VALDEZ at or about 11:53 p.m., local time, that such negligence was a proximate cause of the Spill, and that the Exxon Defendants are responsible for this act of negligence.

2. For purposes of AS 46.03.822, Exxon Shipping Company was the owner and operator of the EXXON VALDEZ, and Exxon Corporation owned the cargo of Alaska North Slope crude oil that was aboard the EXXON VALDEZ at the time of the Grounding; accordingly, the Exxon Defendants are strictly liable for damages proximately caused by the Spill pursuant to the terms of AS 46.03.822.

The parties continue to make progress on stipulations of fact, and contemplate that such stipulations will be filed as supplements to this plan from time to time.

VI. Issues of Law to be Resolved

A. Plaintiffs' Issues.

1. Causes of Action.

    a. Alaska Environmental Conservation Act (AS 46.03.822)

    b. Negligence and Punitive Damages

    c. Additional causes of action pleaded in state and federal complaints not disposed of by motion practice prior to trial or abandoned by the plaintiffs asserting such theories.

2. Legal Issues.

    a. The form of preliminary instructions to be given to the jury at each phase or sub-phase of the trial.

    b. The form of final instructions to be given to the jury at the conclusion of each phase or sub-phase of the trial.

    c. The verdict form to be given to the jury at the conclusion of each phase or sub-phase of the trial.

B. Defendants. Specification of Legal Issues.

In addition to resolution of legal issues relating to instructions, admission of evidence and conduct of the trial, defendants contend that the following issues of law will need to be resolved prior to or during trial.

1. Whether certain conduct is the proximate cause of damage claimed by specific plaintiffs or plaintiff groups?[12]

2. Whether claims for damage other than for damage awarded by the Trans Alaska Pipeline Liability Fund are preempted in this case by the terms of the Trans Alaska Pipeline Authorization Act?

3. Whether any claim for punitive damages may be based on an alleged duty to meet standards in excess of or in addition to applicable Coast Guard regulations, including but not limited to the minimum manning requirements specified for the EXXON VALDEZ by applicable Coast Guard regulations and certificates?

4. Whether any claim for punitive damages based on the assignment of Robert Kagan as an able seaperson is precluded by federal law?

5. Whether, as a matter of federal maritime law, the acts of a vessel's officers or crew may be attributed to their employer without a showing of the employer's strict complicity in the willful misconduct of such officers or crew?

6. Whether any claim for damages based on reductions in fish harvests attributable to closures or other management decisions made by the State or other governmental bodies are cognizable as a matter of federal maritime law?

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[12] This issue includes all questions arising under Robins Dry Dock and concepts of standing.

7. Whether defendants are entitled to an offset for payments received by plaintiffs from Exxon, the TAPLF or others?

8. Whether, as a matter of federal maritime law, there must be clear and convincing evidence of intentional malice or such outrageous conduct as to be the equivalent of actual malice before a jury may award punitive damages?

9. Whether, as a matter of federal maritime law, the overall wealth of a corporation is relevant to enhance the amount of punitive damages a court may allow?

10. Whether claims for punitive damages are barred as a result of judgments entered pursuant to settlement of governmental claims against the Exxon Defendants?

11. Whether defendants may be subjected to liability for punitive damages where defendants have been denied an adequate opportunity to prove their defense by limits on the length of trial, the number of witnesses or exhibits, the time for examination or cross-examination or otherwise?

12. Whether, as a matter of law, the conduct cited by plaintiffs is sufficient to permit imposition of punitive damages?

13. All issues of law raised in defendants, list of motions below to the extent not conclusively resolved by such motions.

VII. Witnesses

A. Plaintiffs preliminarily estimate that they will call 100 non-expert witnesses[13] and 45 expert witness. Plaintiffs estimates are based on the assumption that they will be allowed 30 days for trial of Phases I, II and III.

B. Defendants estimate that, depending on the identity of plaintiffs' witnesses, they will call between 20 and 40 fact witnesses and between 20 and 30 expert witnesses during Phase I, and between 10 and 25 fact witnesses and between 10 and 15 expert witnesses during Phase III. Defendants cannot currently estimate the number of witnesses they would call in the entirety of Phase II. For the commercial fishers trial, exclusive of the sublethal science case, defendants estimate between three and eight fact witnesses and between seven and 10 expert witnesses.

VIII. Proposed Schedule for Fact-Based or Law-Based Dispositive Motions

A. Plaintiffs' Fact-Based Motions. At this time, plaintiffs plan no such motions.

B. Plaintiffs' Non-Fact-Based Motions. At this time, plaintiffs anticipate bringing no such motions.

C. Defendants' Phase I Motions.

1. March 1, 1994: Motion by Captain Murphy for summary judgment.

D. Defendants' Phase II Motions.

1. Motions based on application of *Robins Dry*

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[13] A substantial number of the non-expert witnesses are expected to be the subject of brief videotaped testimony from depositions.

Dock and Benefiel principles.

a. October 15, 1993: Motion for summary judgment on claims for damages attributable to governmental fisheries management decisions occasioned by the grounding of the EXXON VALDEZ or the State's "zero tolerance" policy.

b. October 20, 1993: Motions for summary judgment as to claims of distal links in the seafood distribution chain, including seafood buyers, brokers, processors, tender boat operators and cannery workers.

c. October 29, 1993: Motion for summary judgment as to all claims based on losses allegedly sustained because the price of fish was depressed after the Spill (including all claims made by fishermen outside the Spill area).

d. November 5, 1993: Motion for summary judgment as to claims made by operators of area businesses, municipalities (and all others who allege purely economic loss).

e. November 8, 1993: Motion for summary judgment on claims seeking recovery for emotional distress, cultural or "hedonic" damages.

f. November 8, 1993: Motion for summary judgment on claims for damage to real property not impacted with oil.

g. November 24, 1993: Motion for summary judgment as to all claims based on decline in the value of boats or fishing permits.

h. December 31, 1993: Motion for summary judgment as to plaintiffs' recently-asserted claims for lost or reduced harvests subsequent to 1989.

i. February 1, 1994: Motion for partial summary judgment that plaintiffs who submitted claims to the TransAlaska Pipeline Liability Fund, and had those claims determined by the Fund, subject to review by this Court, are precluded from seeking a greater amount of compensatory damages from defendants.

j. March 1, 1994: Motion for summary judgment as to claims for alleged archeological damage.

2. Fact-based Phase II motions.

a. December 31, 1993: Motion for summary judgment on claims for the alleged subsistence value of real property or for interpleader of overlapping claims.

b. December 31, 1993: Motion for summary judgment on the mining operations and cleanup claims of Jahn H. Preston and J&P Enterprises, Inc.

c. April 4, 1994: Motion for summary judgment as to claims for alleged archeological damage not based on sound title.

d. April 5, 1994: Motion for summary judgment for claims of alleged archeological damage founded on the doctrine of res ipsa locquitur.

e. April 6, 1994: Motion for summary judgment for claims of alleged liability for damage to archeological assets resulting from vandalism.[14]

IX. Motions in Limine[15]

A. Plaintiffs' Motions. Plaintiffs will provide a list of motions in limine at the conclusion of expert discovery, but anticipate bringing an in limine motion on whether any defendants may raise a defense based upon the Sperry steering mechanism on board the EXXON VALDEZ.

B. Defendants' Motions In Limine.

1. Phase I –

a. November 1, 1993: Motion to exclude the report of the National Transportation Safety Board and all testimony based directly thereon.

b. November 2, 1993: Motion to exclude evidence relating to post-accident remedial measures taken by Exxon or Exxon Shipping during Phase I of the trial.

c. November 4, 1993: Motion to establish that every element of any claim for punitive damages must, as a matter of the federal maritime law applicable to this case, be established by clear and convincing evidence.

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[14] To the extent archeological discovery is still ongoing, pursuant to the Discovery Master's Scheduling Order in DM-159, additional dispositive motions regarding such claims may need to be filed at a later date.

[15] Briefing on such motions is limited to 15 pages for any opening memoranda and oppositions, and to five pages for replies.

d. November 5, 1993: Motion to exclude Joseph Hazelwood's private medical records as to Exxon and Exxon Shipping Co.

e. November 12, 1993: Motion to exclude evidence relating to Joseph Hazelwood's citations or convictions for driving under the influence of alcohol.

f. November 15, 1993: Motion to exclude evidence concerning Joseph Hazelwood's use of alcohol prior to August 1985.

g. November 19, 1993: Motion to preclude reference to the redactions of the Hazelwood medical records sustained by the Discovery Master.

h. December 1, 1993: Motion to exclude evidence of defendants' total wealth, net worth or earnings as proof of the amount appropriate to punish or to deter the Exxon defendants.

i. December 2, 1993: Motion to exclude evidence concerning prosecution of legislative advocacy activities.

j. December 15, 1993: Motion to preclude presentation of testimony in support of the report of David Pisoni.

k. December 31, 1993: Motion to exclude evidence relating to establishment of the minimum manning requirement for the Exxon Valdez, or to disputes over manning requirements for unlicensed mariners.

l. February 1, 1994: Motion to exclude evidence of the blood and urine tests administered to members of the EXXON VALDEZ crew on March 24, 1989.

2. Phase II Motions –

a. November 8, 1993: Motion to exclude testimony of environmental experts who depend on empirical observations made by out-of-court declarants.

b. November 9, 1993: Motion to exclude reference to the jury verdict in the Glacier Bay litigation.

c. February 1, 1994: Motion to exclude any evidence of opinions based on ethnographic and similar surveys.

3. Phase III Motions -

a. November 10, 1993: Motion to preclude presentation of testimony in support of the report of Sam Rhodes.

b. November 29, 1993: Motion to preclude evidence relating to natural resource damage or general environmental impact of the Spill.

X. Deposition Designations

A. Not later than January 15, 1994, plaintiffs shall hand-deliver designations of those excerpts of depositions or other prior testimony which they intend to present to the jury to liaison counsel for defendants.

B. Not later than March 15, 1994, defendants shall hand-deliver designations of those excerpts of depositions or other prior testimony which defendants intend to present to the jury to liaison counsel for plaintiffs.

C. Not later than 30 days after service of a designation of deposition testimony by any party (the "sponsoring party"), all other parties (the "responding party") shall (a) notify the sponsoring party of their objections, if any, to designated testimony or to exhibits used in conjunction with designated testimony, and (b) counterdesignate those portions of the deposition which the responding party contends should be included in the sponsoring party's designation pursuant to Rule 106 of the Rules of Evidence or at the discretion of the Court, which counterdesignations shall be read as part of the proponent's examination, and (c) counterdesignate those portions of the deposition which the responding party wishes to present as if on cross-examination, and which shall be offered by the responding party as cross-examination of the deponent.

It is the intent of the parties that each party has the right to control its case in chief and the ability to designate pursuant to Rule 106, and the ability to counterdesignate is not to be used to incorporate additional material, except for appropriate cross-examination material, or where necessary to present the context of designated testimony pursuant to Rule 106, or where necessary to avoid an unreasonable requirement to repeat designated testimony because of the combination of subjects in the deposition dialogue.

D. In every case where one or more of the responding parties has designated additional testimony to be offered in connection with a deposition, the sponsoring party may amend its designations, and in each case, the responding party may counterdesignate to any such amendment until neither party claims the right to further supplement the designation.

E. The parties should attempt to resolve any disputes about the inclusion or admissibility of designated testimony. Disputes which cannot be resolved by agreement shall be presented to the Discovery Master in sufficient time to allow for editing of videotapes or preparation of transcripts.

XI. Designation and Pre-marking of Exhibits

A. By January 24, 1994, plaintiffs shall identify and premark in good faith those exhibits they may use at trial, including summaries of voluminous material proffered pursuant to Rule 1006 of the Rules of Evidence, charts, models, animations and illustrative exhibits. By March 8, 1994, defendants shall identify and premark in good faith those exhibits they may use at trial, including summaries of voluminous materials proffered pursuant to Rule 1006 of the Rules of Evidence, charts, models, animations and illustrative exhibits. By April 2, 1994, each side shall identify and premark any additional exhibits they may use in cross examination of witnesses identified by other parties.

B. The parties shall use their best effort in good faith to identify and segregate which exhibits are expected to be first offered in Phase I of the trial, which exhibits are expected to be first offered in Phase II of the trial, and which exhibits are expected to be first offered in Phase III of the trial. This identification of exhibits shall not be binding. Both sides recognize that exhibits, if identified, may be used in any of the first three phases of the trial.

C. Exhibits designated by plaintiffs shall be marked in sequence beginning with the designation PX-1 et seq. Exhibits designated by defendants shall be marked in sequence DX-1 et seq.

D. Each side shall prepare an index of its exhibits generally in the following format:

No. Description Preadmitted Objections
Identified Admitted Rejected

The description shall, inter alia, include each deposition exhibit number previously assigned to that document. The designations of exhibits filed on January 24, 1994, March 8, 1994 and April 2, 1994, respectively, shall be provided in the index format specified in this paragraph. Such index shall be delivered in writing and as a computer-readable magnetic record in WordPerfect format.

E. Objections. Within 21 days of the designation of any party's intended trial exhibits, all other parties shall notify the sponsoring party which exhibits can be preadmitted and to which exhibits objections, including objections to authenticity, are made based on the face of the document. Such notification shall be given by endorsement upon a copy of the index of exhibits furnished by the sponsoring side. The grounds for objection shall be briefly stated. Except for express agreement to admissibility, all objections endorsed on the catalog and all objections not apparent from the face of the exhibit are reserved.

F. Disposition of objections. Defendants propose:

The Court may be requested to rule on objections to exhibits in advance of trial if any party considers such action necessary.

Plaintiffs propose: **The Court shall conduct a hearing on April 1, 1994. At this hearing, the Court shall pre-admit the exhibits to which there is no objection. As to exhibits about which there is objection, the Court shall rule on as many as possible.**

G. Rebuttal and surrebuttal exhibits. Exhibits intended for use in the plaintiffs, rebuttal or the defendants' surrebuttal cases may be identified as specified in Paragraph XII, B hereof.

XII. Witness Sequence

A. Pretrial designation. Sixty (60) days prior to the commencement of trial the parties shall provide the other side with a listing of witnesses they then intend to call at Phase I, Phase II or Phase III of the trial (including those who will be presented by deposition). This notice shall provide the principal points of testimony expected to be elicited from the witness, the Phase of the trial at which the witness will be called, and the estimated time for the testimony of the witness. Witnesses not so identified may not be called to testify absent special order of the Court.

B. Designation during trial. Commencing on the Friday before trial, and each Friday thereafter, the side entitled to go forward with the evidence shall be required to give the opposing side notice of the anticipated sequence of witnesses for the next five trial days, and the exhibits which shall be offered with those witnesses. Notices provided hereunder should include the sponsoring side's best estimate of the anticipated length of direct examination.

C. If, at any time after giving notice, the party going forward with the evidence has reason to know or believe that the sequence of witnesses will change, that party shall give notice of such proposed change as expeditiously as is practical. Trial counsel shall provide opposing counsel with a telephone number in Anchorage at which messages may be left on a 24-hour basis.

All parties other than the party by whom a witness is called shall be required to identify to all other parties those exhibits which will be used in the examination or cross-examination of a witness not called by them. Ordinarily, such exhibits shall be identified not less than one full trial day prior to the day an which the witness party expects to use such exhibit, and, if less than 24 hours before such anticipated use, as soon as practical after the decision to use the document has been made.

On the first day of trial, and on each Monday thereafter, in a manner to be prescribed by the Court as trial progress, the parties shall identify to the Court, to the extent possible, objections to the admissibility of exhibits expected to be used on direct or in cross-examination of witnesses to be called during the ensuing five (5) trial days.

Not later than 48 hours after defendants have given notice that they expect to rest their case in chief within five (5) trial days, plaintiffs shall give notice of the identity and sequence of witnesses they intend to call and shall identify additional exhibits, if any, they propose to offer in their rebuttal case. Likewise, not later than 48 hours after plaintiffs have given notice that they expect to complete their rebuttal case within five (5) trial days, defendants shall give notice of the identity and sequence of the witnesses they intend to call and shall identify the additional exhibits, if any, they propose to offer in their surrebuttal case. In either case, the notices may be supplemented to include rebuttal or surrebuttal witnesses or exhibits responding to evidence offered in the opposing side's case after the first rebuttal or surrebuttal notice has been provided.

XIII. Daily Stenographic Transcript

The parties are authorized to make arrangement for appointment of a stenographic reporter to make an official stenographic transcript of proceedings at the parties' expense. This reporter shall be directed to provide at least the following capabilities: (a) in-court readbacks from machine-stenographic notes, (b) delivery of electronic copy of un-edited daily transcript immediately at the close of the trial day, (c) delivery of a machine-readable digital record of any part of the transcript in an agreed-upon computer format, and (d) delivery of daily transcript not later than 6:00 p.m. of the day on which the transcript is taken. Any party may arrange with the court reporter for daily or other expedited transcripts at their own expense.

XIV. Modification of the Courtroom

The parties are authorized to use an electronic document presentation system at trial. The parties are to report to the Court what, if any, modification of the court may be required. The parties are authorized to take the necessary steps in contracting and working with the Alaska Telephone Utility and other entities to have installed all necessary equipment including a T-1 line or lines that will provide each side with its own electronic terminal capacity in the courtroom that is connected to off-site electronic information storage of the respective party.

XV. Good Faith

The parties shall act in good faith in carrying out the provisions of this trial plan to achieve the purposes of Civil Rule 1.

XVI. Further Pretrial Conferences

Additional pretrial conferences may be set sua sponte, on joint application of the parties, or after motion made by any party.

DATED this ___ day of March, 1994.

BOGLE & GATES

By: s/ Douglas J. Serdahely
Douglas J. Serdahely
Attorneys for Defendant
Exxon Shipping Company
(D-2)

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By: s/ Jerry S. Cohen

Jerry S. Cohen
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Plaintiffs

APPENDIX N

EXCERPTS FROM THE TRANSCRIPTS OF PROCEEDINGS VOLUMES 1 - 47 May 2, 1994 - Sept. 16, 1994

[3]

* * *

THE COURT: This is a continuation of trial in case A89-0095 civil In re: the Exxon Valdez.

We have seated a jury in this case, good morning ladies and gentlemen. Is there any reason why I should not go straight to my preliminary instructions?

* * *

[5]

The Exxon defendants admit that Joseph Hazelwood, the captain of the Exxon Valdez, was negligent in leaving the bridge of the vessel on the night of the grounding, that such negligence was a legal cause of the oil spill, and that the Exxon defendants are responsible for this act of negligence.the Exxon defendants contend that there were other legal causes of the grounding as well. Defendant Hazelwood denies that he was negligent in any manner. The Exxon defendants and Hazelwood deny the claim for punitive damages.

Next, all parties have agreed that any acts or omissions of Exxon Shipping Company or any knowledge or information chargeable against Exxon Shipping Company shall be chargeable against the

Exxon defendants and each of them Third, all parties have agreed that any acts or omissions of Exxon Corporation or any knowledge or information chargeable against Exxon Corporation shall be chargeable against the Exxon defendants and each of them.

[6]

Fourth, all parties agree that Exxon Shipping Company was the owner and operator of the Exxon Valdez and Exxon Corporation owned the cargo of Alaska North Slope crude oil that was aboard the Exxon Valdez at the time of the grounding. Accordingly the Exxon defendants are strictly liable for damages proximately caused by the spill pursuant to the terms of Alaska Statutes 46.03.822. Fifth, the Exxon defendants have stipulated, one, that Captain Hazelwood was voluntarily hospitalized in April, 1985 for treatment that included alcohol rehabilitation, and that senior management of Exxon Shipping Company learned of such treatment contemporaneously.

Two, that senior management knew in may, 1985, shortly after his discharge from the hospital, that Captain Hazelwood's admitted that in the past, he had occasionally consumed alcohol aboard Exxon vessels and that he had returned to his ship from port drunk several times.

And three, that such conduct constituted a clear violation of Exxon Shipping Company's prohibitions against the use of alcohol and/or intoxication aboard Exxon vessels.

Six, the Exxon defendants stipulate that at all times relevant to this action they have been aware that transportation of large quantities of Alaska

North Slope crude by tanker through Prince William Sound involved the risk that if a casualty resulted in a major oil spill, the spill could

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result in significant impact on the environment of Prince William Sound and its environs.

Due to the number of plaintiffs asserting claims for damages, the parties have agreed to divide the trial into two and possibly three parts or phases. These phases may be generally described as follows:

In phase one, plaintiffs will seek to prove, one, that the Exxon defendants' conduct leading up to the grounding of the Exxon Valdez on March 24, 1989 was reckless; and two, that the reckless conduct was a legal cause of the grounding of the Exxon Valdez. Also in this phase, plaintiffs seek to prove that defendant Hazelwood was reckless, or at least negligent.

Negligence is the failure to use such care as a reasonable,

prudent and careful person would use under similar circumstances. Reckless conduct differs from negligence. Reckless conduct requires a conscious choice of a course of action, either with knowledge of a serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

In phase one, the Exxon defendants will contend that the conduct that resulted in the grounding of the Exxon Valdez was not reckless, as distinguished from being merely negligent. The negligence of the Exxon defendants will not be an issue in this trial.

Defendant Hazelwood will contend that he was not reckless or negligent.

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At the end of this first part of the trial, you will be asked to render a verdict as to the phase one issues on the basis of the evidence presented and the instructions on the law, which I will give you at the close of the evidence and after the presentation of the arguments of counsel.

In phase two, the parties will present evidence for and against claims for some of the actual damages alleged to have been caused by the oil spill. This phase will be divided into two parts, which we will call phase two A and phase two B. In phase two A – strike that.

Phase two A will relate to claims made by commercial fishermen and their crews for compensatory damages. In phase two B, the parties will present evidence for and against claims made by Alaskan natives for actual damages. We will have opening and closing arguments and instructions of the law as to each sub part of phase two. You will be asked to return a verdict on the fishermen's claims for damages at the end of phase two A, and a separate verdict on the Alaska natives claims for damages at the end of phase two B.

If at the end of phase one you find that the grounding was legally caused by reckless acts or omissions attributable to the Exxon defendants, phase two B will be followed by phase three of the trial. If at the end of phase one you find that the grounding was not legally caused by reckless acts or omissions attributable to the Exxon defendants, there will be

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no third phase of this trial.

Phase three of the trial, if held, will deal with the claims of plaintiffs that they should recover punitive damages from the Exxon defendants. Punitive damages are not favored in the law, and are never awarded as a right, no matter how egregious the defendant's conduct but may be imposed for that conduct which manifests reckless or callus disregard for the rights of others. Punitive damages serve the purpose of punishing a defendant, of teaching a defendant not to do it again, and of deterring others from following the defendant's example.

If you have found the Exxon defendants to have acted recklessly, the plaintiffs will ask for punitive damages. The Exxon defendants deny that any punitive damages are warranted in this case, even if you return a verdict of reckless conduct at the end of phase one of this trial.

Again, phase three of the trial will begin with opening statements by the plaintiffs outlining their claims. The Exxon defendants may also make opening statements outlining their case immediately after plaintiffs' statement. At the conclusion of the evidence introduced by plaintiffs and the Exxon defendants during phase three of the trial, the parties will present closing arguments. At the end of these arguments I will instruct you on the law which you are to apply in reaching your verdict for phase three of the trial.

* * *

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DIRECT EXAMINATION OF JOEL ROBERSON,
(by deposition)

BY MS. WAGNER:

Q State your full name and address?

A Joel Roberson, 1009, Stanley Court, Forney Texas, 75126.

Q What age are you?

A 43.

Q Let's touch on your termination. What were the circumstances of your termination at Exxon?

A The company came out with a reduction in force program that offered some severance pay. I took advantage or applied to be included in the program and was accepted.

Q Was there anything that motivated you to do that in the way of your relationship with Exxon at the time?

A Well, yes, primarily the fact that my job was eliminated, essentially.

Q What do you mean your job was eliminated, they eliminated a radio officer job?

A They were in the process of obtaining waivers to sail their vessels without radio officers, yes.

* * *

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Q On March 23rd, 1989, you went ashore; is that correct?

A That is correct.

Q While we are on this, let's take this period of going ashore and cover that. Can you trace your movements from the time you were leaving the vessel, which you started to do, and tell us where you went with Captain Hazelwood and the chief engineer?

A We left the vessel. There was a gentleman – I was under the impression at the time that he was the pilot that brought the ship in. That may or may not be correct. He gave us a ride into town and dropped us off at the agent's office. We remained in that office for some time. Probably longer than an hour. Following that, we were picked up by Mr. Murphy, we went to the Pizza Palace for lunch.

Q While you were at lunch, there was just the four of you; is that correct?

A Yes. The four of us were seated at a table. At one point during the meal, the agent stopped by.

Q And what did you have to drink at lunch?

A As I recall, I had two beers.

Q And what did the chief engineer have?

A I believe he also had two beers.

Q And what did Captain Hazelwood have?

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A Iced tea.

Q And the pilot?

A I believe he had the same, iced tea.

Q And about how long were you there?

A It's difficult to say. Certainly longer than an hour, possibly two.

Q And then what did you do?

A We got back into Mr. Murphy's car and he dropped us off toward the center of town. We agreed to meet back at the Pipeline Club. I went inside a gift shop, looked around for a while. Mr. Glowacki left. I don't know where he went. The captain came inside the gift shop with me. A few minutes later, I went next door to the supermarket, purchased some magazines and then walked over to the post office.

* * *

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Q And who was at the Pipeline Club when you arrived?

A I joined Captain Hazelwood and chief Glowacki.

Q And when you joined them, were they drinking?

A They had glasses in front of them at the table, yes.

Q And what were they drinking?

A I don't know.

Q Was it some type of alcohol?

A I assumed that it was.

Q But they gave you no indication of how long they'd been at the club prior to your arriving and seeing them there; is that correct?

A Not that I recall, no.

Q While you were at the Pipeline Club, what did you have to drink?

A I had beer.

Q How many?

A I wasn't counting. At least two.

Q And while you were there how many drinks did Captain Hazelwood have?

A Again, I don't know. There were drinks on the table when I arrived. I purchased a round.

Q Anyone else purchase a round after you?

A I believe so. Again, I don't know how many.

Q After the Pipeline Club, where did you go?

A We walked over to the Pizza Palace, I believe it's called.

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Q And what did you do at the Pizza Palace?

A I stood around and waited while the chief engineer Glowacki ordered pizzas to take back to the ship.

Q And then what?

A Then we moved over into the Harbor Club. I believe it's called located adjacent.

Q Did all three of you move as a unit? In other words you went in and ordered the pizza and the three of you remained there, or did Captain Hazelwood leave that group?

A No, we went over as a unit, as I recall.

Q And you went over to the harbor –

A I believe that's.

Q Harbor Club?

A Yes, I believe that's correct.

Q What did you have to drink in the Harbor Club?

A A bourbon and water.

Q Just for placement of time, about what time is this?

A I don't know it was still daylight.

Q It was still daylight?

A Yes.

Q Late afternoon, is that generally correct?

A Late afternoon, I think that would be the general time frame.

Q Did you sit down at the Harbor Club?

A Yes.

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Q And what did Captain Hazelwood have to drink?

A I don't know.

Q What did he order?

A He ordered a brand that I don't recall. Although I took it to be Russian vodka.

Q Did they have it? Or I mean, did they say we don't have that?

A The bartender indicated that he didn't have that brand.

Q And do you know what he ultimately gave Captain Hazelwood to drink?

A No, I don't know what he ultimately gave him to drink. He did set up several bottles on the bar to show him what stock that he had.

Q Of vodka, was it the bottles or couldn't you tell?

A I assume it was all vodka, yes.

Q And Captain Hazelwood picked the one that he wanted?

A That's a little vague in my memory.

Q Well, did you reach a conclusion that Captain Hazelwood

ultimately – he didn't get the brand he wanted but he got some other brand?

A My impression was that he settled for a different brand.

Q When he was served it was he served it in a short glass or a tall glass; do you recall?

A No, I don't have a recollection of the glass.

Q How many drinks did you have there, to the best of your

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recollection?

A Just one, as far as I know.

Q Could Captain Hazelwood possibly have had more than one?

A Your question was is it possible that he more than one? I would certainly think that, yes, that was possible, certainly.

Q And how long were you at this club, approximately?

A Only a few minutes, as I recall. Half an hour. Not long at all.

Q Now after the Harbor Club, what did you do?

A Captain Hazelwood asked the bartender to call the agent to arrange transportation back to the ship.

apparently he couldn't get through, and a cab was called. We boarded the cab. The cab made one stop, picked up another passenger at the Pipeline Club. We then drove back to the terminal, through the check point, back into the cab and on down to the head of the jetty or pier, or whatever you like to call it now, to the ship.

* * *

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Q Did you go up to the bridge at all between the time you felt the grounding and it awakened you and your hearing the captain on the MARSAT radio telephone?

A Yes, I did.

Q And how soon after the grounding did you go to the bridge?

A Well, again, I would estimate it was about half an hour, but to explain it or to backtrack from the time you refer to here, me overhearing the captain on the radio, I went to the bridge to tell him to come down to the radio room, that he had a MARSAT telephone call.

Q I see. Who was that's from?

A That was from Mr. Myers.

Q Was there a point in time when the house began filling with vapors and you also mentioned there was a stream of oil shooting in the area from the deck 40 to 50 feet high, do you recall that?

A Yes.

Q How – what I want to do is just point out about that point in time, was that the house was filled with vapors, is that how you were describing?

A The very early stages following the grounding.

* * *

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Q Do you remember him telling Paul Myers anything about the fact that Captain Hazelwood was not on the bridge at the time of the grounding?

A I vaguely recall some reference to the fact that he had just laid below to his cabin to do some paperwork.

Q Now, after this telephone call, what did you do? You were down in the radio room for this period of time. Let me just back a up minute. You said that Captain Hazelwood was there, and you can correct me if I'm wrong, he was only there for part of this time, then who else talked with Mr. Myers in addition to Captain Hazelwood?

A I did. He instructed me to stay on the line with Mr.

Myers, and he returned, the captain returned in the direction of the bridge.

Q Now, you've stayed on the line with Mr. Myers. What did you discuss with him, to the best of your recollection?

A For quite a while, we stood there listening to each other breathe, then he asked about the circumstances, what it felt like. There was a lot of shock or disbelief, I think, on both of our parts. He was asking me how bad the list was.

Q And was there a list?

A Yes.

Q And in which direction?

A To starboard.

Q A starboard list, and can you give me the approximate

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number of degrees of list, or describe it in any way?

A As I recall, I described it as a ten degree list.

Q And this ten degree list that existed from the time of the grounding, was this something that gradually took place, or was there a ten degree list shortly after the grounding occurred?

A The list was relatively rapid. It was – there was a sudden jarring motion, and it seemed to me that the list started to become noticeable about the same time as vapors were starting to fill the radio room.

Q You were in close proximity to Captain Hazelwood then, as you've testified. After the grounding did you ever smell alcohol on his breath?

A I think I did later. This was after the Coast Guard was already aboard. I didn't notice any of them prior to that.

Q About what time did the Coast Guard come aboard; do you know?

A No, I don't recall the time.

Q Now, when the Coast Guard came aboard again, it's in your prior testimony, but do you recall a conversation that took place when the Coast Guard was talking with Captain Hazelwood that you overheard in connection with the nature of the problem?

A Yes.

Q Can you describe, first of all, where did this conversation take place?

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A Directly outside the radio room in the passageway.

Q And you were at that time where?

A In the radio room.

Q And Captain Hazelwood was just outside the radio room?

A Yes, in the – in the passageway.

Q And there were Coast Guard personnel there. How many; do you recall?

A I believe there were three. The two I'm sure of, Coast Guard people. Possibly three or more, as I recall, one other individual.

Q And can you tell us what you overheard?

A One of the Coast Guard's men asked the captain what seemed to be – he said, what seems to be the problem. And Captain Hazelwood says, you're looking at it. As I recall, the Coast Guard officer asked about the anchors, whether one or both of the anchors were down. Captain Hazelwood indicated that they were both out and the Coast Guard officer said good. At that point they turned and went in the direction of the bridge.

Q Did you ever learn subsequent to this time you've just described that the Coast Guard personnel aboard smelled alcohol on Captain Hazelwood's breath?

A I had heard the two Coast Guard officers talking between themselves in the radio room. One indicated to the other that he smelled alcohol on the captain's breath.

Q In your interview with the NTSB, I want to focus on one

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incident, and you can refer to the bottom of the first page if you need to refresh your recollection of the NTSB interview, but it's in connection with when if you were ever asked if you had seen Captain Hazelwood drinking on the vessel prior to the grounding, and you start relating an incident. Can you tell us the circumstances of the incident that you told the NTSB about?

A Yes. I don't recall the exact day. I believe it was on the weekend. The captain had come to the radio room before lunch time and asked me to come down to the lounge after lunch, that he had something to show me.

Well, subsequent to that he called me into his office. I don't recall if this was before or after lunch, but he indicated that he had a confiscated bottle that he wanted me to witness the destruction of down in the lounge. I went into the lounge, Greg Cousins was there. The captain came in and reached under a jacket that was on one of the recliners and pulled out a bottle. I think in the NTSB account it indicates that I said that the bottle was handed to me. I don't recall that. I do recall that the bottle sat on the deck for some period of time.

Q What was in the bottle? What kind of liquor? Well, what was in the bottle?

A Clear liquid.

Q Was it alcohol?

A At this point, I wasn't sure. I think I assumed that yes,

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it was alcohol. Captain indicated that Greg and I should have some. I was very uncomfortable in the situation. I had been called on in the past to witness destruction of confiscated or out of date controlled substances aboard the ship in the medicine chest, and it was a pretty unusual situation.

Q So did you all have some drinks from this bottle, then?

A I had a cup with orange juice. I had tipped the bottle into the cup. I tasted it. I was puzzled at the time. There was no taste of alcohol, pretty much just sat there and observed the video that the captain started.

Q Did you observe Captain Hazelwood drink from the bottle?

A I do recall that he had a glass. I don't have a specific recollection of him pouring from the bottle, no.

Q What about Cousins?

A Again I would have to say the same thing. I do recall that he had a glass. I do recall him handling the bottle, but as far as a recollection of him actually drinking from the bottle or pouring from the bottle, I don't have that.

Q Did this bottle have a label on it?

A Yes, it did. I don't recall what the label – the printing on the label. It seems to me that it was somewhat silver in color with a reddish stripe.

Q Well, based on your experience did you have an opinion when you saw the bottle with the label that there was some kind of alcohol in it?

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A My impression was that yes, it was an alcohol bottle.

Q Did you have an opinion whether it was vodka or anything else before you were going to taste it, because of its color? Was it a clear liquid?

A It was a clear liquid. I don't know if I formed an opinion as to what type of alcohol it was, either vodka or some other colorless alcohol.

Q Did anyone else, other than Cousins, yourself, and Captain Hazelwood, was anyone else in that room with you?

A Yes, the chief mate.

Q Kunkel?

A No.

Q Another chief mate?

A It was his predecessor. I want to say Klees, but I'm not sure of his last name. Now in addition to that, I don't recall any other – anyone else coming into the room. But there were windows on the door and I do recall one or two people looking in the window without coming up.

Q Did you ever hear anything or did you ever observe anything in connection with their performance? Did you ever hearing anything in connection with Kagan's performance – let's stay with Kagan, concerning his performance as a helmsman?

A Just that I'd been on the bridge on a few occasions when Kagan was at the helm.

Q Did you observe anything in connection with his performance

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on the helm?

A I didn't observe anything out of the ordinary, no.

Q Did you ever hear any criticism of Kagan's ability as a helmsman?

A Yes, I had, although I'm not sure what sequence in time that would be, but I had heard those remarks.

Q Do you remember in general what the remarks were?

A Generally, that he had difficulty steering the vessel, that he had a very short attention span.

Q Were there any announcements made over the P.A. System on the ship after the grounding concerning smoking, not smoking in any areas, or anything of that nature?

A No, there weren't.

Q Were there any announcements at all made over the P.A. System after the grounding during those early morning hours?

A No.

Q What were the first announcements that were made over the P.A. System after the grounding that you can recall?

A I don't recall the P.A. System ever being in use.

Q Did you ever have any discussions with Chief Officer Kunkel about the stability of the vessel?

A Yes, I did.

Q What were the first discussions that you had with him concerning the vessel's stability?

A The morning after the grounding.

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Q And the morning about – was it daylight?

A Yes.

Q And what did he tell you?

A He seemed to be concerned, if not upset. The captain was no longer aboard, I believe, although I'm not totally sure that Captain Deppe and Captain Wallace were aboard. Mr. Kunkel indicated that he was unsure of the stability of the vessel. He thought it was a very dangerous situation, that he thought that the crew should be removed from the vessel and he seemed to be concerned that whoever he had expressed those feelings to didn't seem to be that concerned. He said it was a situation on his stability computer that was essentially useless. It was a condition that there were no calculations for.

Q You testified with regard to an incident involving what you believe to be alcohol on the Valdez and involving Captain Hazelwood. Do you ever recall, in addition to that, do you ever recall anybody bringing alcohol onto the Exxon Valdez?

A I can't say that I have.

Q When you came back to the ship on one occasion in San Francisco, did you see anything that led you to believe somebody was bringing alcohol back on board?

A I can just say that I observed a bottle, what I took to be alcohol, aboard the launch as the launch was traveling from San Francisco back to the Valdez and also to another vessel that was anchored.

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Q In whose possession was that?

A Greg Cousins.

Q And in the same record, it's possible that there was only one drink; is that correct?

A That is correct.

Q Why don't you tell us what you observed?

A The launch was leaving from San Francisco bound for the vessel Exxon Valdez which was anchored. I think there was another Exxon vessel also anchored nearby. We were on the dock waiting for the launch. Mr. Cousins had an athletic type bag with him and I saw him on at least two occasions open the bag and remove a glass bottle. Aboard the launch, I again saw him with the bottle. As I recall, he offered me a drink and a couple of the other crew members that were aboard the launch.

Q Who else was aboard the launch?

A There was an A-B that – I don't suppose anybody has a crew list. I could recognize his name, but I don't recall it at the present time.

Q Wayne, the A-B from the Exxon Valdez?

A Yes.

Q Anybody else you can recall?

A That was aboard the launch?

Q Yes.

A Yes, the second mate, Lloyd LeCain was aboard and also a gentleman that I took to be the master of the other vessel.

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Q And do you recall what –

A Also the ship's cook was aboard, our second cook, Melanie Wright. I believe she was there, yes. I think that's the case. I believe there was a pump man aboard. I don't recall his name.

Q Do you recall what the other vessel was?

A No, I don't.

Q Was it an Exxon vessel?

A Yes.

Q Was it the Galveston?

A It's possible, but I don't recall.

Q Now about when did this incident occur?

A In the relative early stages of joining the vessel. It seemed to me about the time that Lloyd LeCain joined the vessel because I recall that he was on the launch and there was another second mate prior to – to him joining. So that's the time frame, as best I can recall.

Q What did the bottle look like?

A Pure glass.

Q What size and shape?

A As I recall, it wasn't so cylindrical or too narrow and cylindrical, such as a fifth bottle, but it was more – somewhat shorter and larger in diameter.

Q When you say shorter and larger –

A As compared to a fifth bottle.

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Q Was it round?

A Yes, as I recall, it was round.

Q Did it have a label on it?

A I don't know that I saw a label.

Q Do you know what color – what the color of the liquid inside was?

A As I recall, it was clear.

Q Clear as – clear as in colorless?

A Yes.

Q From looking at the bottle, itself, there's nothing you saw in the bottle that identified to you that it was alcohol that was there?

A Not that I recall.

Q Did Greg say anything to anybody that said this is vodka, this is Everclear, anything that would lead you to believe there was alcohol in the bottle?

A Not that I recall.

Q Did you smell any odor of alcohol at that time?

A Not that I recall.

Q Associated with the bottle?

A No, I don't recall any odor.

Q Now Mr. Russo asked you some questions about an incident involving the destruction of the bottle on the Valdez. Did Captain Hazelwood ever suggest to you that he was playing a practical joke when he did that?

[152]

A No, he didn't.

Q As a matter of fact, after that, you had a discussion with Mr. Cousins; did you not?

A Yes.

Q About the incident?

A More or less, yes.

Q Did you tell Mr. Cousins that you were uncomfortable about it?

A I think I indicated to him that I was surprised.

Q Did you, during that conversation, get the impression that Mr. Cousins was uncomfortable about what had happened?

A During that conversation, I don't recall. I did have the – during the incident, I had the impression that he was uncomfortable.

Q When you talked with Mr. Cousins after the incident, did you tell him that you were surprised that there would be alcohol on the ship?

A In a roundabout way, yes.

Q Did he in any way suggest to you that what was in that bottle was not alcohol?

A No, he didn't.

Q Did he in any way suggest to you that it had been a joke?

A No.

Q As you sit here today, you don't think it was a joke; do you?

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A No.

Q Mr. Sherman provided me the names of the A-Bs aboard the Valdez, at least those A-Bs who were present at the voyage that ended in the grounding, and your responses were possibly yes and no. Were you saying that you recognized their names or – and in particular, Mr. Claar, as to whom your answer was yes, did Mr. Claar take a drink?

A My response indicated as to whether or not these individuals were aboard the launch. I indicated that – I indicated yes to Mr. Claar. My recollection is that he was aboard and that he did take a drink from this bottle.

Q I believe – and he was the only one you have a distinct recollection of taking a drink; yes or no?

A Other than Mr. Cousins.

Q Yes, sir?

A Yes, as I recall, that's correct.

Q And those A-Bs as to whom in response to Mr. Sherman you said possibly, well, they probably were aboard the launch and possibly may have taken a drink from Mr. Cousins?

A That is correct.

Q And finally, às I understand the chronology, this incident with Mr. Cousins aboard the launch was before what we had been referring to as the bottle destruction episode aboard the Valdez?

A Yes.

[154]

Q Mr. Roberson, under all the circumstances, to include Mr. Cousins' demeanor and the actions that took place in the launch, did you conclude that he had been – had something to drink?

A Yes.

* * *

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DIRECT EXAMINATION OF LISA HARRISON

BY VIDEO EXAMINER:

Q Please state your full named and spell your last?

A Lisa Marie Harrison, H-a-r-r-i-s-o-n.

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Q And your address?

A 3311 Eagle Avenue.

Q And –

A Valdez, Alaska.

Q You were employed by the Pipeline Club?

A Yes, I was.

Q In Valdez, and what period of time were you employed there?

A I believe I started in 1984, September of '84.

Q And in what capacity were you first employed there?

A As cocktail waitress for about four months and then I became a bartender. And usually I always worked daytime bartending, few night shifts.

Q And how long did you work at the Pipeline Club?

A Until April of '89.

Q And during this time period, approximately five years that you worked there?

A Yes.

Q And you were employed on a full-time basis?

A Yes.

Q You were mainly working the day shift?

A Yeah, when I first started, I worked like three day shifts and two night shifts and then I worked just – just varied, you know. Summertime I worked some swing shifts but mainly, five days a week.

Q When you were working at the Pipeline Club as a bartender,

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what were the hours of your – of the day shift?

A 10:30, 6:30.

Q When your relief person came on, the person that would take over from you when your shift ended?

A Um-hum.

Q What time would that person then come on?

A They came on at 6:30. They were usually there about six, you know, to start checking on their banks and things, but they come behind the bar at 6:30.

Q Going back to March 23rd, 1989, first of all, do you know who Joe Hazelwood is?

A Now I do, yes.

Q Before March, now, we'll say before March 24th, 1989, did you know who he was?

A No, I didn't know him like I knew a lot of the tanker people by name or by ship. I saw him on March 24th, but until I seen his picture the following day, I didn't know who he was.

Q Okay. On March 23rd, 1989, okay, did you have occasion to see an individual you later learned was Joe Hazelwood?

A Yes.

Q And where did you have that opportunity to observe him?

A In the bar.

Q And that would be the Pipeline?

A Yeah.

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Q Okay. Now, do you recall when the first time you saw him was?

A I would say just because it's been so long, approximately 11:30 or noonish.

Q And could you describe to us the circumstances in which you saw him?

A He came in and ordered a drink and just – he was very quiet, sat up and had a drink and left a short time later and then he returned with another gentleman that used the phone, I would say around two, and came up and ordered a drink for himself and the gentleman and took it to him. And he sat off in the corner and he left after that drink and I never seen him again until I saw him on TV. But he wasn't – I mean, he didn't come up and socialize with the people. He was – he looked like he just wanted a quiet drink, be by himself.

Q You say he ordered a drink. Do you recall what kind?

A Yeah.

Q What kind was that?

A He had a double Smirnoff on the rocks.

Q Okay.

A Each time.

Q Was there – this first drink that he ordered from you, was that a double shot as well?

A Yes.

Q How much would be poured in a double (inaudible)?

[175]

A A double on the rocks would go in like a roly poly, a tumbler glass. You know, you repour it. We don't use (inaudible) or –

Q Okay. In terms of the amount of alcohol that would go into a double, would it be –

A I'd say like three and a half ounces.

Q Three and a half ounces?

A Three, three ounces probably a good – yeah, I'd say three ounces.

Q Okay. And do you have any knowledge as to the proof of Smirnoff?

A It was the blue label. It wasn't the hundred proof. It was the silver, which you know, I believe was like 80 or I'm not real sure. It was – if you want to look, it was the blue label.

Q Okay. And was anybody with him at this time?

A The second time he came back in, there was a – another gentleman that, like I said, used the phone but – and then after that drink, he left, so – and the gentleman never came back in. He just used the phone and left, so –

Q Okay, let's back up to the first time.

A No, he was by himself the fist time.

Q First time by himself, and could you describe, he came up – well, how did he get his drink? Did he come up and order it?

[176]

A He came up to the bar and ordered it.

Q Okay, and what did he do after he ordered the drink?

A He just went back to one of the high-tops over by the juke box and you know, there might have been a football game or you know, something on the TV, but usually it was real quiet. I probably had four or five customers, maybe even drinking coffee at that time of the day, or you know, having a drink at the bar but no one else was sitting – the first time he was in there no one else was sitting in the outside of the room, you know, at the tables.

Q As far as – you mentioned he came back again?

A Yeah.

Q And what did he have to drink at that time?

A The same thing. I know because I started to grab – what was it, it's like Wild Turkey, just because I had a gentleman in prior to that and he said no, he corrected me and, I said oh, I'm sorry. I wouldn't have made you pay for it, but it was, it was vodka.

Q Wild Turkey is a bourbon?

A Right, but it's right next to it up on the top shelf, so –

Q And he – did that double, that had as much alcohol in it as the first one?

A Oh, yeah.

Q Like three, three and a half ounces?

A Probably about three ounces.

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Q Okay. The second time then, is it possible that he ordered another drink in addition to the double Smirnoff?

A He ordered two drinks, one for himself and one for the other gentleman on the phone.

Q Now as far as your interaction with Mr. Hazelwood, let's say the second time there, did you have any conversation with him?

A Just the part about trying to pour the wrong drink, you know, and he kind of snapped about it, but it wasn't – I mean, it's not like – most people do, if you make a mistake, they're not very happy about it, but that was it and he walked away. It wasn't – I mean, there might have been some brief conversation but nothing that stuck in my mind.

Q All right. Do you recall how he paid for the drink?

A Probably cash. I'm not real sure.

Q How close were you – how close were you to Mr. Hazelwood?

A About two feet.

Q And how long did you have the opportunity to observe him the second time he was in?

A I said maybe – maybe 15 or 20 minutes. He was there and he was gone.

* * *

[181]

Q The cap, was it – what color was it, if you recall?

[182]

A I believe white, or – I'm not sure. Could have been gray. I'm not real sure, but it was – other people recognized

* * *

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DIRECT EXAMINATION OF ERMA LEE

BY VIDEO EXAMINER:

Q Please state your full name and spell your last.

A Erma Lee, L-e-e.

Q What is your address?

A 313 E-l-g-u-e-a, Harley, New Mexico, 88043.

Q Could you give me the dates of your residence in Valdez?

A I lived in Valdez from August of '78, and I left there in October of '90 – of '90, yes.

Q How long were employed by the Pipeline Club?

A Ever since I've been up here. I think the first year I worked there was probably late '78.

Q That would have been through October of 1990 then?

A Uh-huh.

Q Was that full-time employment?

A No. When I started out, I was just doing part-time,

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probably the last ten years on and on. Mostly full-time shifts, five days a week.

Q And what type of job did you hold there?

A Bartender.

Q Had you always been a bartender there?

A Yeah. Well, I helped in the kitchen, around the motel, little odds and ends at the beginning, but for at least the last ten years, I was bartending.

Q Did you have any particular shift that you worked?

A Mostly always worked nights, especially the last at least five years.

Q When would that shift begin?

A Well, for a while it was like 6:00 to closing, whatever time that was. And then it changed to 6:30.
Q When did it change to 6:30?

A It was after – it was after the oil spill that it changed to 6:30, or during the oil spill, sometime in there.

Q Do you recall if you were working on March 23rd, 1989?

A Yes, I was.

Q And –

A And I went to work at 6:00 that night.

Q Do you know Captain Joe Hazelwood?

A Yes, I do. I don't know him really well, but I know him when I see him.

Q How do you know him?

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A Just from coming in there off and on, you know, from the time, I guess – seemed like a long time. Quite a few of the tanker – at that time, quite a few of the tanker guys in, so you know who is who.

Q Did you know him by name?

A Uh-huh.

Q This was before the spill, did you know him by name?

A Yeah, I knew who he was, yes, by name.

Q Okay. Did he come into the bar often?

A Usually when they were in, you know, in port. If he was in town, he did usually come into the Pipeline Club, maybe have one drink and leave. I've never,

ever saw him sit there for a long time, you know. He was just kind of in and out. And how you get to know who they are, you know, is you get a lot of the younger guys that come in and stay for a while, so they will say, he's the Captain, and go over and say hi. So I got to know who he was. Because I never really ever talked to him that much. He's kind of a quiet guy, so, you know, just to speak to him when he come in, I don't know who he was.

Q On March 23rd, 1989, did he come into the Pipeline?

A Yes, he did.

Q You were working at that time?

A Uh-huh.

Q Do you recall about what time he came into the Pipeline Club?

A Well, I went to work at 6:00, and I cannot put an exact time on it, because it was kind of busy. It was ladies dart night and I had four teams of gals there. So I would say he came in somewhere between probably 6:30 and 8:00. That's a broad time, but I can't say exactly what time.

Q And that was into the bar as opposed to the restaurant?

A Yes, uh-huh.

Q Do you recall if he ordered any alcohol?

A He had one drink on my shift.

Q And do you recall what that drink was?

A I can't. I tried to remember that. I'm not positive. I can take a guess, but I'm not real positive on what it was. He sat at the table.

Q Whereabouts was that table, if you can recall?

A It was right by the – when you came in the front door, it was like the second table right when you come in.

Q When you say –

A Before you get to the bar, from the door to the bar there is like two big high-top tables and he sat at the second table.

Q Was he with anyone when he came in?

A No, he was by his self.

Q And did he join anybody while he was there?

A No. Now, there was a couple of the guys that were in there of his crew that went by and said hi to him, you know, seen him over there and talked to him, and then they left and

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he got up and left. He wasn't there very long.

* * *

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DIRECT EXAMINATION OF JANICE DELOZIER

BY MR. GERRY:

Q Would you state your full name?

A Janice Lynn Delozier, D-e-l-o-z-i-e-r.

Q Mrs. Delozier, how long have you lived in Valdez?

A Five years this past June.

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Q Where is your physical address in Valdez?

A 155 Gulkana Street.

Q How long have you lived there?

A Three years this past February.

Q So coming to Valdez five years ago, where have you been employed? Let's start with the first job.

A I really didn't intend to work, but I got a good offer from a dentist that came to town, so I went to work for him in February of '88.

Q And the dentist's name?

A Doctor Allen Stewart.

Q Are you still employed there?

A No, I am not.

Q How long did you work there?

A About 18 months.

Q And what was your job there?

A Dental assistant.

Q Now, in March of 1989 you were employed by Dr. Stewart?

A That's right.

Q Do you recall the events of March 23rd, 1989?

A Uh-huh, I sure do.

* * *

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Q What did you do during this time period that the office was closed from 1 to 3?

A I had the dental receptionist, Mrs. Vculek, give me a ride over to the Pipeline to meet some friends for coffee.

Q When you say the Pipeline, what are you referring to?

A A restaurant club and motel all under one roof.

* * *

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Q You said you saw Captain Hazelwood, a person you later identified as Captain Hazelwood in the Pipeline?

A Uh-huh.

Q What day would that have been?

A Thursday, the day of the – the day of the two-hour lunch.

Q That was March 23rd?

A The 23rd.

Q The 23rd of March?

A Uh-huh.

Q Could you tell us how it was that you came to see Captain Hazelwood in the Pipeline?

A Yes. As I say, when you walk in the Pipeline, the kitchen is to your – the restaurant is to your immediate right, a separate room, and as you walk up to the bar, the right side is curved and there is a coffee machine up against the wall. I was probably the second to the third bar stool coming out from

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the wall. To my left is an opening area where waitresses stand in and place their order for their drinks. A couple of little split rails are there where you can put your body between. He walked in off the street into the building, came up to that little open waitress station, made eye contact, nodded, you know, as in a gesture, ordered a drink, ordered a specific drink and watched Ms. Hoots pour it and he watched her pour from a well pour bottle, which I guess he saw that it wasn't what he ordered, so he kidded her about it. And she apologized and said she would pour it out or fix him what he wanted, and just cast it aside.

Q Ms. Delozier, how far were you from Captain Hazelwood when he ordered this drink?

A The same way at the bar. One bar stool between me and the waitress station.

Q Would four or five feet sound correct?

A Yeah, three, three-and-a-half, four, not that much of a distance. Like a chair and then the space, the bar stool and then the space.

Q Did you have any problems at all in distinguishing the man's features due to the lighting conditions?

A No, I did not.

Q Anything odd at all that would have hindered your vision of Captain Hazelwood?

A No, sir.

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Q How long did this – how long was Captain Hazelwood at the bar?

A Probably just a couple minutes.

Q And you said he ordered some kind of drink?

A Yes, sir.

Q Was that an alcoholic drink?

A Yes, sir, it was.

Q Do you recall what he ordered?

A Yes, I do.

Q What was that?

A Smirnoff on the rocks.

Q Was that the drink that he obtained, if you know?

A There was a mistake made. He did take vodka on the rocks. It was not the brand that he had asked for.

Q And you said he had some kind of conversation with Lisa Hoots about this?

A He told her that it was not what he had asked for and she apologized to him. He was not upset about it, he just kind of jokingly said it would be all right.

Q Did you watch Lisa Hoots pour the drink?

A Yes, I did.

Q Do you recall what kind of glass it was put in?

A When you pour a drink on the rocks, you fill the rocks glass with ice and pour directly onto it. You do not use a shot glass or a little metal beaker like a lot of bartenders

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mix with. She poured it directly on to the rocks glass which was somewhat filled with ice.

Q Now after Captain Hazelwood got the vodka on the rocks, what did he do, if you know?

A He took the drink and just walked back a few feet to what they call a high-top table which is just called that because it rises up higher than a small cocktail table.

Q How far was that from where you were seated, located?

A About six, six to seven feet.

Q And the shape of the table?

A It's round and they generally have three to four tall bar stools pushed underneath them.

Q How did Captain Hazelwood sit, as far as his position at the table, vis-a-vis where you were sitting? What I'm trying to say, was he facing you, was his back to you?

A He took the chair to the back of the high-top in front of the juke box and he would have been facing towards the coffee people, yes, sir, facing ahead towards us.

Q From your vantage point, did you have the opportunity to see his fashion?

A Yes, sir, I did.

Q Do you recall how long you had been at the Pipeline before Captain Hazelwood came in and ordered his first drink?

A 15 to 20 minutes.

Q So that would have put it about what time, approximately?

[221]

A He probably got there about a quarter till two.

Q Once he went over to this table, did you see him drink the drink that he had ordered?

A I did not stare at him. I did look that way a couple times. I didn't see him drinking the drink. I only saw the drink in his hand at one point like mid – either he was, I assume, putting it down or picking it up. I did not watch him drink the drink, no, sir.

Q Was there anything that happened while you were there that would give you an indication that he had consumed his drink?

A He got another one. He ordered another one.

Q And would you relate how that happened?

A Well, he had some friends join him.

Q Did you see these friends come in?

A Yes, I did.

Q Did the friends come in together or separately or how?

A That one gentleman that I remember coming in came up to the bar and placed a drink [sic] for two drinks. One of them was intended for Mr. Hazelwood and Mr. Hazelwood said that he had a drink already, thank you.

Q That was going to be my next question. How did you know that the drink that this man ordered was for Captain Hazelwood?

A He turned around and gestured and Mr. Hazelwood said he had a fresh drink but that this gentleman could pay for it. So they were kind of joking back and forth. So the gentleman

[222]

did not take Mr. Hazelwood a drink.

Q When you said that the man gestured, could you describe what kind of gesture that was?

A I believe the gentleman got a scotch and water and he said, and another drink for my friend, as in like –

Q What you're doing is pointing in a direction and the gentleman would have been pointing in the direction of Captain Hazelwood?

A At the high-top table, yes, sir.

Q And you mentioned something about Captain Hazelwood stating that –

A He had a drink.

Q But this other gentleman could pay for –

A He said, I have a drink, but you want to charge him for my drink, you can charge again, was what I think he meant.

Q Okay. Now, did this gentleman go and visit with Captain Hazelwood?

A He went and sat with him, yes, he did.

Q Was there anybody else that came in?

A There was a third person there, I did not see the third person enter the building, nor did I see him go to the table, he was just there.

Q Now, do you have any idea who the second man was, the man who wanted to buy the drink for Captain Hazelwood?

A No, I don't.

[223]

Q At the time that person came in, you had no knowledge of who it was?

A No, I did not.

Q And up until that time, you had no knowledge of who this other individual was?

A I did not know who he was. I, in my own mind, assumed he was aboard the vessel. I did not know his name or what his job might have been.

Q Now, this person while you were at the Pipeline did not buy Captain Hazelwood a drink?

A No, sir, he did not.

Q But you mentioned Captain Hazelwood ordered another drink?

A He came back up to the bar, yes, sir.

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Now, the man you identified as Captain Hazelwood, could you tell us what he looked like when you noticed him at the bar?

A He had a coat on, an open coat, it came down to probably the pockets of his pants. It was hanging open. He had a hat on, a small hat, kind of like a golfer's hat. I wouldn't call it a beret, just a small hat with a little deal on the front, kind of – he wore it kind of, I want to say cocked to one side a little bit. He had a beard. I wouldn't call it a full beard. It was kind of sparse, I guess is the word. Kind of dark under the eyes, maybe like dark circles or kind of shadowy like crows' feet or little lines. Basically I noticed his eyes were kind of dark under them.

Q And approximately the age of this man?

A 50 – up to 55.

Q How tall was the man that you saw in the Pipeline Club?

A I thought he was about 5'9".

Q And your recollection is his age was somewhere in the 50s?

A Early 50s, yes.

Q All right. What else do you recall about the way he was dressed?

A He had a hat on, a small hat. He had a beard.

Q Did this hat have a clip on it?

A A what?

Q A clip, a snap on?

A It had a small bill on it.

[243]

Q Do you recall ever saying that the cap appeared to have a snap on it?

A Uh-huh, I did say that.

Q You said that to the state police, is that correct?

A Yes, sir.

Q You said that to a state trooper by the name of Burke when you were interviewed by him on April 4th, 1989, is that correct?

A Correct.

Q Does that refresh your recollection that you remember at the time that the cap had a snap on it?
A It seems like it had a snap that would make the bill closed or the bill open.

Q And you also described this as a golf cap, correct?
A Yes, sir.

Q I'd like you to describe for us what you mean by a golf cap?

A Do you ever watch golf?

Q Sometimes. I try to avoid it.

A Small type hat. Some have a snap in front. It has a little opening in the back I presume where you can adjust. They are usually tweed, like heavy tweed, corduroy. I have one like it, not a cowboy hat, just a little cocky like – I wouldn't call it a beret. A beret to me has no bill.

Q But this golf cap that you've just described, it's your

[244]

recollection that was the type of hat that this individual was wearing?

A Yes, sir.

Q What portions of his face were covered with hair, do you recall?

A His entire chin.

Q His chin?

A Not up in here. Right in here was kind of clean-shaven.

Q Let the record reflect that the witness has indicated a portion below her lip and above her chin was clean-shaven. That's what you indicated, correct?

A Yes, sir.

Q What else?

A Just the beard.

Q When you say the beard, were the sides of his face covered with hair?

A No. He did not have mutton chops either.

Q So I want you to describe then for me, as best you can, how were the sides of his face? Were they clean-shaven, too?

A I guess his beard to me started from – started down from his cheekbones. Some of them start higher, real bushy. His was a nice kept spar – scarce beard.

Q So in other words, was his beard like a strip from his cheekbones down to his chin?

A No, it was a molded shape. Probably he kept it up very

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well. Probably he had a beard for a while. That's how it looked.

Q What about, was there a space between his sideburns and where the beard began?

A No.

Q Were his cheeks clear of a beard, or were they also covered with hair?

A Clear.

Q They were clear, all right. This is hard to describe in words, I understand that. I'm just trying to visualize what you recall seeing. If you would just, you know, indicate to us, your face, you know, where you saw the hair, and then I'll describe it for the record?

A The cheekbones was exposed. The beard started, like I say, this right here –

Q Was clean?

A Uh-huh. And his beard was very well groomed. It wasn't full out. It was a nice groomed beard.

Q And I don't recall what you said about whether there was a space between his sideburns and where the beard started?

A His hair was cut down to here and a beard started, and I don't think there was a space between where the hair started and a space of skin and then beard.

Q Do you recall how his hair was cut?

A He's balding.

[246]

Q Was his hair over his ears or was it above his ears or what?

A It was thinning right in here, and what there is he combs back.

Q So his hair, the witness indicated the top of her head and saying it's thinning up there?

A Yes, sir.

Q And it was combed back where?

A Where his hair does start?

Q Yes.

A Right about where the – what hair he does have, he combs back. He doesn't part it or anything.

Q He doesn't part it?

A No.

Q He just combs it back?

A Right.

Q So in other words, he doesn't, like some people do, comb their hair to cover up their bald spot?

A No, he does not.

Q So you can see his, you know, the bare portion of his head on the top?

A Especially on the sides.

Q On the sides, all right, and the rest of it was combed back, correct?

A Thin, yes.

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Q Can you describe the color of his hair?

A Gray, grayish. Probably at one time it was brown, ash brown, but it's graying. His beard had some gray in it.

Q What portion of his beard was gray, if you recall?

A Mingled. It wasn't like one pronounced –

Q Uh-huh. You –

A – that you see on some gentleman. It was just mingled.

Q What about his hair, was there any portion of his hair that was gray, do you recall?

A Maybe a little on the temples.

Q All right.

A A little bit of gray. He wasn't totally gray.

Q But you recall that his temples were gray enough that they were noticeable to you as being gray?

A Slightly.

Q How would you describe his complexion?

A Kind of olive.

* * *

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DIRECT EXAMINATION OF WILLIAM E. MURPHY

BY MS. WAGNER:

Q Would you please state your full name and spell your last?

A William Edward Murphy, M-u-r-p-h-y.

Q What age are you, about?

A I'm 46.

Q Is this a notebook that you use for your transits with vessels?

A Well, yes. It's a – the notebook changes every month, but that's correct. I have a monthly notebook and I record all ship movements and other data in that notebook, all ship movements that I take part in.

Q In connection with your service aboard the Exxon Valdez on the 22nd and 23rd, did you check your wristwatch with the Valdez clock?

A Yes – let me go back. Some of these entries, for example the time of standby engine and last line, for example, or of first line to the dock in case of docking and finish of engines, I asked the mate on watch who was recording those things what times he logged, entered in those. Although the times – the time I disembarked, for example, I don't know what they have logged that, so I refer to my personal wristwatch but normally it's the times that the ships' personnel have locked in their deck log.

Q While we are on this document – at this time, would you

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describe your license that you – is the license you have todaythe same license you had on March 23rd, 1989?

A Yes, it is.

Q Would you describe for the record what that license is?

A Well, I have two licenses, the federal license is a U.S. Coast Guard license, Second Mate of Oceans.

Q Second Mate of all oceans, is that right?

A That's right. Master of vessels not more than 1,000 gross tons on oceans. And my state – and with endorsement as first class pilot on vessels of any gross tons upon the waters of southwest Alaska. And my state license is as a first class pilot on vessels of any gross tons upon the waters of southwest Alaska with a VLCC, very large crude carrier endorsement. I don't believe the VLCC endorsement on the state license – at the time of the accident that was in the regulatory process, so I think that would be the only change in my license now as opposed to then.

* * *

[270]

Q Now, let's just turn to the outbound voyage. When you came out on March 23rd, what location did you get off the vessel? You showed us where you got on. Is it in the same general area or is it –

A In the same general area. Abeam Rocky Point or slightly south of that area, or southwest, rather.

Q To the best of your recollection, when you got off the vessel on March 23rd, where were you? Where was the vessel in the traffic with relation to the traffic separation scheme?

A The vessel was in the middle of the outbound lane of the traffic separation scheme.

Q In the general area you indicated before where you boarded the vessel, is that correct?

A Yeah, in the general area abeam of Rocky Point or slightly southwest of that.

Q But in the outbound lane?

A In the middle of the outbound lane.

Q What is the pilot's function aboard the vessel?

A I know of nowhere where a pilot's function is written down in a law book or a guide to pilot. It's pretty much dictated by custom administration over the centuries, really, but essentially a pilot comes aboard to provide local knowledge, and in the case of most pilotage district, certainly ours, ship handling expertise. The relationship between the master and

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the pilot is that of one professional with another. In almost all cases the master turns over the conn over to the pilot, that is the direction of the ship navigational control over to the pilot who directs the navigation of the vessel to its destination and then docks it. And generally the master who always retains command keeps an eye on the pilot. If the pilot does something the master thinks is inappropriate, either in terms of endangering the vessel, or I suppose in abusing the equipment, the master is there to advise the pilot of that and ultimately take the conn away from him if he thinks the pilot is doing something –

Q Which will endanger the vessel?

A – which would endanger the vessel perhaps. The master is always retains command. The master is always in command of the vessel.

* * *

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Q When the Exxon Valdez was loaded, such as she was when you took her out

[273]

on the 23rd and in the conditions you took her out

on the 23rd, which we'll get into, the weather conditions and so forth and the current, the weather was calm on the 23rd?

A That's my recollection.

* * *

[276]

Before you left the vessel, did you make any date with

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Hazelwood for the next day?

A Yes.

Q Go on and tell us about that?

A Well, we hadn't seen each other for a number of years, and I believe it was he suggested we have lunch together. He said he was going to be in town the next day, probably at his agent. He had some business to do there. And we agreed that he would telephone me. I thought that I was going to be free, and we'd have lunch together.

Q Okay, and then the next day, can you tell us how you were contacted by Hazelwood?

A I was telephoned by him. He said he was at his agent's office and would I come back and pick him up for lunch.

Q So that was sometime prior to noon?

A I think it was during the noon hour, it was somewhere around the noon hour.

Q And you went and picked him up?

A Yes.

Q Where did you pick him up at, the terminal?

A No, no, front of his agent's office in Valdez, the town of Valdez.

Q Was he with anyone?

A Yes, he was with two other gentlemen.

Q Do you know who they are?

A I know who they are now. At the time I recognized the

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chief engineer, whom I had met previously, and the other fellow I didn't recognize. He was introduced to me as the radio officer, radio electronics officer.

Q Then what did you do?

A They got in my car and we drove down to the Pizza Palace restaurant.

Q And you had lunch?

A Correct.

* * *

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Q You boarded the vessel at 2020 and you proceeded as you indicated to the bridge via the captain's cabin. About what time did Captain Hazelwood appear on the bridge?

[280]

A I don't remember what time it was. It seems to me that I had been aboard, oh, 10 or 15 minutes, and I did not know that the captain was not aboard. I believe I heard the third mate say, here comes the captain, or the captain is coming aboard, or words to that effect. That was the first I had learned that he was not in fact aboard. Shortly after that, the captain appeared on the bridge.

Q When the captain came to the bridge, did he say anything to you, where he was or why he was late getting back to the ship?

A No, we greeted one another and I was – at that time, I think I was – the ship's agent was on the bridge, we were chatting and Captain Hazelwood came to the bridge. He and I greeted each other. He and the agent greeted one another and then Captain Hazelwood and the agent went below, I presume, to the captain's stateroom.

Q When you were having this conversation with the captain, did you smell any alcohol on his breath?

A Yes.

Q When did you first smell the alcohol on Captain Hazelwood's breath? That is, he comes up – comes on the bridge, and was it when he came up to you and was standing a certain distance from you, or can you describe these circumstances?

A Yes. I think it was – I don't know if I was standing or I was sitting on a stool near the chart table having a cup of coffee and talking with the agent, and Captain Hazelwood came

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through the chart room door and he and I greeted each other and I smelled something on his breath then.

Q Right away?

A I believe so, yes.

Q How many feet was he standing from you?

A Oh, probably close enough. I don't know. How close do men they shake hands, a couple, three feet, something like that.

Q A few feet?

A Yeah.

Q You shook hands?

A Pardon me?

Q You shook hands with him, you shook hands with Captain Hazelwood, I take it?

A I don't really remember. Probably.

Q Did you continue to smell alcohol on his breath as you continued with this conversation?

A Well, we talked for just a short time, then he and the agent went below.

Q All right, but then subsequently Captain Hazelwood came up to the bridge again, right, when you got underway?

A Yes.

Q And did you have any further conversations with him on the bridge?

A Yes.

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Q When you were getting underway, did you continue to smell alcohol at that time?

A Yes.

Q Now, you had left him at lunchtime at about what time?

A Let me go back. I don't remember every instant when I was with Captain Hazelwood that I smelled alcohol on his breath. I smelled alcohol on his breath, that's what I smelled.

Q When you described it though, when you –

A The smell that I associate with the smell of alcohol, that's what I smelled on his breath.

Q But you're not – you're still standing by your testimony it was in the chart room when you met him as you describe?

A Yes, I am.

Q A few feet away?

A That's correct.

Q Are you standing by your testimony you continued to smell alcohol on his breath when you had subsequent conversations with him when you were getting underway?

A Yes.

Q And he was on the bridge?

A Yes.

* * *

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Q Would soon thereafter – do you recall at the NTSB interview you had you told them it was about a five minute interval from the time you told the third mate to have the captain come to the bridge?

A Yeah, it was something in the range of a few minutes, five possibly. About five minutes and maybe less.

Q On page 2 of the NTSB summary interview which you told me you reviewed before you testified, if you could just read the bottom of this paragraph where I have that little line. Do you want to read out loud what you told the NTSB?

A The master arrived on the bridge about five minutes later.

Q That was your recollection at the time you were interviewed by the NTSB, is that correct?

A Yes.

Q Where is the captain's cabin located with respect to the bridge?

A It's on the deck immediately below the bridge deck.

Q Did Captain Hazelwood, when he came to the bridge, did you have any conversation as to where you've been, trying to find out where he's been this period of time?

A No.

Q Did you smell alcohol on his breath?

A Yes.

Q Did you smell it – at what point did you smell it? He walks into the wheelhouse and comes to where you are, is that

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correct?

A Yes.

Q And he's standing a few feet from you?

A Yes.

Q And you start to have a conversation, do you?

A Uh-huh.

Q Is that – right at that point, did you smell the alcohol?

A Yes.

Q Did you smell the alcohol even before he opened his mouth to say anything, do you remember?

A I don't remember.

Q You continued to have a conversation with him then for a period of minutes before you left the vessel, is that correct?

A That's correct.

Q And about how many minutes was that?

A Oh, it must have been about 10 minutes, somewhere in the range of 10 minutes.

Q Did you continue to smell the alcohol during that 10 minute period while you were having the conversation with him?

A I believe I did.

* * *

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Q During this 10 minute period, did you hear Captain Hazelwood issue any orders whatsoever on the helm or engine?

A No, no. He – I still had the conn.

Q So when you left the bridge, he then had the conn but you hadn't heard him issue any orders, is that correct?

A I turned over the conn to him and I don't recall having heard him issue any orders to the rudder or the engine.

Q And you left the vessel, according to notebook at 23:20, is

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that correct?

A Yes. Is that what it says there? I don't know.

Q Yes, I'm just reading your entry, 23:20?

A Then yes, that's when I left the vessel.

Q All I'm trying to do is, would you agree that the period of time Captain Hazelwood was off of the bridge from the time he left the bridge, which you've testified to is about 20 minutes after getting underway, and the period of time he returned to the bridge, was approximately an hour-and-a-half, would you agree with that?

A The time he was off the bridge?

Q Yes.

A While I was on the vessel?

Q Yes?

A The time he wasn't present on the bridge?

Q Yes.

A Something in that range.

Q Okay, that's all I want.

For a captain on a vessel like this that had a licensed officer with a pilotage endorsement to be off the bridge for approximately an hour a a-and-a-half from the Port of Valdez and where you get off the vessel at Rocky Point, that is not the norm, is it?

A That's not the norm, no.

* * *

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Q After lunch, did you drop them someplace?

A I did, yes.

Q Where did you drop Captain Hazelwood?

A In the – it's been renamed. At that time, there was an establishment called, I think, the Valdez Market, and there are other businesses connected to it. In that complex, in the parking lot in front of the Valdez Market complex.

Q And the two other officers got off there, too?

A Yes, I believe they did.

* * *

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Q Now, when you saw Captain Hazelwood for the first time up on the bridge, did he appear – did he in any way appear to you to be intoxicated?

A No.

Q Did he in any way appear to you to be impaired?

A No.

Q Did he in any way appear to you to be slurring his speech?

A No.

Q Did you observe him swaying or misstepping?

A No.

Q Was he slurring his words?

A No.

Q Did he appear to you to be at that point in time in any way intoxicated or impaired?

A He gave no such appearance.

* * *

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Q You had an opportunity to speak with Captain Hazelwood at that point?

A Yes.

Q And to observe him?

A Yes.

Q Did he appear to you to be in any way intoxicated?

A No, he did not.

Q Was he slurring his words?

A He was not.

Q Was he swaying in walking about the bridge?

A No.

Q Did he appear to you to be the same as he's appeared a quarter of nine, 9:00 that evening?

A Yes.

Q Did he appear to you to be the same as he appeared at lunch?

A Yes.

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Q Was he basically acting the same?

A Yes, he was.

Q And the same as he had been acting the night before?

A Yes.

* * *

[308]

DIRECT EXAMINATION OF JOSEPH HAZELWOOD

* * *

[310]

Q Were there any events leading up to your going into South

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Oaks that led to the decision to go into South Oaks, any significant events?

A Well, there was culmination of a couple of events. I had reached a point in my life where, I hate to use the mumbo-jumbo of the '80s, the mid life crisis, but due to expanded vacations, I was spending more and more time at home and less and less time at sea, and I had a young daughter who was growing up and I came to realize at that juncture in my life that I had missed a significant portion of her growing up and a significant portion of life, not to be critical of life ashore, as it were, rather than life at sea. Been married for approximately 20 years, 16 of which I had been on a ship somewhere, 16 out of the 20 years. And I was reevaluating my life. I wanted to continue that, continue going to sea. And some occasions I would get down in the dumps and depressed and I would abuse alcohol at home on my vacations. I had been doing this for a while on vacations. I wasn't particularly pleased about it, and whether I was – I didn't really know what I was suffering from, if I was truly suffering from something.

I did a sea tour over the holidays into '84 and '85 on the Exxon Yorktown in the east coast products trade, and went on vacation, I think, in late January, mid to late January of 1985. And some time during that vacation period, I was contacted by a port captain, Captain Mark Pierce. And he

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just – he had interacted with me a couple times in December of that sea tour, the previous sea tour, December and January, and Captain Pierce and I have been friends for a long time and we communicate with each other rather well, with as few words as possible. And he says, I think you might have a problem with your life, see what you can do to fix it up.

Q Now, I'm going to ask you a couple questions about – specific questions about what you just said.

You mentioned that you abused alcohol?

A Uh-huh.

Q In your own mind's eye, what is abusing alcohol, how many drinks?

A Specific number, I couldn't really attach to it.

Q Could I give you a description and see whether you agree with it?

A Sure.

Q How about in the evening, four or five doubles, followed by wine and then a couple more doubles after the meal?

A I think that's the description I gave in my deposition.

Q And this was a pattern that had at least set up right

before your going in the South Oaks?

A Well, not a pattern, per se. It wasn't a clockwork pattern. It happened sporadically, yeah.

Q Now, when you had four or five doubles followed by wine and then a couple more doubles after the meal, what effect did that

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have on you? I mean, did you – I guess the vernacular is, did you hold your liquor?

A Well, I didn't trip over any furniture. I could detect a little clumsiness on my part. I just wasn't – I wasn't blotto, I guess is the expression.

Q We've described anywhere from 14 to 20 shots, if you take the four or five doubles plus a couple more doubles after the meal plus the wine, and my question is, other than feeling some clumsiness, you didn't feel blottoed, could you function?

A Well, I hadn't planned nor did I function outside of sitting on the couch and maybe looking at a magazine.

Q You could sit there and read a magazine?

A Well, I could look at the pictures.

Q Did you pass out?

A No.

Q Would you admit with me that this amount of drinking took place weekly?

A Sometimes it would be weekly, sometimes it would be biweekly. There was no lock and step pattern that it followed that I recall.

Q Now, when Captain Pierce talked to you – let me ask a couple more questions.

At any point up going into South Oaks, did you lie about your drinking?

A I'm not sure. Before, during or after?

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Q Have you ever lied about drinking to your wife?

A In a social sense, probably, yeah.

Q Indeed you were asked that questions in your deposition on page 2181. Can you dig that out? You're going to have to squint to get those page numbers. And I'm on page 2181, line 25, which is at the bottom, and I'm going to go to page 2182, line 7. And I'll read – you were under oath when you gave the deposition, do you recall that?

A Uh-huh.

Q And the deposition was in this case, that's a correct statement, isn't it?

A Yes.

Q And the question asked was, okay, Captain, have you told lies about your drinking, and there is an interjection from the lawyers; when, and at what point in time. At any time. Answer, to my wife. Question, to anyone. I am sure I have, like anybody else.

Did I get that right?

A Yes.

Q Let me ask another question, if I could, about this period just prior to South Oaks, and about the time Mr. Pierce called you up. Had you been having any trouble in your marriage at or about that time?

A Not at that time specifically. There had been problems like any other relationship.

Q Had you and your wife discussed marriage counseling?

A We had discussed it, yeah.

Q Have you ever had a faulty memory as a result of drinking?

A I don't know about a faulty memory. I couldn't remember a phone number, you know, specific instances. But I suppose on empirical data there is probably some faulty memory.

Q Have you ever had a faulty memory as a result of abusing alcohol?

A In the sense of maybe I forgot what I said to somebody, or forgot what I – possibly, yeah, what I read.

Q Now at the time that Captain Pierce talked to you about going into South Oaks, was your wife supportive of the idea?

A She had detected that I was moodier than I had been before. She was supportive, yeah.

Q Up to the time you went into South Oaks, had there been occasions where you knew you already had too much to drink and you continued drinking?

A I probably had those occasions. I don't know if I gave it that much thought, I had too much to drink.

Q There had been occasions where you felt that you had too much and you had another?

A I don't know if I gave it that much thought, really.

Q Could you go to page 1,239 of your deposition transcript, and I'm going to begin at line 23 and then pick up the question, the answer to the question at page 1240, line 5.

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A Okay, yeah.

Q And the question is, were there occasions where you knew you already had too much to drink and you continued drinking. And the answer, your answer at page 1240, line 5 is, I felt I had too much and had another, yes.

Do you see that?

A Yeah, okay. It's in conjunction with the previous question and answer.

Q Well, I'll tell you what, just to be fair, why don't you read to the jury from the previous question and answer all the way to page 1240, line 5, and put it in the context that you wanted it?

A Well, the question was is, when you started drinking one of these moods, as you described, could you have stopped at any time you wanted to. Answer, I don't know how to answer that. Could I or did I. There were a couple of occasions I have a general recollection if something came up that I had to go do and I just went and did it and drank nothing else. So if you say out of control, or once the ball started rolling down the hill I couldn't stop, I would have to disagree with that characterization. That's the only way I can answer.

Q And then does it continue on?

A Yeah, were there occasions when you knew you had already had too much to drink and continued drinking. There was an objection, talking about the periods of time when he was abusing alcohol according to his definition. The questioning attorney, correct. My answer, I felt I had too much, and had another, yes.

Q On any of these questions when I asked you about your deposition transcript, if you want to go high or low in the transcript, just let me know and we'll do that?

A Very well.

Q Now, this Mark Pierce that called you, who was he?

A He was assigned on a temporary assignment in Baytown, Texas, in the Gulf Coast Fleet, to which I was attached as the port captain. He was not a supervisory role, he was kind of liaison between the masters and deck officers of the Gulf Coast Fleet, kind of a liaison or conduit to management in the operational sense of things.

Q Was he a personal friend?

A I considered him a personal friend.

Q Did you pal around with him at work, or was it a personal friend in a work trip?

A Personal friend in a work relationship, and we corresponded over the years and bumped into each other occasionally.

Q In the three or four months prior to the phone call from Captain Pierce, had you been out with him socially?

A I think I – socially I had gone out to dinner with himself and his wife in Galveston, Texas, sometime in early December, I believe.

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Q One time?

A Yes.

Q Did Captain Pierce in his telephone call to you say anything about the fact that your problem, whatever it was, had some effect on your job?

A I don't think he couched it in those terms. He said, if you've got a problem, take care of it.

Q And the conversation with Captain Pierce was about a minute-and-a-half?

A Minute-and-a-half, yeah.

Q And as a result of this minute-and-a-half conversation, you went through the yellow pages and picked South Oaks out of the yellow pages?

A That's correct.

Q And you talked to your wife?

A Yes.

Q And you went to South Oaks?

A Yes.

Q And you had your bag packed when you went to South Oaks, you brought a suitcase with you or a bag or a gym bag that had clothes in it?

A Yeah.

Q When you went to South Oaks, you had no understanding, would it be fair to say, as to what the diagnosis was going to be or the treatment?

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A No. I left that for them to make that determination.

Q And you went to South Oaks with your bag packed and then you were admitted to South Oaks and you spent 28 days there?

A Yes.

Q And then you got out of South Oaks?

A That's correct.

Q Now, did you get a second call from Mr. Pierce, or did you call him?

A I believe I called him back.

Q I'm sorry, and about when was that?

A I think that was later that same day, in the afternoon, I believe.

Q Of the day that he called you?

A Yes.

Q And what did you tell him?

A I said I would be availing myself of this treatment facility. I don't know if I mentioned it by name or not. I called and made an admission appointment that I would be checking in there, I think this was on a Thursday or Friday I spoke to him, I would be going in there on Monday.

Q Did he give you an administrative contact?

A Yes, he – as I recall, he said when you check in, or you're going through the admissions procedure, your contact, or their contact would be a Mr. Ben Graves and he gave me a phone number for him.

Q Did you meet Mr. Graves?

A No.

Q Have you ever met Mr. Graves?

A No.

Q So would it be fair from the time you were born until the time we sit here today, you have never met Mr. Ben Graves?

A Not to the best of my knowledge.

Q I don't know. You know, in all of the research I've done, I can't come up with it.

Now, when you talked to Captain Pierce over the phone, you called him back, did you give him any details about what the program was?

A No.

Q Was it just generally vague?

A I just told him I was going to be getting some help the following Monday.

Q Now, there is a fellow at Exxon named Mr. Tompkins who claims he was on this call with you, or on a call with you and Mr. Pierce in which this subject was discussed?

A You mean like a conference –

Q A conference call?

A Uh-huh.

Q Have you ever been on a conference call with Mr. Tompkins on this subject?

A Not on this subject, no, not to my knowledge. I wasn't

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aware of it.

Q Now, while you were at South Oaks. your treating physician was a Dr. Vallury?

A That's correct.

Q And we're going to play his videotape after we finish with you.

A Uh-huh.

Q When you got out of South Oaks, was there a recommendation with regard to drinking?

A Yes, not to – general recommendation was not to drink.

Q When you left South Oaks, did they have an aftercare program?

A Yes.

Q Did you go to the aftercare program?

A For a period of time, yes.

Q At some point in time, did you quit going to the aftercare program?

A Yes.

Q You dropped out of it?

A Yes.

Q Would you tell us why you dropped out of the aftercare program?

A Well, my primary reason for dropping out was the people that were in this aftercare group I was assigned to randomly, I guess, had an overwhelming obsession with – all they talked about was drinking.

Q Now this aftercare program was run by South Oaks?

A The out patient unit of South Oaks, yeah.

Q And you didn't finish the program, you dropped out of the program?

A As I understood it, there was no start or finish. People were – it was a dynamic process that people were cycling through all the time.

Q Well, if you go to 1290 of your deposition transcript, on the top of the page of 1290 I think you describe your leaving the aftercare program as dropping out. Could you just check that and see if I'm right?

A Yeah, I kind of dropped out. I quit going, yeah. As far as a start and finish, a lot of time – I don't know if there was a –

Q Now, at the time you got out of South Oaks, did you still have alcohol in your house?

A As I recall, yeah.

Q At the time you got out of South Oaks, one of the things you did in conjunction with the 28 day program is you started participating in Alcoholics Anonymous?

A I attended the meetings, yeah.

Q And indeed, for the first 90 days after you got out, did you go to meetings?

A That's correct.

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Q Did your wife go to any program like Alcoholics Anonymous?

A She went in to – I guess it's called Alanon.

Q Alanon. And in Alcoholics Anonymous, what is Alcoholics Anonymous?

A It's a self-help program for people that have a desire to stop drinking.

Q And indeed, under the third tradition of Alcoholics Anonymous, the desire to stop drinking is the one requisite of the help, isn't it?

A As I recall, yes.

Q And in Alcoholics Anonymous, you get something called a sponsor?

A You're advised to pick a sponsor, yeah.

Q Did you pick either a permanent sponsor or a temporary sponsor?

A I had a couple temporaries.

Q And you had temporary sponsors from mid '85 through when?

A Until fall of '88, I think so, possibly – yeah, fall of '88.

Q Now, you were on – while you went to South Oaks, you were on a paid disability?

A During the inpatient portion of that, yes.

Q And then when you took the 90 days off from South – the 90 days off from Exxon to go to the 90 days of AA and to go to some aftercare –

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A Yes.

Q – Exxon didn't pay you then, did they?

A No.

Q Now when you came out of South Oaks, did you have any kind of plan to abstain from drinking?

A I had a generalized plan to not drink, see how it went.

Q With regard to the decision to attend Alanon, was that your wife's decision?

A As far as I know, yeah.

Q Did you enjoy going to the AA meetings?

A For the most part, yeah, it was pretty enlightening, and I met some nice people.

Q At some point in time you had a conversation with Ben Graves – this Mr. Graves who you never met, you had a conversation with him on the telephone?

A That's correct.

Q Who said what to who?

A He called me up and asked me some questions. I believe it was – I'm not sure of the date. I think it was in May sometime.

Q This is right about the time you got out of South Oaks?

A Shortly thereafter. It's kind of a goofy hook up. He was in Newark, and he left a message, or something like that and I contacted him at a hotel or motel.

Q And you talked to him on the phone?

A Uh-huh.

Q What did he ask you?

A He asked me some questions, including whether I had ever drank on Exxon vessels.

Q What did you tell him?

A I told him yes, I had.

Q Did you tell him that you had ever returned to Exxon vessels drunk?

A No.

Q Did you ever tell him you had returned to Exxon vessels after drinking?

A Yes.

Q I'm going to show you what is in evidence as number – plaintiffs' Exhibit No. 160. You've seen this before, this is the so-called Graves' report?

A Yes.

Q Probably more than you've ever wanted to?

A Yes.

Q And I want to know on the Graves' report, do you know who Mr. W.J. Davis is?

A No, I sure don't.

Q How about Mr. F.J. Iarossi?

A Yes.

Q Who is he?

A At the time, he was the President of the Exxon Shipping

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Company.

Q And on the second page of the Graves' report, there is the statement: I asked Joe if he ever drank aboard ship. He commented that he occasionally drank aboard ship but not frequently. He also indicated that he came back to the ship from port drunk on several occasions.

Did I read that right?

A Yes.

Q Now with regard to drinking aboard ship, that's a violation – that was at the time a violation of Exxon policy, wasn't it?

A That's correct.

Q And why would Mr. Graves say – well, I'm speculating why Mr. Graves would say anything.

With regard to this conversation that you had with Mr. Graves, and what you told him about violating corporate policy and about returning to ship after drinking, did anybody ever follow up on that and, say, reprimand you, or –

A No, not a specific reprimand, no.

Q Now, other than this conversation that you had with Mr. Graves on the telephone this one time, were there any other conversations with Exxon people about this drinking on ship and returning to ship after drinking?

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A Directed at me specifically.

Q Yeah. Did anybody call you in and say, we have these reports, I want we want to clear them up, we have them, what are we going to do about them, or words to that affect?

A For those incidents that I spoke to Mr. Graves about?

Q Yes.

A Not that I'm aware of, no.

Q Do you recall how long this telephone call with Mr. Graves was?

A I'd say five or seven minutes, maybe ten minutes at the most.

* * *

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Q Now at some point in time there has to be some kind of a discussion about going back to work?

A That's correct.

Q What was that discussion?

A There was a couple of discussions.

Q What was the first one?

A I was contacted by my physician, Dr. Vallury, who informed me that he had been contacted by Exxon physician named Dr. Montgomery, and he indicated to me that he had relayed to Dr. Montgomery that I was fit to return to sea duty.

Q At some point in time, a Ms. Helen Shorret (ph) called you?

* * *

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Q We were talking about captains and I wanted to stop here for a second because we were talking about captains, but I want talk about what a ship captain is, and that is a subject to which you have dedicated a major portion of your adult life, is that a correct statement?

A Yes.

Q Would you tell us what a ship captain is?

A His primary goal is the safety of his crew, secondary goal is safety of the ship, and the third or tertiary is the safe

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and expeditious delivery of the cargo to the owner, whoever that may be.

Q It takes some years and training to become a captain, a supertanker captain?

A Yeah, a number of years and formal – more on-the-job training than formalized classroom, is what you're saying.

Q Are most of your colleagues ship captains that are graduates of a maritime academy or the Merchant Marine Academy or the Coast Guard Academy?

A Yes, in this day and age, yes.

Q And that's because of both the complexities of the job and the responsibilities of the job?

A No – yes and no. It's a little more complex and a little more higher tech than it used to be, but the job is essentially the same.

Q The job is one of great responsibility?

A Yes.

* * *

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Q Now let's go back, we discussed captains and unions, let's go back to Ms. Shorret's phone call and this is after the 90 days of unpaid leave?

A That's correct.

Q And she said the Gulf Coast port captains Tompkins and Sheehy want to talk to you?

A That's correct. She was the manning assignment clerk who handled the masters and I think chief mates. So she would call me up on occasion and say tell me where the ship was going to be, where it was, and when I was supposed to meet it. So it wasn't a lightning bolt that she called me with this information.

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Q Was there an appointed date to meet?

A Yes, as I recall, yes.

Q Where were you going to meet?

A As I recall, it was a Greens Point, or something. I forget the name of the hotel out at international airport at Houston.

Q Who was the first one that you met with?

A I met Captain Sheehy first.

Q Where did you meet with him in the hotel?

A I first approached the registration desk to see if he was registered there, because I had only met him once before, and I was walking there in the lobby and I saw him, and we went to, it's a sidewalk cafe, it's in the lobby, some palm trees in part of the lobby, and sat down.

Q I want to focus on what you just said. You just called it a sidewalk cafe?

A I think that's what it was labeled as, something cafe. It had umbrellas and stuff like that.

Q And you were here for my opening?

A Yes.

Q And what did I call it in my opening?

A I believe you called it a bar.

Q And where did I get that?

A I guess from me. It was a lobby, bar, cafe, whatever.

Q Let's go to page 1436 of your deposition transcript?

A Okay.

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Q Let's go to line 6, and will you read – let's go to line 5, and will you read to the jury the question at line 5 and your answer?

A Then what happened. We went over to a lounge, lobby, lounge, some little bar, restaurant, there in the open air and sat down.

Q And at that point in time in your answer, and you're focusing on this event, did you call it a cafe?

A No, I guess I didn't. Lobby, lounge, bar, it was an open air bar, restaurant.

Q What did Mr. Sheehy do, Captain Sheehy?

A You mean as per my deposition?

Q If you can remember, tell me, or if you want to look at your deposition, look at your deposition.

A I think he ordered a beer. I ordered a diet soda or club soda, whatever I had.

Q This meeting at this lobby, lounge, bar, restaurant this meeting when Mr. Sheehy ordered a beer, was that the first contact in person that you had with anybody from Exxon Shipping Company, or Exxon Corporation following leaving the South Oaks medical facility?

A Yeah, I think that was the first face to face.

Q Now have you reviewed, in the time that you've spent with this case, which is more than should be visited on anyone, have you had the chance to review Mr. Sheehy or Captain Sheehy's

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version of that testimony?

A Uh-huh.

Q And he says that he discussed with you whether you were drinking anymore or not?

A Yes, sum and substance of that.

MR. NEAL: Your Honor, could I have an objection? We'll approach the bench if you don't want to talk about it in the presence of jury.

MR. O'NEILL: I don't see anything unfair about it.

THE COURT: What's the objection to?

MR. NEAL: I think it's appropriate to ask the witness what happened. He's asking him is something else now – he's comparing his testimony with somebody else's. He can ask the witness what happened there, but comparing him with what somebody else said I think is argumentative.

THE COURT: I'll watch it. Let's proceed a little bit and see how it goes.

MR. O'NEILL: Could you read his answer back, please?

(Record read.)

BY MR. O'NEILL:

Q Did that discussion take place?

A No.

Q Thank you. What did you and Mr. Sheehy discuss?

A When we first met at the lobby there by the registration desk, he indicated to me that Mr. Tompkins, his superior, or my

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superior as well, had assigned him the role of explaining to me some wrinkles or changes or alterations, if you will, that had occurred in the union contract for the crew in my absence, and that's what he was there to do.

Q So he updated you on some union matters?

A Union interpretation of the new contract for the crew members, yeah.

Q Would it be fair to say that there was no discussion of either your stay in South Oaks or aftercare or AA or drinking in your conversation with Mr. Sheehy?

A No, strictly business.

Q My statement was a correct statement?

MR. NEAL: Objection.

BY MR. O'NEILL:

Q I'll reask the question, sometimes when I say would it be fair to say, and you say no, the transcript gets goofed up.

Is this a fair statement: There was no discussion between you and Mr. Sheehy of South Oaks, aftercare, AA or drinking, is that a correct statement?

A None that I was, you know – no.

Q My statement is a correct statement?

A Your statement is a correct statement. I'm a little slow.

Q If we're going too fast or you want to take a break, you tell us. Now, you had a meeting then with Mr. Tompkins?

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A That's correct, yes.

Q And where did that meeting take place?

A It was in the same hotel, a couple decks up in a meeting room, or a conference room where he was – appeared to me he had been doing something during the earlier part of the day, I don't know what, conferring with somebody. He and I sat down in this conference room.

Q Who said what to whom?

A He indicated to me – he welcomed me back. He said it's good to see you, welcome back to the fleet, shook my hand, and after the pleasantries were over, he indicated to me, he said what you've just been through is confidential in nature and only a few people will know, he says, but we all know what the rumor mill is like in this fleet, so be prepared for rumors to start leaking out. And I indicated to him at the same time that any sources of any rumors wouldn't be from me. And then he indicated to me, he had in a pile of papers like this, maybe a little skinnier, he had what was labeled on a cover sheet the current, I guess it was, I forgot the date, Exxon Alcohol and Drug Policy. And at that juncture, he looked me square in the eyes and told me in no uncertain terms that there would be no violations permitted of the Exxon alcohol policy.

Q Now let me ask you a question about the policy. Was that the policy manual, itself, or was it a xeroxed copy of the front page?

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A That I couldn't tell you. He just kind of patted his hand on it. As I indicated, it was a pile of papers a little thicker than that. It was a cover sheet.

Q We can dig it out, but you've testified you thought it was the xerox copy of the cover page?

A It was a xerox cover page, I don't know what was underneath it.

Q And he said you had to comply with the policy, or words to that effect?

A It was more like, there will be no violations tolerated.

Q Of the policy?

A Yes.

Q Now, I want to ask you a series of questions about whether these topics were discussed in this meeting with Mr. Tompkins?

A Very well.

Q Was AA discussed?

A No.

Q Was aftercare discussed?

A No.

Q Was the subject of your personal drinking discussed?

A No.

Q Was the subject of drinking on board vessels or returning to vessels after having drunk discussed?

A No.

Q Was – were you told not to drink?

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A With the exception of the parameters of the alcohol policy, no.

Q Were you told that you were going to be monitored?

A Well, in his imitable fashion, Mr. Tompkins kind of indicated to me I was going to be watched.

Q Did he tell you you were going to be watched?

A He didn't verbalize that, no.

Q So he did not tell you you were going to be watched?

A No.

Q Did he tell you you were going to be monitored?

A No, it was just, look forward to working with you.

Q Did he tell you or discuss with you anything that Exxon could do to facilitate attendance at Alcoholics Anonymous?

A No, that subject wasn't broached.

Q Now, there were these two meetings?

A Yes.

Q And then you were – then you rejoined the fleet?

A Yes.

Q Now, have we covered the subject matter of these two meetings fairly?

A Yes.

Q How did you rejoin the fleet?

A Following morning I flew from Houston to Jacksonville, Florida, and waited until the ship docked and joined it later that evening.

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Q Let's talk for a minute, are you aware at all that you had been recommended on prior occasions for shore side duty assignments like port captain?

A I wasn't aware of that. I remember Mark Pierce, when he first got the job, kind of approached me. I don't know, by phone or somewhere along the line, asking me if I would be interested in being his relief when his time was up.

Q His time would have been up in the summer of '85?

A No, I think he stayed on for an extra year. He was due off in the summer of '84.

Q So point in fact, in the summer of '85, Mr. Pierce, his stint as port captain ended in the summer of '85 and somebody else picked up?

A Captain Sheehy replaced him.

Q So at the same time you were going through the 90 days of unpaid leave, the port captain's job switched?

A Somewhere in there, yeah.

Q Did they offer you a port captain's job?

A No, they probably knew better.

Q A port captain's job, is it fair to say, is one of

comparable status, have the same people that do it, isn't that right?

A Uh-huh.

Q With no cut in pay?

A As far as I am aware of, yeah.

* * *

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Q And I asked you a question, did they discuss the shore side assignment with you, or port captain's assignment, and you said something along the line of not if they knew what was good for them, or words to that effect?

A No, Captain Pierce proffered that early on and he knew my position on it, and he probably relayed that to the powers to be that were in charge of nominating the next candidate for that position.

Q At one point in time, you told Captain Pierce you were interested in a shore side assignment, didn't you?

A I said I might be interested in relieving him.

Q That was as port captain as a shore side assignment?

A If he was really desperate, yeah.

Q And have you ever had an opportunity to take a look at your

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Exxon personnel records in this litigation?

A Just vis-a-vis this litigation.

Q They are Exhibit 11, or pages from them are on Exhibit 11?

A Yes.

Q I'm going to pull up a page, and we can look at it on the monitor, if I can run the monitor. Do you got it on the monitor in front of you?

A Yeah, I sure do.

Q And if I can do this correctly, we're off and running. This is from one of your evaluations prior to 1985, and this subsistence here indicates some discussion of a shore side assignment, doesn't it?

A That's correct.

Q I'm trying to get another page up. This the original up there?

A I believe –

Q Does it have a good sticker on it? Let me borrow that for a minute.

A It's in here somewhere. That's too early, that's '81.

Q I pulled another entry from the record up on the monitor, and it's a pre '85 entry?

A Uh-huh.

Q And that again raises the possibility of a shore side assignment?

A Yeah.

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Q So would it be fair to say that in the summer of 1985, the subject had been raised at least a couple times in your performance reports, and you and Captain Pierce had talked about it, and you said you would be interested in it?

A Yes.

Q Now, when we left off you had finished your meeting with Sheehy and Tompkins, and you'd met one day and then the next day you were flown to New Orleans?

A No, Jacksonville, Florida.

Q And you assumed the command of the Yorktown?

A That's correct.

Q And the Yorktown was what kind of vessel?

A She was 41,000 ton handy sized tanker that had been in the products of trade. She was at that time in the dirty oil trade, heavy fuels and crude oil.

Q And the Yorktown tour of duty was 99 days?

A Something like that, I recall seeing.

Q Would it be fair to say that 99 days was as long a tour that you had had working for Exxon, or about as long a tour you had had working for Exxon?

A About as long, maybe longer.

Q Up to the time of assuming the command of the Yorktown, you had been going to AA?

A Yeah.

Q And on the 99 day tour aboard the Yorktown, would it be

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fair to say that AA was unavailable?

A Pretty much, yeah.

Q You can't go in, you're on a ship?

A No, and the ports we were calling in were remote.

Q Would it be fair to say that up to the time of assuming command of the Yorktown there had been no discussion with anybody at all from Exxon Corporation, or Exxon Shipping Company with regard – with regard to the availability of AA while you were out on a vessel, or what were we going to do about that subject. That was not discussed?

A There was no discussion, which was no surprise, no.

* * *

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Q Now, there was no AA available on the Yorktown –

A That's correct.

Q – for this first tour.

Did you call your sponsor, your AA sponsor while you were on the Yorktown?

A There was very limited phone contact. No.

Q How about the entire period from your return from South Oaks to your last tour on the Yorktown, on any of your sea tours did you call your AA sponsor?

A A couple times I did, one of my sponsors, yeah.

Q Do you know Captain Andre Martineau?

A Yes.

Q At about the time that you were given the Yorktown, was he given a shore side assignment?

A He and I were co-masters on the Yorktown originally, and then when I came back after South Oaks, I think he went to the west coast as port captain, yeah.

Q Now with regard to your tour of duty from the Yorktown, that was about from '85 to '87?

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A Yeah, the tail end of '84.

Q And you didn't go to AA meetings on the vessels, but when you were home you did go to AA meetings?

A That's correct.

Q And your wife went to Alanon meetings while you were home?

A As far as I knew, that's where she was going.

Q And you didn't drink while you were at home in the presence of your wife?

A Not that I can recall, no.

Q Now at some point in time did you resume drinking?

A Yes.

Q And that was in about May of 1986?

A It was in the spring, yeah, April or May.

Q So it was about one year after you got out of South Oaks?

A About a year, yeah.

Q And you had a glass of wine?

A Yeah, it was a glass, maybe two even.

Q In Manatee, Port Manatee?

A It was outside of Port Manatee, Florida, near Naples, yeah.

Q And after that, there were occasions when you drank with Exxon Shipping Company employees in Philadelphia, at the Mariott Hotel outside of Philadelphia?

A Well, Mariott was close to where we were docked, yeah, out of Philadelphia.

Q And that was Mr. St. Pierre and a Mr. Dengel?

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A That's correct.

Q Would it be fair to say that with regard to your decision to drink you weren't hiding anything from anybody?

A I didn't think much about it consciously.

Q You weren't avoiding drinking in front of Exxon management? It wasn't an issue, was it?

A Never had been as far as I was concerned, no.

Q In addition to this Philadelphia incident that I talked about, you, on occasion, drank beer with Exxon employees in Norfolk or New York?

A I said that in my deposition, and as best I recall, that's where we were trading, yeah.

Q And you'd have a couple, two, three beers with – whatever it was?

A Usually it was Mr. Dengel and Mr. St. Pierre, plus Mr. St. Pierre was going through kind of a sloppy divorce.

Q And Baton Rouge –

MR. CHALOS: Your Honor, excuse me, the witness was in the middle of an answer.

BY MR. O'NEILL:

Q I'm sorry, did I cut you off, sir?

A Not really. Baton Rouge, yes, I think I'll agree with that.

Q And flying home from your last assignment on the Yorktown?

A Possibly, probably. I really don't know.

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Q Would you disagree with the proposition that you had a bloody mary or a drink on flying home from your last assignment on the Yorktown?

A Entirely possible.

Q Now at some point in time, the Yorktown grounds in the Mississippi?

A No, not when I was on it.

Q Did the Yorktown ground at all while you were on it?

A Well –

Q Where?

A Bolivar Roads.

MR. NEAL: Object, covered by the discovery master. Mr. O'Neill is not aware of it.

THE COURT: Is anyone on the plaintiffs' side aware of discovery master ruling on this point?

MR. O'NEILL: I'll move on. I'm unaware of it. I'll move on and we can revisit it tomorrow.

BY MR. O'NEILL:

Q With regard to your time aboard the Yorktown, you'd drink on occasion with Exxon Shipping Company employees, not on the vessel, from 1985 to '87?

A Rather refer to them as shipmates.

Q Shipmates?

A Yeah.

Q Did anybody from '85 to '87, during this Yorktown period,

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come and ask you anything about AA, aftercare, the availability of AA, how you were doing emotionally, from Exxon Corporation or Exxon Shipping Company?

A Well, considering I thought it was a private matter, if they had broached the subject beyond or proceeded beyond how are you doing, I probably would have slammed the door in their face.

Q But the point is, nobody did, including Sheehy and Tompkins?

A Tompkins, with the exception of the alcohol policy, no. Now, I was kind of in the dark of who knew what, to tell you the truth.

Q Did Mr. Sheehy ever say anything to you about AA?

A No.

Q Aftercare?

A No.

Q The availability of AA meetings?

A No.

Q The availability of your family as a support network?

A No. You kind of lost me on the last one.

Q Is it a fair statement to say, Captain, that from '85 to '87 you had no knowledge that either Mr. Sheehy or Mr. Koops were monitoring you specifically for alcohol use?

A I had no specific knowledge of that, no.

Q And the subject of alcohol use, your alcohol use never came

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up with either of those gentlemen, did it?

A Not that I'm aware of or can recall, no.

Q How about anybody from Houston headquarters, Mecca, is that what you guys call it. From '85 to '87, did anybody from Houston headquarters, Dr. Montgomery or anybody like that, talk to you about whether you were going to AA meetings, whether you were drinking at all?

A Not specifically, no.

Q Now, you had – let's, again, take this through the end of your Yorktown period.

With regard to your AA attendance through the end of your Yorktown tour of duty, you continued to go at home?

A Yeah.

Q And you continued to – your wife continued to go to Alanon, or at least that's what she told you?

A Yeah.

Q And for at least the last year you had resumed drinking, at least on occasion?

A Hu.

Q And would it be fair to say you did not tell your wife you had resumed drinking?

A I don't know if the subject came up or not. I don't think so, no.

Q So the answer is no?

A Yeah, I would have to say no.

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Q Now, let's move on to the Exxon Valdez. The topic of the Exxon Valdez, and at some point in time did somebody from Exxon Shipping Company raise with you the topic of the Exxon Valdez, being assigned to the Exxon Valdez?

A Yeah. It was Captain Martineau, who was port captain on the west coast fleet at the time. He approached me. It was an officer's conference in '86 sometime, possibly spring of '87. I really – it's hard to remember this. In Houston, and asked me if I would – somebody was retiring or was leaving the Valdez, and they asked me if I was interested in going over there from the Yorktown.

Q Do you think that was Andy Martineau that asked?

A Yes.

Q And what did you say?

A I was pretty ambivalent on the subject. There was pluses and minuses to both jobs. I said, if you can't find anybody, give me a shout.

Q Was that the only conversation that you had with anybody from Exxon Shipping Company with regard to reassignment of the Valdez?

A I can't pin down the date of that conference in my mind's eye, but I think I went back and did another short hitch on the Yorktown. I may or may not have, but I thought I returned to the Yorktown and then somebody, whether it was Andy or somebody else, Sheehy, told me somewhere in that hitch that I would be

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transferring after that hitch.

Q So we have two conversations. We have Andy Martineau's talk with you in Mecca, and then some time later on, either your port captain or somebody else tells you you're going to the Valdez?

A Yeah, they do a follow up and say, you're going whenever the schedules are going to work out.

Q In either of those discussions, was the subject of AA, aftercare, emotional well-being, drinking, were any of those discussions talked about – were any of those subjects talked about?

A Subjects? Not that I recall, just –

Q When were you reassigned to the Valdez?

A I believe it was the fall of '87.

Q When was your next – when was your first tour of duty with the Exxon Valdez?

A That was late fall, early winter, I believe.

Q Yeah, it was. Were you aboard the vessel over Christmas?

A '87 into '88?

Q Yes.

A Yeah, I believe so.

Q There is a tradition – at that point in time there was a tradition in the fleet, a legitimate tradition at that point in time of providing Christmas wine?

A Yes.

* * *

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Q So is it your testimony that from 1987 to 1989 there was no requirement for pilotage from Hinchinbrook entrance up to Rocky Point?

A You mean to have an officer on board with a pilotage endorsement?

Q That's a correct statement?

A The majority of the ship masters for Exxon didn't have it.

Q My question was, is it your testimony that there was no requirement to have a master from Hinchinbrook up to Rocky Point, to have an officer from Hinchinbrook to Rocky Point that had a pilotage endorsement? I want your testimony to be

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clear. I don't care what other vessels did. What was your understanding of the requirement?

A My understanding, my lay understanding was if you had it, fine, if you didn't, fine.

* * *

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Q Was the practice of having vessels, Exxon Shipping Company vessels from Hinchinbrook up to Rocky Point without a pilot, was that practice condoned by Exxon Shipping Company, or do you know?

A I don't know if it was condoned, but the requirement, as I understood it, was waived over in '81, '85 and '88, and those masters or mates that had the endorsement retired. They weren't replaced.

Q Would it –

A On those particular ships a master would come on there, would have no endorsement, or he would go up there like

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everybody else.

* * *

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Q Now in February, 1988, the Valdez docks in Long Beach?

A February of '88? I guess she might have, yeah, all right.

Q And –

A Yeah, I guess so.

Q And indeed when the vessel did dock in Long Beach, there was a regular practice of the departing crew members to get together at either a joint called the Yankee Clipper or the Yankee Whaler?

A Usually the people predominantly that were going on vacation that lived in the east coast were getting the redeye while they waited for the limo to take out to the Yankee Whaler or would stop at the Yankee Clipper.

Q And have a couple beers?

A On occasion I did that with 10 or 12 other people.

Q Sit around and drink beer?

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A Yeah, waiting for the limo, yeah.

Q And they were primarily Exxon people?

A Well, they were shipmates you just spent two or three months with.

Q And they included Chuck Kimtis, the chief engineer?

A Yes.

Q And Nate Carr?

A Nate, yeah.

Q And Mr. Enright?

A Pat Enright, yeah.

Q And Katherine Haven?

A Well, I have a vague recollection she was there once, but she lived on the west coast. Usually her husband would drive down and pick her up.

Q Do you have a recollection of that on occasion she drank with you?

A I remember her being there. Whether she just said goodbye and took off, I don't know.

Q How about a Butch Ogen (ph)?

A Butch, yeah.

Q I want to talk a little bit about Portland?

A Uh-huh.

Q Just so we're oriented on what I'm going to talk about.

Early in 1988 do you fly back from the east coast to Portland?

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A No, I thought it was in May.

Q Is that when it is?

A Late spring sometime. She was down in the yard.

Q May?

A Yeah.

Q And you were on the east coast and you fly back to Portland?

A Well, I was on vacation and flew to Portland, yeah.

Q Let's take the vacation just prior to going to Portland. Where was vacation?

A I think that go around. I brought a couple yachts up from the Caribbean to the northeast. That was – most of my time was spent doing that, and then I flew back to work.

Q Did you spend any time at home?

A A little bit, yeah.

Q When you were at home, did you go to AA?

A I couldn't really say whether I did or not. I may have.

Q Was your wife going to Alanon then?

A I believe so.

Q Did you drink at home when you were there?

A I wasn't home all that much that hitch, as I recall.

Q Did you drink when you were at home?

A I don't think so. I don't remember.

Q As a normal practice, you didn't drink – after you got out of South Oaks, as a normal practice, you didn't drink when you

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were home, did you?

A Normal practice, yeah, because nobody familiar – my folks don't drink, my wife's folks don't drink.

Q And your wife wasn't drinking, or was she?

A She occasionally would drink, yeah.

Q But you did not drink in the presence of your wife?

A Not that I can – my recollection, we went to a wedding, you know, somewhere in there.

Q One wedding?

A Yeah, some cousin or something got married.

Q As a general practice, you did not drink in the presence of your wife?

A No.

Q And that was a different regimen than prior to going to South Oaks, because prior to going to South Oaks, you would drink in front of your wife?

A I did most of my drinking in front of my wife, yeah.

Q Now, coming back from this vacation to Portland, you flew back and you met a guy on the airplane, and as a result of some bet or another, you lost a bet with regard to a beer or you won a beer?

A I don't know who, we had a bet about the luggage. We had to transfer planes in Salt Lake. One of us bet our luggage would make it and one of us said it wouldn't.

Q Was it a Delta flight?

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A Yeah.

Q Been there, done it. God, that was such a pit. I

shouldn't say that about Delta, but I think I have some privilege in the court when they sue me.

When you got off the airplane in Portland, and Captain Stalzer met you?

A That's correct.

Q And you had a couple vodkas with Captain Stalzer?

A I heard – I don't know. I bought this fellow a beer, and I had a drink.

Q And you did that while you were waiting for your luggage?

A Yeah, waiting to see the results. It was going to get there, it was just going to be a little bit late.

Q And then you went to dinner that night?

A About seven hours later.

Q And was Stalzer at dinner?

A Yeah, he, myself and the chief mate went to dinner.

Q And Stalzer is an Exxon captain?

A He was the alternate master on the Valdez.

Q And you had wine with dinner?

A Yeah, I think the three of us split a bottle of wine.

Q On this trip to Portland, did you have a beer with Mr. Cousins in his apartment, or your apartment?

A We were there. The ship got squared away, they were there about 30 or 40 days. And I had a beer with Mr. Cousins in

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there somewhere, yeah.

Q How about Mr. Carr, he's an Exxon employee?

A Yeah.

Q Did you have a beer with Mr. Carr on the vessel?

A No, I saw his testimony to that. I had a beer with him the Friday before. He was taking off for his daughter's wedding up in Seattle. My recollection, he yanked it out of the back of his rent-a-car.

Q So you were sitting in the car drinking beer?

A No, we were standing there in the parking lot, he had it in the trunk. He was waiting for a cab to take him to the airport.

Q So you disagree with him about that?

A Yeah, I recall having a drink with him.

Q If you would have drunken a beer aboard the vessel, would that have been a violation of the company policy?

A Yes. As I understood it, yes.

Q Now at some point in time, the subject of Henry Weinhards comes up, do you know what that –

A Yes.

Q It's a beer?

A Yes.

Q Out of Portland?

A Used to be.

Q Still is. Tell me about that?

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A Mr. Kimtis had mentioned, who was the chief engineer at the time, since he departed, we were living side by side over in some rented apartments while the ship was in dry dock. I had mentioned – we were working kind of long hours, and he had mentioned that he had been trying to find some and he couldn't find anything. I don't know whether the ensign had gobbled it all up, but he couldn't locate any, and that morning I had gotten hold of the rigger foreman, asked him if he knew where any was, and he says yeah, I can track some down, I'll get you a six pack by this afternoon. That afternoon came and went and I was fixing to leave and go back to the apartment, and I called up this rigger foreman, he had a walkie-talkie with a private channel, I called him up and asked him if he'd been able to locate the Henrys, and he says, yeah, sure, I'll meet you by the gangway. I met him at the gangway, he gave me a six pack of beer, and I went back to the apartment.

Q And drank the beer there with who?

A Mr. Kimtis. It was either that evening or the next evening.

Q Now at some point in time when Mr. Herb Leyendecker – do you know who he is?

A Yes.

Q Who is he?

A He was, at that time, in the repair section of the

engineering group, Exxon Shipping out of Houston, but he was up

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in Portland, I think basically checking some invoices, because this particular shipyard was kind of complex in the sense that we were trying to rectify a lot of guarantee items that the ship was roughly new, she had come out of the shipbuilder's yard and there was a squabble about a lot of deficiencies that had come out of the builder's yard, and he was up there assisting in that procedure.

Q Would it be fair to say that he was a part of Exxon management?

A In the grand scheme of things, yeah, I guess so. I really, over the years, I never had any contact with him.

Q Your answer is yes?

A Yeah.

Q And at some point in time Mr. Leyendecker asked you about the Henrys or the transmission over the walkie-talkie?

A The next day, he came over and asked me about it, and I told him essentially what I told you, said you could search my room or Chuck, Mr. Kimtis' room, refrigerator, quarters, whatever you want, they were kind of torn up because of the repairs. He did, and I assured him there had been no violation of the alcohol policy that I was aware of.

Q And you did inform Mr. Leyendecker that you drank the beer back at your apartment?

A Yeah, it was either my apartment or Mr. Kimtis' apartment. Watched the Bruins and the Edmonton Oilers.

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Q Important thing, Mr. Leyendecker was told about you drinking the beer?

A Yeah.

Q Who is Mr. Myers?

A Paul Myers is – was, when I first joined the Valdez, he was the port engineer who was the engineering counterpart of the port captain for Andy Martineau. He was port engineer. He had been the construction superintendent of the Valdez and her sister ship, the Long Beach in San Diego.

Q Who was in May of 1988?

A At that time they had evolved the management scheme of things where there was no longer a port captain or port engineer, and they converted over to a line management format where there was a titutlar head of a group of ships who was known as the ship group coordinator, and he kind of wore both hats of the port captain and port engineer, and that was what Mr. Myers was.

Q As the – on an organization chart, would he appear as your boss?

A He would be my direct supervisor, yes.

Q In May of 1988, he was your direct supervisor, at least in terms of an organization chart?

A Yeah, essentially, yeah.

Q And in May of 1988, did Mr. Myers approach you with regard to this radio transmission incident, the Henrys incident?

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A It was later than May. We discussed it – the way it works, generally speaking, you have a couple repair inspectors at that time, who supervise the repairing of the vessel. The ship group coordinator isn't day-to-day involved. I don't think Mr. Myers is up in Portland that much.

Subsequent to the Portland shipyard period and trip to Valdez and down to the Lower 48, he sat in with me for five, six, seven hours. Basically debriefed me item by item of what I saw in the yard period and what I liked or didn't like. And that – the

Henrys subject came up as an aside during that period some time.

Q What did you tell him?

A I essentially told him –

Q Same thing you told me?

A Same thing I told you, yeah.

Q And did Mr. Myers at this point in time ask you anything about AA, aftercare, recovery, emotional maintenance, anything like that?

A He said he just wanted to ensure that there was no violation of the alcohol policy, and I assured him there wasn't. And he went on to the next subject.

Q And when we talk about no violation of the alcohol policy, that is the beer was not consumed on the vessel?

A Best of my knowledge. I got to the bottom of the gangway, so it was never physically on the vessel.

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Q But Mr. Myers concerned expressed to you wasn't a generalized concern about you or drinking, it was a specific concern about beer being on the vessel? Do you want me to try it again?

A Yeah, violation of the alcohol policy.

Q Now, the summer of 1988 – sounds like a movie, doesn't it – you were on leave between July 24th and September 26th or about that?

A Sounds about right.

Q Did you attend AA meetings during that period of time?

A If I was home I guess I did, but that's – summer of '88. I know I was running around working on some boats. That point in time I really couldn't tell you what that summer – if I had a week or two off, I would be surprised.

Q Let's see if I can help you out using your transcript. Let's go to page 1849 of the transcript, line 9, and why don't you just take a look at it and see if it refreshes your recollection, and then I'll ask you the question again.

A Yeah, okay.

Q Does it make sense that during that period of time you attended AA maybe three to five times a week?

A Yeah, if I was home, yeah, during that time period.

Q Now during that period of time, did you do any heavy drinking?

A I guess in September I did, yeah.

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Q The heavy drinking was with an Exxon employee?

A Yeah.

Q Now I want to talk for a minute about something that's been referred to as the four hour rule.

A Uh-huh.

Q Do you have an understanding of the four hour rule?

A Essentially, shall not – Coast Guard says you shall not consume alcoholic beverages less than four hours prior to assuming your duties.

Q In October of 1988 you – or September, October, 1988 you attended some kind of a gathering with yourself, Ray Jones, Paul Myers and Harvey Borgen, do you recall that?

A Yeah, it was a luncheon in San Francisco.

Q Were those the four people that were there?

A Yeah.

Q Let me ask you a question. Up to this point in time were you at all aware of the fact that you were supposedly being monitored?

A I don't know about monitored in the structured sense. Paul Myers, once I started working for him, I started calling him LaMonte Cranston, he was like a shadow, I couldn't shake him.

Q Would it be fair to say you didn't know you were being monitored?

A Not in a checklist format, no.

Q And you met with Myers and Harvey Borgen, who is Harvey

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Borgen?

A He was the west coast fleet manager.

Q At this meeting in October, was the subject of your emotional health discussed, the subject of AA discussed, the subject of drinking discussed?

A Not particularly, no. It was a 20 year congratulatory 20 year survivors award for me, I guess, luncheon.

Q In February of 1989 you attend a conference in Dallas, radio school?

A It was a radio school, yeah.

Q And you were there for three weeks?

A Yes.

Q And you attended Alcoholics Anonymous meetings in Dallas during that three week period?

A Well, I looked into it, and they had a little different deal, they have clubhouses where you just go in there and drink coffee, basically, that was their version of it. No meetings per se.

Q Did you go to three different gatherings?

A Well, they weren't really gatherings, and there is people there coming and going. I looked them up in the phone book and attended, yeah.

Q What's a closed meeting?

A Ostensibly it's for – it's a meeting that's not open to the public, although closed meetings are open to the public,

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anybody can walk in.

Q For alcoholics, isn't it?

A People that want to consider themselves alcoholics, I guess, yeah.

Q How do you introduce yourself at the beginning of the closed meeting. Is there an introduction that goes around?

A No.

Q People don't stand up and say hi, my name is Joe Smith and I'm an alcoholic?

A Only the speaker.

Q Was the Dallas AA meeting one or two or three times you attended, gatherings, AA gatherings in Dallas, the last time you went to AA?

A Best I can recollect, yeah.

Q I want to talk about the so called launch incident, and I only use that so we can focus our attention on the subject so we know what we're talking about.

About when did this situation occur?

A It was – we had come up from discharging down in Long Beach and San Pedro, split discharge, and we headed up to San Francisco, anchored. We had about one lighter left in there. So the Galveston come alongside, it was in March 13th, 14th, somewhere around there, 1989.

Q Of 1989. So this is about two, two-and-a-half weeks before the Valdez incident?

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A No, later, maybe the 18, 17, 18. It was the trip south before the –

Q Before going north, before the fateful voyage?

A You got it.

Q You went ashore at had dinner that night at a restaurant called Viva?

A The best I can recall I went up to Viva, North Beach.

Q And you had wine with dinner?

A Yeah.

Q And you were alone?

A At that time, yeah.

Q When you drank the wine you were alone?

A Yeah, at dinner, yeah.

Q And you got on a launch at some point later on that evening to go back to the Valdez?

A Yeah, the midnight boat, 11:30.

Q Was a Mary Williamson on that boat?

A I believe I saw her and a number of other people, yeah.

Q Did you talk at all with Ms. Williamson?

A A little bit on the launch landing, a little bit on the launch, yeah.

Q Did you talk at all with Ms. Williamson about her captain, Captain Reeder?

A In passing I just said, how is he doing. She said, all right. I think she mentioned he had his son with him for a few

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days riding up and down the bay.

Q Did you say anything disparaging of Captain Reeder on the launch?

A Not particularly. I didn't really recall talking to her much about him at all.

Q How was your demeanor on the launch? Would you say it was restrained, jovial, boisterous?

A I don't know, you got to shout to be heard, open exhaust – that launch was an open exhaust launch. You couldn't hear yourself think.

Q Now at some point you get back to the Valdez and you call Captain Reeder on the radio?

A Yeah.

Q And what do you say to Captain Reeder?

A Well, prior to that I received notification that the Coast Guard was going to pay me a visit in the morning, and we, at that point we had been modernized enough to where we had cell phones, so I called up the Coast Guard inspection office, the night number to find out what all this was about, because supposedly we were going to be issued a citation for something we had done in San Francisco Bay, and we had only been there for about 12 hours, and I wanted to know what hell was going on.

And the Coast Guard man there checked his notes and he said a commander would be coming out first thing in the morning to

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either issue us a citation or discuss the issuance of a citation for disabling the main engine in San Francisco Bay, which you have to report that and have tug boats in attendance. And I inquired further of him, and he says well – I said the main engine on the ship, since we've been here today, has never been disabled. We did have a tug in attendance when we were doing some engine work for about 20 minutes in case the main engine were to be disabled. And I said, where did you receive this information. And he said, we received it from the master of the Exxon Galveston.

And I had taken it in the shorts for Captain Reeder in 1977, and at that time I told him I wasn't going to be so demure if he tried to pull some stunt again. And I went – I used some language that probably wasn't appropriate for 30 seconds and then we got about our business and he let go.

Q What inappropriate language did you use?

A Same words you used yesterday.

Q Those weren't my words then, were they?

A Well, no.

Q Douche bag?

A It was a stream of consciousness.

Q Scum bag?

A Yeah.

Q In fact, you used words worse than those, didn't you?

A Well, yeah. I know most of them, yeah.

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Q Would you describe that as an unusual radio communication, or for you is that just a regular radio communication?

A No, I don't think I've ever done that before or since.

Q It's unusual conduct, isn't it?

A Well, the circumstances called for unusual conduct.

Q I need to find my next stack. My handwriting isn't good enough to write these out in an outline, so I just rip all these pages apart.

This incident that we've just talked about where you talked to Captain Reeder over the phone, let's focus from the time when you got to the west coast to the Valdez up to that point in time?

A Okay.

Q Isn't it true, captain, that you have no knowledge that you were allegedly being monitored specifically for alcohol use by either Mr. Myers or Mr. Borgen at any time between 1987 and the grounding of the Exxon Valdez?

A With the exception of a lot of contact with Mr. Myers, which I thought was odd, then again I don't know Mr. Myers, I had no specific knowledge that there was a monitoring program in place specifically designed for me, no.

Q Would it be fair to say that when you've been asked that question before you didn't raise Mr. Myers?

A Maybe. I'd have to – probably not.

Q Sir, can you find a document in front of you that has on

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it, a sticker that has number 127, and it looks like this.

A Yeah, I got it. Okay, yeah.

Q Exhibit 127 has been pre-admitted. It's a document that was taken off of the Exxon Valdez after the grounding. We only have terrible copies of

127, but I'm going to pull up the first paragraph or two and see if we can see it any better. What is Exhibit 127?

A It was a list of joints in San Francisco that was compiled, as I was told, by a law student who was in the Navy at the taxpayer's expense, and he compiled this while getting his law degree, he's now working for the justice department. He was a classmate of Ms. Haven's who is a third assistant, second assistant on the Valdez, in college they were classmates. He gave it to her. She distributed a bunch of copies on the ship.

Q Do you recall when you came into possession of yours?

A She had a bunch of copies, I would say, in summer or fall of '88.

Q So would it be fair to say from either the summer or fall of '88 through the grounding there was a copy of exhibit, plaintiffs' Exhibit 127 either in your office aboard the Valdez or in your stateroom, bedroom?

A Yeah, it was kicking around with a bunch of stuff.

Q Were you ever aware of the fact that Steve Day talked to Paul Myers about this Mary Williamson, Captain Reeder passage?

A Not that I'm aware of, no.

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Q And from the time of the Reeder telephone call, you spent the next three days with Paul Myers on the vessel trying to fix the turbocharger?

A More or less, yes. We went out and had a couple false starts, came back and anchored it, and redid it two or three times.

Q And in those three days, and those were the two or three days after your telephone conversation?

A Walkie-talkie, yeah.

Q The subject of either Mary Williamson and her statements about coming over on the launch, or the Captain Reeder telephone conversation never came up between you and Mr. Myers?

A Well, he was living on the ship, and the Galveston never come back alongside, so I don't know – no, didn't. Not with me and Mr. Myers, no.

Q I'm going to read you a list of names of Exxon employees, and ask you whether from the time you got out of South Oaks until the time you left San Francisco for the faithfull voyage you drank with them?

A Okay.

Q Carlos Hogan?

A Oh, yeah.

Q Nate Carr?

A Uh-huh.

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Q Mr. Cousins?

A Yeah.

Q Brian Dengel?

A Yes, sir.

Q Kevin Dick?

A Yeah.

Q Patrick Enright?

A Uh-huh.

Q Kathy Haven?

A Uh-huh.

Q Charles Kimtis?

A Yes.

Q James Kunkel?

A Yes.

Q Kunkel is a yes?

A Yes.

Q Joel Roberson?

A Yes.

Q Thomas St. Pierre?

A Yes.

Q Captain Stalzer?

A Yes.

Q Robert Sturgis?

A Oh, yeah, yes.

* * *

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Q Well, you've raised the subject of this interview. We're eventually going to get to 4:30 to 6:30 in the afternoon, and when we get to 4:30 or 6:30 you will admit that you had at least three drinks, vodkas?

A Yes.

Q Whether they are singles or doubles we'll get to tomorrow.

And you had, or at least ordered a drink over at the Harbor Club while you were waiting for the pizza?

A And the taxi, yeah.

* * *

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Q One thing I want to go back to the afternoon, just for a second.

Who did you have drinks with at the Pipeline Club? Were they people off the ship?

A Yes.

Q And that was Glowacki and Roberson?

A Yeah. Initially, Mr. Glowacki was in there when I arrived, and then Mr. Roberson came in there later.

Q And your recollection is you had three drinks in the Pipeline Club?

A Yes.

Q And if I was to say that they were in glasses that were about this tall and they were free poured, would you take any disagreement with me on that (indicating)?

A Well, I ordered vodka on the rocks, and they were in a three or four – three inch tumbler glass full of ice, free poured, yes.

Q And vodka up to the top of the glass with the ice?

A Yes.

Q And the drink, when you ordered a drink at the Harbor Club,

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were you with anybody from Exxon Shipping Company?

A I was with Mr. Roberson and I had stepped in, because it was too crowded in the Pizza Palace, and to get out of the weather. And we just didn't feel like standing in this guy's establishment without ordering something. We ordered drinks and Mr. Glowacki ordered a drink, he ordered. Mr. Glowacki was in there with us. The three of us were there together.

Q And that's when he showed you the array of bottles he had on the bar with regard to vodka?

A Yes, it's – I just wanted to twist Mr. Glowacki's tail. He's a Polish immigrant. He doesn't like anything Russian.

Q Alamar is the ship agent?

A Yes.

Q Could you tell me what a ship agent is?

A Generally an agent, or an agency provides support for the vessel when you come in, mail services, if people are sick they will make sure – make an appointment with a doctor. If you need to order parts or supplies, you go through them. They are your shore representative. In this instance, they are an outside contractor.

Q Have you ever had a drink at the Pipeline Club or the Harbor Club or any drinking establishments in Valdez when any representatives of Alamar were there? Is it out of the question?

A I believe that evening I saw Gretchen Dunkin walked through the Pipeline Club, she was there.

Q Did you say hi to her?

A I said hello, yeah.

Q How about on prior occasions?

A Over the years, I would have to say yes.

Q Thank you.

Now at some point between the vessel passing Hinchinbrook and coming in, and the vessel departing 9:10, or about 9:10, did you have any discussion with anybody about ice, ice out off of Columbia Glacier?

A Well, I had discussions with the vessel traffic on the inbound voyage, yeah, because I had to go out of the lanes to avoid the ice.

Q Did you and Murphy ever talk about it, that you recall?

A Prior to sailing, or in the process of letting go the lines, I inquired of him what his knowledge was of the current ice conditions in the Columbia Glacier – the ice out of Columbia Bay, Point Freemantle area into the lanes. He relayed to me that he had overheard a conversation of the Arco Juneau, I believe, on the radio, that it had to divert around the ice earlier in the evening.

Q We talked for a minute yesterday about the four hour rule with regard to drinking.

A Yes.

Q Would you agree with this proposition, that on the evening of March 23rd, 1989 you violated the four hour rule?

A Unintentionally, yes.

Q Did you – the answer is yes, I violated the rule?

A Yes, as it turned out.

MR. CHALOS: Your Honor, objection.

THE COURT: What's the objection?

MR. CHALOS: He gave his answer and Mr. O'Neill mischaracterized it.

THE COURT: No, he didn't. The answer was qualified and he asked a followup question, that's okay.

BY MR. O'NEILL:

Q Would it be fair to say that both with regard to your first vessel assignment on the Exxon Philadelphia, and your last vessel assignment on the Exxon Valdez, that you violated Exxon's alcohol policy?

A Yes.

Q Now when you got back to the vessel, it was about 8:40?

A Approximately, yes.

Q And the pilot was there?

A Yes.

Q And you got ready to go?

A Uh-huh.

Q Are you aware at all – this is going to be a diversion into the so-called six on/six off rule, which really isn't a six on/six off rule, it's Statute 8104. Have you ever had any discussions about that?

A I've seen – yeah, over the years, yeah.

Q And let me see if I can state it right, because I may not have stated it right in my opening, you help me with that and we'll get it right.

When a vessel is going to leave port, like the Port of Valdez, if an officer is going to stand a watch, he has to have had six hours off duty in the prior 12 hours?

A Yes, exclusive of – there are some qualifications to that, including mooring and unmooring. That can be within that six hours. Six hours off duty prior to assuming on his own a bridge watch exclusive of a pilot or anybody else that's sailing a normal bridge watch.

Q Had you ever sailed on an Exxon vessel in a situation in which none of the deck officers had six hours off in the 12 hours immediately preceding the sailing?

A I'm sure I have at some point in my seagoing career, yes.

Q Are you aware of any specific policies or procedures that Exxon Shipping Company had whereby mates were required to report to the master before sailing how many hours off duty they had in the 12 hours immediately preceding the sailing? Was there a policy in place for you to check this six on and six off – I guess six on/six off rule?

A What's the six on part?

Q I'm sorry, the requirement that we're talking about?

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A Yeah.

Q Was there a policy in place for that?

A You mean prior to sailing, head count, how many hours have you had off?

Q Yeah.

A Not a formalized policy, no.

Q When you left the dock in Valdez, did you know at that point in time whether there was a violation of 8104 or not?

A I assumed there was not because it was an easy load. There was no topping off of tanks, which require extra mates around. It was a light load, if you can use that expression, she wasn't filled up, so the tanks weren't pressed up, which usually requires you extra manpower to do. Pretty straightforward, one man could have handled the whole load.

Q Would it be fair to say on that evening you did not know the specific amount of rest or off duty time, or off duty time each of the mates had?

A I had no specific recantation of their hours worked or not worked, no.

Q Do you recall any Exxon policy that had the effect or the purpose of making deck officers aware of 8104?

A Not a specific policy that I was aware of, no.

Q Had you ever discussed 8104 with the ship's officers that were on the Valdez that night, Cousins, LeCain or Kunkel?

A The previous trip, yes.

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Q With which one?

A All three of them, and taking corrective action.

Q Could you go to page 1992 of your deposition transcript.

A Yes.

Q And I'm going to read the questions and answers beginning on line 5 of 1992 down to line 25, and you follow and tell me if I read them correctly?

A Yes.

Q At any time before the grounding, do you recall ever having any conversations or discussions with Gregory Cousins regarding that statute. Your answer, the statute per se. The question, or the actual rule that comes out of the statute. Answer, no. Same question for Second Officer LeCain, do you recall any discussions you ever had with him regarding the statute.

Answer, no. Question, have you ever had any discussions regarding that statute with First Officer Kunkel. Answer, not the statute per se. I relieved him on some occasions on different scenarios to have him get some rest. Question, right, but did you ever – you say statute per se. Did you ever have any discussions with First Officer Kunkel regarding the rule of – with the statute. Answer, no.

Were those the questions given and the answers given?

A Yes.

Q While we're on that subject, were there any records that were kept on the ship, time cards, time entries, that would

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allow Exxon Shipping Company to monitor or know with regard to watch officers whether there was any compliance with 8104?

A With the exception of – chief mate would normally – Mr. Kunkel did keep a workbook for his activities on a daily basis. But the second or third mate wouldn't.

Q Was there a formal way for Exxon Shipping Company to know or monitor 8104 because of the ship's records?

A You mean a monthly or weekly submission?

Q Yes. Yeah.

A Not that I'm aware of, no.

* * *

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Q At the time you left the bridge to the Busby Island light, would it be fair to say that you were about two minutes away?

A Two to three. You can look out the window and see it, yeah.

* * *

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Q We're going to play, with the Court's permission, that section where you report back to the VTC, and then we're going to talk about it.

(Audio tape played)

BY MR. O'NEILL:

Q Now, in that transmission you say, we've fetched up hard north – we've fetched up hard around north of Goose Island off

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of Bligh Reef?

A Fetched up hard aground.

Q Around north of Goose Island off Bligh Reef. You weren't near Goose Island, were you?

A We were north of it, but I had Mr. Cousins take a position to find out where we were and where we were aground. Looking at the time, I couldn't believe that we were on Bligh Reef.

Q But you weren't near Goose Island, were you?

A Time-wise we should have been down in that latitude, but I can recall at that time thinking we hit some uncharted object. I couldn't believe we hit Bligh Reef.

Q Would it be fair to say that at the time you phoned this call in then to the Coast Guard you didn't know where you were?

A No, I had a position on the chart, but my mind wouldn't accept the fact that we hit it. I checked Mr. Cousins' position that I ordered him to take, but I wasn't accepting.

Q Would it be fair to say then at the moment that you called the Coast Guard, Mr. Cousins had shown you where you were on the chart but you thought you were someplace else?

A I checked the position myself. My mind still didn't want to accept it.

Q Now in the moments that follow and then the minutes and the hours, do you try to rock the vessel off of the reef?

A No.

Q Did you try at all to rock the vessel off of the reef?

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A I thought about it initially for a couple minutes when I first arrived up there, as any mariner would involved in a grounding. I thought that wouldn't be very prudent.

Q It would be bad judgment?

A In that situation, it wouldn't be the proper thing to do, no, to back her off the reef.

Q Or to rock it off the reef?

A I don't know how you rock a ship off a reef.

Q Okay, you're the captain. I'm going to play, with the Court's permission, another segment of the VTC tape and we're going to talk about what we just talked about now.

(Audio tape played)

BY MR. O'NEILL:

Q Would it be fair to say that at or after 1:00 you've told the Coast Guard that you were trying to extract the vessel from the reef?

A I remember reading those words and hearing them.

Q Did you say them? Do you have any doubt that you said

them?

A Nope.

Q Did you see oil boiling up the sides of the ship?

A Both sides, yes.

MR. O'NEILL: I want to ask you about an exhibit that your lawyer is going to use. Can you put the other map up?

BY MR. O'NEILL:

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Q It's Exhibit Number 851, for the record. I just want to establish two things with this chart. Is this where – about where you thought the leading edge of the ice was that evening?

A Well, I know Mr. Blank (ph) and I went around and around with this.

Q We'll fix it however you want me to fix it?

A That's the major concentration of ice I thought roughly indicated by there a silhouette.

Q You're aware that Mr. Cousins places the ice right here?

A No, I'm not. His testimony is – he comports with mine, generally. He's got a leading edge line which doesn't indicate the concentration of ice.

Q Is this his leading edge line?

A It's a leading edge outer limit of some ice, but the

concentration he indicated comports with mine.

Q Have we discussed that fairly?

A Reasonably fairly.

Q At some point in time there is a detachment that boards the vessel. Do they come out in a helicopter. The vessel is aground on Bligh Reef and sometime people come aboard?

A About 10 or 11 in the morning, yeah.

Q Do you recall making a statement to a member of the boarding party in response to the question, what's the problem, answer, you're looking at it?

A I remember saying that to – they came out in a boat. It

[441]

was Mr. – Lieutenant Commander Falkenstein, Warrant Officer Delozier, and I believe it was Dan Lawn. I do recall making that statement. I thought it was one of the more absurd questions that's been asked of me. The problem was pretty obvious what was wrong, what the problem was.

* * *

[488]

Q This document, Navigation and Bridge and Organization Manual, was that a document that was on the Valdez?

A Yeah, it was in the required library of publications.

Q Required to be on the vessel?

A Yeah.

Q Were the officers required to read and study and be familiar with this document?

A Yes, they were, and sign off. There is a sign-off sheet

[489]

included.

* * *

[513]

A Uh-huh.

Q Did you, on March 23rd, 1989, go into the Pipeline Club at 1:45 p.m.?

A No.

Q Were you in the Pipeline Club at any time between 1:45 p.m. and 2:45 p.m.?

A No.

Q Did you on that day wear a golf hat?

A No.

Q Did you have a hat with a snap on it that day?

A No.

Q Were you wearing a hat that day?

A Yes.

Q What kind of hat were you wearing?

A Just a black driving cap.

Q A what?

A Driving cap, I think they call them, driving a car.

Q Did that hat have a snap on it?

A No.

Q Captain, how at all are you?

A Six feet.

Q What was your age in March of 1989?

A 42.

[514]

Q Did you wear your beard the same way in 1989 as your beard is today?

A I wore it the same. It was a little less gray then.

Q Captain, did you ever have that beard, as Mrs. Delozier described it, shaved from your chin to your lip?

A No.

Q Has it always been in the same condition, please show the jury, as it is today?

A More or less, yeah.

Q Captain, while we were on Mrs. Delozier and Mrs. Harrison, you heard Mrs. Harrison's testimony to the effect that she and Mrs. Delozier met the day after the grounding and saw your picture on television or in the newspaper, do you remember that?

A Yes.

Q Do you have a recollection of when the first time was your picture appeared in either a newspaper or either on television?

MR. O'NEILL: Objection, foundation.

MR. CHALOS: Your Honor, he can tell me if he remembers when the first time that was.

THE COURT: I'll allow the question.

THE WITNESS: The first time I had any idea that I had been photographed or – was Tuesday or Wednesday following the grounding.

BY MR. CHALOS:

[515]

Q On that Saturday, Captain, had any pictures been taken of you that were published, as far as you knew?

A No, nobody knew what I looked like.

*   *   *

[564]

A Yes.

MR. CHALOS: Your Honor, I have here copies of plaintiffs' Exhibit 90-A that was admitted into evidence yesterday. With your permission I would like to pass them out to the jury so they can follow along.

THE COURT: Mr. Murtiashaw, do we have that?

THE CLERK: 90-A.

THE COURT: Oh, 90-A.

* * *

[593]

What did you – come around this side, this way so Judge Holland can see as well. Show us where you saw the ice?

A After we were on the 180 heading, we steadied up on the due south heading. Generally this was the outline, this apex in here, and then it trailed off over into this area due south. We were coming down, and this (indicating) stuck like a thumb into the north bound lane.

Q Pointing to C, now that's where Busby Island was?

A Busby Island and the light was right here. There is a little lob right there.

Q Where is your ship at this time?

A The ship, as I had lined up, would be one mile off the

[594]

light and one mile off this ice right there, Busby Island.

Q So you were shooting between the leading edge and the light, was that your plan?

A Yes.

Q Where was the ship when you were looking at the ice in this situation?

A It was up in here, mile, mile-and-a-half.

Q Where was Bligh Reef light?

A Bligh Reef light was down in here.

Q That was Bligh Reef light?

A The buoy.

Q Yeah, the buoy, I meant. How much room was there, based on what you were seeing, between the leading edge of the ice and Bligh Reef buoy?

A This area here?

Q Yes.

A About two miles.

* * *

Q So your plan at this point when you're talking to Cousins is to shoot between Busby Island light one mile off on your port hand, and one mile from the leading edge of the ice on your starboard hand?

[595]

A Being equidistant between the two.

Q Did you discuss that with Cousins?

A Yes.

Q Did he at that time say to you, Captain, I don't see the ice the same way you see it?

A No, he agreed with my assessment.

Q Did you have – at this time did you tell him that you were thinking about going below?

A Not in the first –

Q At what point in time did you tell Mr. Cousins that you were contemplating going below?

A It was – first I solicited his input and asked him if he thought it looked like a decent maneuver to do or a do able maneuver to do, and if he had any reservations I'd like to hear about that, so I tried to elicit that from my junior officers.

Q This was before you decided to go below?

A Yeah. And he said this is a piece of cake, or words to that effect. And then I leave a moment or two later. I said, do you want to handle it, do you want to do the turn. He says yeah, no problem.

* * *

[597]

Q What orders did you give him before you left?

A I –

Q Well, what I'm asking, did you tell him that you wanted him to come abeam of Busby?

[598]

A Abeam of Busby Island light and alter course to re-enter and come down the southbound lane – or the inbound lane.

Q Did you point to him on the radar –

A On the radar.

Q – visually what you wanted him to do?

A Yes, to Busby Island light, and we both visually looked out the window, you could see it flashing away.

* * *

[610]

Q You had discussed the maneuver that you were planning with Mr. Cousins?

A Twice, yes.

Q You stood at the radar with him for ten minutes discussing the maneuver?

A Yes.

Q You had told Mr. Cousins that you were about to go below?

A Yes.

Q For a few minutes?

A Yes.

Q And did he protest at all when you told him that?

A No, he said fine; said, "I can handle it," or words to that effect.

Q Okay. Now, you said that Mr. Cousins told you that he was comfortable with the situation?

A The initial conference, if you will, that we had, he was comfortable. He saw no problem with the maneuver, and then when I inquired whether he could handle it himself, he had no problem either; either the proposed maneuver or him handling

[611]

the maneuver.

* * *

[614]

Q All right, Captain, why did you leave the bridge?

A At that time, there was no – giving all those factors that I had in mind, there was no pressing need for me to do the maneuver. I had some calculations I was working on that I'd gotten some weather update and there was a storm brewing in the Aleutians. It was heading towards Prince William Sound and I wanted to make sure either we got out and passed in front of the storm enabling us to make a tide window or an area that we were shooting for in Long Beach; or, in the converse, I'd have to stay in Prince William Sound.

* * *

[615]

Q While you were down below, did Mr. Cousins call you?

A Yes.

Q When did he call you?

A As I was sitting at my desk, there's a clock over my desk, he called and said we started – "I've started to alter course" and I looked up and it was – time I predicted we'd be abeam, it wasn't too hard to figure out, it was 55 or 56, you know, just a quick glance at the clock; and it was the right time or the appropriate time that he should be turning.

Q You expected to be called about that time?

A Yes.

Q Now, what – tell me exactly what Mr. Cousins said to you?

A He said, "We're commencing the turn now" and I said, How does it look. And he said, Fine, we may, further on down the road, get into a little bit of ice; but, he said, No problem. I asked him if Mr. LeCain had appeared yet. He said no,

[616]

and I said, Okay, I'll be up in a few minutes.

* * *

[643]

Q Yesterday – I want to turn to another subject.

Yesterday your radio officer, Mr. Roberson testified – or it was the day before – testified that at some point a call came in from Mr. Myers on the MARSAT telephone?

A Uh-huh.

Q You remember that?

A Yes.

Q That was in that time frame when – the 12:30-to-1:00 time frame, as best you remember; is that right?

A Yeah, right in there, because I remember him coming up to the bridge and saying, Paul Myers wants to speak to you in the

[644]

radio shack on the radio.

Q And did you go down below to speak to him in the radio room?

A Momentarily, yeah.

Q How long did you remain in the radio room?

A I – he handed me the phone. Paul said good morning or hi or whatever, and I said – responded, and I think we – I don't know if time was impressed or not, but it seemed like two minutes I was on the phone with him and then I left.

Q You gave him a report as to what happened and what was going on?

A As near as I can recall. I said, Yes, we're aground. I don't know – I think he testified that I said something about the ice or – you know, I really – I don't recall much of what I said to him.

* * *

[697]

Q Now, you testified in response to the questions from Exxon Corporations lawyers, there was some questions about self-identification; do you remember those?

A Yes.

Q And the questions went along the lines of, Don't you want

[698]

to encourage self-identification and if somebody

self-identifies, isn't that the kind of behavior that you want to encourage; do you recall that?

A Generally, yeah.

Q You didn't self-identify; did you?

A No. No.

Q You got a call from Exxon Corporation through Captain –

A Pierce.

Q – who said, You have a problem, I think you ought to get some help?

A Or work it out or – yeah.

Q And at the same time, Mr. Graves was reporting – Mr. Graves was investigating instances of drinking prior to you going into South Oaks?

A Judging from the date of that report, yeah.

Q So you didn't self-identify?

A No.

Q You got caught?

A I – I don't know how Captain Pierce came to call me.

Q Now, with regard to self-identification, and this concept of self-identification, do you know as you sat there and testified about it that Exxon Corporation, that it was in Exxon Corporation's interest to say that you had self-identified because it helps them with regard to their argument that they properly reinstated you in a vessel – you knew that, didn't

[699]

you?

A I'm a little confused now with the –

Q At the time you testified about self-identification –

A Yeah.

Q – it was you and Exxon Corporation, you knew that the concept of self-identification was important to their defense with regard to their reinstating you as a tanker captain; you knew that, didn't you?

A The concept of self- – I didn't think in those terms, no.

Q With regard to this episode of drinking in 1988, the one where you testified that you had ten or 12 drinks –

A Yes.

Q – you were able to drive an automobile after those ten or 12 drinks; weren't you?

A Yes.

Q And you did?

A Yes.

Q And you had the poor judgment to drive an automobile after those ten or 12 drinks; didn't you?

A Yes.

Q And on that same day, would it be fair to say that after you had a number of drinks – three, four, five, six, seven – at some point in time you had the poor judgment to continue to drink; didn't you?

A Yes.

* * *

[702]

Q Was the treatment as reported to Exxon Corporation, did it include Alcoholics Anonymous?

A Yes.

Q Lectures, seminars, workshops pertaining to alcoholism?

A Yeah.

Q And did they report to Exxon Shipping Company, the Exxon defendants, After discharge Mr. Hazelwood be given a leave of absence to get involved in AA, Alcoholics Anonymous, and aftercare?

A I don't know what they reported to the shipping company.

Q Isn't that what the IDR says?

A But I don't know where that goes. I assumed it went to the medical people.

Q Exxon USA, even higher up the hierarchy; isn't that right?

A Somewhere in the administrative.

Q Thanks. And you went to AA; is that a correct statement?

[703]

A Yes.

Q And you went to the aftercare?

A Some of it, yeah.

Q And then you quit aftercare?

A Yes.

Q And you went to lectures on alcoholism?

A While I was an inpatient, yeah.

Q And this was, as we can see, reported to Exxon USA?

A Somebody there, yeah.

* * *

[707]

Q Plaintiffs' Exhibit 127.

What is 127?

A It's a copy of a bar list for San Francisco, City of San Francisco and a couple of other places.

Q And you had this for a year in your cabin, or just short of a year in your cabin?

A Somewhere around there, yeah.

Q And you call it a bar list?

A Well, it's San Francisco bar list. I can't read the copy too well.

Q Why did you keep it?

A I thought it was pretty well read. It was pretty funny.

Q Did you ever use it?

A No.

Q So you've never been to any of these bars in this bar list?

A Oh, I've been to a couple of them.

Q Are these particularly nice joints that are described in here?

A Some are, some aren't.

* * *

[717]

Q You were asked that question repeatedly at your deposition and you answered repeatedly, I have no specific recollection of ever being monitored?

A Yes. Monitored, yes.

Q And you didn't qualify it in your deposition transcript, did you?

A I probably didn't.

* * *

[733]

Q Now, you describe Mr. Cousins calling you two minutes after you left the bridge to give a report that the vessel had turned? You described that today?

A Yes.

Q Did you describe that to Mr. Delozier?

A I don't know if he asked about it.

Q Here you talk about "I went down to here, I was at my desk, starting to do some papers and I felt a shudder. And the vessel shuddered and I was about to go up to the bridge when the phone rang and he said, 'I believe we're aground'"?

A Yes.

Q Now, I want to talk for a minute, if we could, about your testimony about rocking the – your testimony about after the accident, vessel's –

A Uh-huh.

Q – on the reef after the grounding of the Exxon Valdez?

A Yeah.

Q Okay. And would you agree with the proposition that, if you in fact tried to get the vessel off of the – off of the

[734]

reef, that that would evidence a lack of sound judgment?

A Depends on how you tried to get it off the reef, yeah.

Q My statement's a generally fair statement; isn't it?

A Not really. I mean, it depends upon the procedure you

took. I mean the ship's got to get off the reef eventually. That's –

Q You testified here today that you made the judgment not to get it off the reef?

A Yes. With the ship's engine.

Q That's right.

A That's all I had.

Q That's right. So at the point in time, when you're sitting there with the ship's engine on the reef, it would be bad judgment to try to extract the ship just using the ship's engine?

A And rudders, yeah.

Q And as you sit here today, it is in your interest to have your testimony be such that at or about the time of the grounding you don't show evidence of bad judgment?

A It's in my interest and against yours, yes.

Q How many times did you tell people that you were trying to extract the vessel from the reef?

A I mention it here in the Delozier interview and I think two transmissions to Commander McCall, one or two.

Q And not only is it mentioned in the Delozier interview –

[735]

can I have page 5 – you mention it in the Delozier

interview – could I have the – could you go back two pages?

Pick it up, I think here in the Delozier interview – see if I can call it up. The testimony or the statement given to Mr. Delozier covers the subject right about here?

A Uh-huh.

Q So it's mentioned once to Mr. Delozier?

A Well, a mention is made, yes. I experimented with the rudder and engines for a few minutes.

Q To extract the vessel off of the rock?

A Well, that refers to the initial playing around with the rudder and the engine, yes.

Q Would it be fair to say that what you told Mr. Delozier is consistent with the several transmissions that you made to the Coast Guard with regard to attempts to extract the vessel from the rock?

A No. This was a few minutes when I first arrived up there and I slowly brought the rudder back and basically saw what she was doing.

Q How many times did you tell the Coast Guard you tried to extract the vessel from the rock?

A As I recall, it was – this response here, which was when I first arrived on the bridge and the two transmissions.

Q So we have three different statements to the Coast Guard that you tried to extract the vessel from the rock?

[736]

A Three statements, yeah.

Q They're all along that line and your testimony here today is contrary to the sum and substance of those statements?

A To the statements, yes. As well as my actions.

* * *

[751]

Q And you say we fetched up a hard ground – hard aground north of, uh, Goose Island, off Bligh Reef?

A Yes.

Q In point of fact, you weren't near Goose Island?

A I think you asked this yesterday. We went through this whole thing.

Q I understand that I asked it yesterday, but you – you – you testified at great length with regard to all of the care that went on during the voyage. I want to go through this transcript to show that care didn't happen during the voyage.

A Very well.

Q And you weren't near Goose Island at all; were you?

A No, we were north of it.

Q And you didn't know where you were, did you?

A I couldn't believe where we were.

* * *

[757]

Q And you deny that you're an alcoholic?

A I don't consider myself one, no.

Q And we agree that we've had various versions from you on drinking in Valdez?

A Different versions, yes.

Q And we've had different versions from you –

A At different times and different circumstances.

Q That's right. We've had different versions at different times in different circumstances?

A Certainly.

Q So sort of the theory of relative truth; isn't it?

A No.

Q And with regard to the Paul Myers incidents and whether you told Mr. Myers that you had been drinking or not, would you agree that we've had different versions of that story?

A I would have to agree there have been different versions, but the conversation that we had was really part of a six-hour meeting, really. It wasn't a big issue.

Q We are clear on the fact that, specifically speaking, you were never told not to drink by Exxon Corporation?

A That's correct, yes.

* * *

[758]

Q You were never told – nobody ever inquired about your AA or your aftercare?

A Not specifically, no.

* * *

[766]

Q Okay. Then he says, Okay, all right. When you arrived on the bridge, did you – did you do anything at that time? And you say, I was – I tried to rudder and engines for a few

minutes to see if we could extract it from the situation,, but then –

Now, is that exactly what you did?

A Essentially, yes. I tried using the rudder and engines in the first two or three minutes I was up there and returned the rudder to midship and shut the engine down.

Q Then you say, But then I got my faculties about me. I was a little upset of course, but then I thought about it and driving her off might not be the best way to go because it just exasperates – exacerbate the damage, so I just stopped the engines.

A Yes.

[767]

Q That's what you told him about that, isn't it?

A That's all part and parcel of the same –

Q And isn't that exactly what you told us today?

A Essentially, yes.

Q And isn't that exactly what you did?

A Yes.

* * *

[769]

DIRECT EXAMINATION OF SIVANCHANDRA VALLURY, M.D. (Read)

BY MR. GERRY:

Q Could you state your full name and residential address for the record, please, Doctor?

A My name is Sivachandra, S-I-V-A-C-H-A-N-D-R-A, middle initial M. as in Mary, Vallury, V-A-L-L-U-R-Y. I reside at 268 Bayview, B-A-Y-V-I-E-W Avenue, Massapequa, Zip 11758.

Q And by whom are you currently employed, Doctor?

[770]

A South Oaks Hospital and I'm also in private practice.

Q What type of private practice do you have?

A Individual and I also work as a senior psychiatrist at South Oaks Hospital.

Q Individual practice, you are referring to a psychiatric practice?

A That's correct.

Q Where you see patients?

A Right.

* * *

[774]

Q Is it your normal practice to provide a diagnosis when you

[775]

first meet a patient?

A Yes. If I might clarify, you had asked about the dysthymic disorder, the alcohol abuse episodic. If I might clarify, to me in treating a patient, it's not that significant, but in a statistical fashion or in the order, it's a primary dysthymic disorder and the secondary comes in as alcohol abuse episodic.

Q Now, what do you mean by primary?

A That is if a patient come in – comes in that, let's say features with dysthymia and also with alcohol, you put it in that order, depending on how the history evolved also or what was showing at that time. There are differences between a dysthymic disorder and let's say a major depression or schizophrenic. They have different connotations, so even if this went to another one of my colleagues, we might see it differently but the treatment really doesn't differ; you address both situations simultaneously.

* * *

[777]

Q You don't tell them you have to be alcohol-free for your whole life, you say, Let's do it one day at a time?

A That we do. I do tell them.

Q You do?

A Yes. Once an alcoholic, always an alcoholic. Not in a demeaning sense, but that is the nature of the beast.

Q So it was your view, then, that Captain Hazelwood should remain alcohol-free for the rest of his life on discharge?

A Yes. I am talking generally. That, again, what I

generally practiced, would apply to him logically. Again specifically what I said to him at that time, I don't recall.

Q What do you generally practice, then?

A A lifetime of abstinence from alcohol.

Q When you use the term sobriety, what do you mean in the context of treatment of a patient?

A That is – again, I can only speak for myself. Sobriety is somebody who is abstinent from alcohol.

* * *

[779]

Q What about the typed numbers opposite the diagnosis?

A This would be typed in by our medical records because, again, we don't spell out the diagnosis because we don't know whose desk this is going to lie on. This is the DSM-III, as it is set. So anybody who receives it, the medical department or whoever, then looks at the DSM-III and then collates the numbers to a diagnosis.

Q These numbers are taken from the DSM-III, then?

A Right.

Q They correspond to diagnosis?

A Right.

[780]

Q Dysthymic disorder, what number corresponds to that?

A I would say the 300.40, and the alcohol abuse episodic would be 305.02.

* * *

Q The entry below the treatment section says, I believe,

[781]

treatment dates and then it is a little hard to read. Can you read the entry below or the note below that?

A I can surmise. Regular work, presently fit for regular work.

Q The next one?

A The next one is –

Q That is checked no; right?

A That's right. That is checked no. The other one is –

Q Looks like "presently fit for work with restrictions"?

A That's right.

Q That is also checked no?

A That's right.

Q Could you read the entry beneath that? Let me read the print and I'll let you read the handwriting. "If still now not now able, I estimate patient may return to full duty on," and then it is blank. In the meantime, any restrictions recommended as a result of this disability are –

A It says Mr. Hazelwood will complete our 28-day program. It is recommended, given the nature of his job, that after discharge Mr. Hazelwood be given leave of absence to get involved in AA and aftercare.

Q Just to clarify, my question is whether as of the date that you filled out this form, was it your view that the patient could not control – return to his work as of that date? Do you understand my question?

[782]

A Yes. And no in the sense that he couldn't return to work as of that date, but also into a little past that date, or into the future. So that he could be given a leave of absence to get involved in AA and aftercare, so not only at the writing, but also for the future, past that writing that he shouldn't return.

Q So based on this form, when do you think he should have returned to work?

A The reason why I qualified it so I wouldn't get into the question of saying when he would get back to work, that as of that date and into the future and then, as I said in my previous testimony, that all this is evaluated on an on going basis.

Now, hypothetically – and this is totally away from it, if he was drinking and falling down all over the place, he wouldn't be going back to work, so it belongs in that category. It has to be evaluated over time. There is no exact spot.

Q Based on this document and your recommendation, Doctor, was it your view that the captain could return to work as of this date of the discharge from inpatient treatment?

A No.

* * *

[784]

DIRECT EXAMINATION OF LLOYD LECAIN
(Read)

BY MS. WAGNER:

Q Please state your full name and home address?

A Lloyd LeCain, 416, Evesham Place, Longwood, Florida.

Q What is your present employment today?

A I'm selling real estate. I'm not with Exxon anymore.

Q How long have you not been with Exxon?

A About four or five months.

Q What were the circumstances of your leaving Exxon?

A I have post-traumatic stress disorder and I was retired

from Exxon.

Q You have the disorder from the accident?

A That's correct.

* * *

[785]

Q And then what did you do?

A I went to work for Exxon. I went to work as an A-B. They didn't have any third mates jobs available at the time. There was a shipping slump during the '70s and after 14 days, I got promoted to third mate and I sailed as third mate until I got my second mate's license; and as soon as I got any second mate's license, I sailed second mate and I continued to sail second mate.

Q What year did you start working as a second mate with Exxon, approximately?

A I would say '77, somewhere around there.

Q So you worked about five years as a third mate?

A Uh-huh.

Q And then from '77 on through the grounding, you were working as a second mate?

A That's correct.

* * *

[800]

Q Was there any procedure that Exxon employed in connection with reporting anyone you saw drinking aboard a vessel or the like?

A No.

Q You said before you joined the Exxon Valdez in August, 1988. Was Cousins aboard at that time?

A No, I'm talking about the fateful trip, the last trip.

Q And that was the only trip that you sailed with Cousins?

A Right.

Q Where were you at the time of the grounding? Were you asleep?

A Uh-huh. Excuse me, I was in bed, yes.

Q Can you take us from there to – take us from there to what happened and what duties you're assigned and so forth. Where did you go when you first learned of it, how did you find out about it?

A What happened was I was lying in bed and I felt the ship – I felt this feeling of like going aground. It is a unique feeling for seamen. You know what it is. Like a slight vibrations, all right. At that point I saw lights coming on through the window on deck and I got out of bed and I looked and then the chief mate opened the door and said, Lloyd, we're screwed. This is very bad.

[801]

Q That was Kunkel?

A Kunkel, yeah. So I changed the words. So at that point, I went up to the bridge and looked at what happened and then I went down and assisted the chief mate and we just – well, we got out our hose lightering. I put the anchor down during this period.

Q Where did you go from the bridge, what location?

A I'll give it to you short. I went right to the control

room where Mr. Kunkel was. We took a look at what was going on with the cargo going out of the ship.

Q At what rate was it going out of the ship?

A I don't know. It was just very fast, from what we could tell.

Q Very fast. You previously testified to that and used that. Now you say from "what we could tell." What gauge were you looking at?

A We were looking at the u-l-l-a-g-e gauge. They're digital and there is – we have digital and there was another type of gauge there. It was just really spinning by there.

Q Could you tell from what tanks this was coming from on the vessel?

A The chief officer was doing that. I was just in there looking, sort of shaking my head.

Q Did Kunkel say anything to you about the rate at which the oil was leaving the vessel?

[802]

A Not that I recall. We sort – we sort of looked at each other and said, wow.

Q The gauges were moving constantly were they, do you recall testifying to that?

A Yes, uh-huh.

Q And how long did you stay in the cargo control room?

A A couple minutes, then I sort of went around the ship seeing what was going on. We had, as you can imagine with a disaster, there are all sorts of things going on. People were opening up soundings, seeing where the oil was, the water was.

Q Just a second. You said you went around the ship. Did you look and see oil in the water around the ship?

A Yes.

Q Was there a lot of oil in the water?

A From what I could tell, yes.

Q When you went around the ship as you described, after you – you were in the cargo control room, could you smell fumes from the oil?

A Yes.

Q Did you have any fear of fire?

A Of course. I mean, it was – we didn't know how badly we were hurt.

Q Do you recall testifying at the NTSB that you had a concern for the danger of fire or explosion and there was oil all around the ship?

[803]

A Well, that's what I'm saying. We had a concern about the fire. Because – about fire, because of all the oil that was in the water. An explosion, yes, because the Coast Guard brought a little boat up alongside with an inboard-outboard engine and we were afraid of them sucking the oil into the engine and that would cause an explosion.

Q Did the situation with the oil around the ship and the fumes you've described continue throughout the next day of March 24?

A I can't recall. It was there. But the oil was gone in a couple hours. We had stopped losing oil at that point.

Q And you no longer saw oil around the ship?

A We saw oil around the ship, but we weren't losing it the way we were. Some of it went with the tide. Let's face it, Prince William Sound was full of oil, everywhere.

Q What about the fumes? Say about 3:00 in the morning, a few hours after, was there still the presence of fumes around?

A Yes. On deck.

Q Did you have any concern about the stability of the vessel after you went in the cargo control room and you saw how fast the oil was coming out?

A Certainly.

* * *

[824]

CROSS EXAMINATION OF JAMES R. KUNKEL

BY MR. MONTAGUE:

* * *

[825]

Q You have been with Exxon since 1979; is that correct?

A 1979, yes.

Q Okay. And you were employed by Exxon on March 23 and March 24 of 1989?

A Yes, I was.

Q And on March 23, 1989, you were serving as the chief mate on the Exxon Valdez?

A Yes.

* * *

[839]

Q Now, are you familiar with the federal statute which requires an officer being off duty for six of the 12 hours prior to his taking a watch while departing a port?

A Yes.

Q And on the night of the 23rd, you did not meet that requirement; isn't that correct?

A Well, I don't know what you're saying I didn't meet that requirement. See, because I – I didn't really go on watch.

Q I understand, that's a good point. What I'm saying is, at the time of departure, you hadn't had six hours off duty in the prior twelve hours?

A I wouldn't say that. I definitely had the opportunity to have six hours off, twelve hours prior to the ship sailing.

Q All right, well we'll go over that in a minute, then. See where we end up.

A All right.

Q Do you recall that most of the time you were not able to take six hours off within the twelve hours before leaving port?

[840]

A There was a number – in my experience as chief mate, which up to the Valdez, I guess would be anywheres from five to six years, there were many, many occasions when I did not have six of the previous twelve hours off.

Q Now, let's go to the – well, let me ask one other

question. Prior to the grounding, you did not receive any directions from Exxon Valdez about complying with that statute?

A Now, wait a minute, from Exxon Valdez.

Q I'm sorry, from Exxon, I beg your pardon. I misspoke.

Prior to the grounding, you never received any directions from Exxon about complying with that statute; is that correct? From on shore?

A Well, not that I can recall that specific statute, but we had definite guidelines from Exxon to observe all government statutes and regulations, but more importantly, that's what my license is all about. It's my job to comply with rules and regulations of the United States Coast Guard and the U.S.

Courts. Secondary comes Exxon.

Q All right, and if somebody doesn't comply with that, then you're not doing your job; is that correct?

A If someone doesn't comply with that and they do actually take the watch, then I'm not doing my job.

Q Right, and is there any procedure in such instances where Exxon – that Exxon set up so that they would know that that existed?

[841]

A I don't know if there was any procedures where I was supposed to report it, but there were guidelines on how to handle it.

Q My question is, was there any way for Exxon to know that? Had they set up any methodology or modus operandi so they could determine if the mates such as you and the mates under you were complying? There wasn't?

A I'm not aware of a reporting procedure, no.

Q And there were no overtime records kept by the mates; isn't that correct? So there was nothing to look at?

A That's correct.

**

[875]

Q Now, one last point and then I'll be done with Mr. Kunkel. When you first joined the Valdez, the Exxon Valdez in September of 1988, you were waiting for a launch to get to the vessel? Do you remember that?

A Okay, this is 1988?

Q Yeah, September.

A Uh-huh.

Q 1988?

A Uh-huh, that's correct.

Q And you met Captain Hazelwood at the launch?

A I think I met him at the airport.

Q All right.

A I think they drove us together in the van.

Q And while you were waiting for the launch, you had a beer with Captain Hazelwood?

A That's correct.

Q And that was while you were waiting at the launch to go to the Exxon Valdez?

A Yes.

Q And to report to duty?

A Yes.

* * *

[902]

Q Okay. You were on the bridge about 2100, that's 9:00?

A Yes.

Q And sometime before that? Little before that?

A Yes.

Q Did you see Captain Hazelwood come up to the bridge?

A Yes.

Q Did he speak to you at that time?

[903]

A Yes.

Q Were you close to him?

A No.

Q Did you observe him walking on the bridge?

A Yes.

Q How would you describe his movements?

A Normal.

Q Did you at that time see any signs of impairment on Captain Hazelwood?

A No.

Q Did you see any signs of intoxication?

A No.

Q Now you were on the bridge during the undocking process?

A Yes.

Q Was Captain Hazelwood on the bridge during that period?

A Yes.

Q During that undocking process, did you hear Captain Hazelwood giving orders?

A Over the radio, yes.

Q Did you have a chance to observe Captain Hazelwood?

A Yes.

Q Were his orders proper and appropriate for that – for the undocking?

A Yes.

Q Did you happen to hear his voice?

[904]

A Yes.

Q Were his words slurred in any way?

A No.

Q Did he appear to you to be impaired during that process?

A During the undocking process.

Q Yes.

A No.

Q Did he appear to you to be intoxicated?

A No.

* * *

[908]

Q Now Mr. Kunkel, you testified that sometime around 12:30 after you had gone down to your cargo control room and gotten some figures you came up and spoke with Captain Hazelwood?

A Yes.

Q Do you remember that? How close were you to Captain

[909]

Hazelwood at the time?

A Very close, within three feet.

Q How much time did you spend with him?

A No more than five minutes, I would say.

Q During that period of time, did you have a chance to observe his demeanor?

A Yes.

Q You observed – strike that.

Did you spell my alcohol on his breath at that time?

A No.

Q Was he slurring his words when he spoke to you?

A No.

Q Did he at all appear to you to be impaired or intoxicated?

A No.

Q Did he look to you to be the same as you had seen him the day before?

A Yes.

Q When I say "the day before", I'm talking about March 22nd when you were coming into Valdez?

A Yes.

* * *

[936]

DIRECT EXAMINATION OF DAVID DINGES, Ph.D.

BY MR. GERRY:

Q Dr. Dinges, we've asked you to come here today and asked you to consult with us before about the topic of fatigue; is that correct?

A That's correct.

Q And could you – I have your resume before me and I'd like to go – it's pretty thick I'd like to go through it as fast as we can so that we can get to the meat of your testimony.

What do you do at the present time?

A I'm a faculty member at the University of Pennsylvania School of Medicine, and a scientist that directs the laboratory.

* * *

[948]

Q And you've heard the testimony that they were broken into two watches a day, four hours in each watch. Were there other duties, however, that they had besides the watch duties?

A There were other duties, yes.

Q What were they?

A Well, Captain Kunkel referred to some of them I think in one of his answers, but my understanding of them from the deposition record is that the mates, in addition to standing their two four-hour watches each day had additional jobs that they were supposed to do as part of their responsibilities.

The second mate, for example, Mr. LeCain, was responsible for the navigation equipment and the charts. He also had responsibility for the stores, the food supplies of the steward's department.

The third mate was responsible for safety equipment, updating the manuals and a considerable amount of paperwork.

And the chief mate, as we heard, was responsible for loading and unloading at port and for maintenance of equipment on deck.

Q From the materials that you've read, have you determined the approximate workday at sea for each of these mates?

A It was clear in the record each mate indicated that 11 to 13 hours, or an average of 12 hours a day was a typical workday

[949]

for them.

Q And now did you have access to any overtime records for these people?

A There was no overtime record keeping that I was aware of in any of the materials I reviewed.

Q And did you hear the master speak about the developments that went on that did away with the overtime records?

A I heard the testimony, yes.

Q I'll show you, sir, plaintiffs' Exhibit 215. And does this exhibit demonstrate what you discovered in your research into the background of the company and its treatment of the mates?

A Yes.

Q So that by 1983, the mates were no longer in a union, they had been declared management and been put on merit salary; is that right?

A Yes.

Q Once they were on merit salary, was overtime – were overtime records done away with?

A There was no overtime record keeping once the mates became a part of merit salary.

Q They received a pay increment that was supposed to reimburse them for the loss of overtime; did they not?

A That was my understanding from the record, yes.

Q Besides the pay increment that they had, was there a ranking system that was used to rank the mates?

A Yes, it was – there were performance assessments done and they were – were ranked then, within the fleet, as to where they stood relative to other mates.

Q And if they were at the top of the rankings, did they at times receive bonus for their good positions in the rankings?

A The record indicated that was possible, yes.

Q Can you tell us whether or not their willingness to work hours outside their regular watches was part of the assessment on the ranking system and the bonus awards?

A One of the items on the evaluation sheets for the mates indicates willingness to accept additional duties and undertake additional work.

Q Now, you – did you also check to determine whether besides the watches that they stood and the – and the other systems, that there were other things aboard the vessel.

MR. LYNCH: Could I ask Mr. Gerry just identify what he's going to show the jury before it's –

BY MR. GERRY:

Q I'm going to show you number 216, sir, and ask you if those were items that you identified which would also interrupt the ability of the mates to sleep or cause them to be unable to rest at other periods when they would otherwise be off duty?

A Yes.

Q And so all the mates were called out to tie up or let go; right?

[951]

A Yes.

Q The chief mate had to get some other mates, mate or mates to help him top off cargo?

A Yes.

Q Meal times were fixed, what's that mean?

A Well, if a mate was off duty and the mate that was on duty had to take a meal time, then the mate that was off duty had to be called to relieve that mate and then also had to take their meal time. In other words, you didn't – the meals were served at specific times, and if you slept through them you missed them, but you also had to be available to relieve whoever was on watch for the meals.

Q So if you were the second mate on the 12 to 4 watch for the evening meal, you couldn't get it right after watch, you had to wait?

A Yes.

Q And if you were the – all right, when sailing north, all hands had to be present for the weekly fire and boat drill?

A Yes.

Q When sailing northbound in ballast, sleeping was difficult especially when the vessel was riding in the trough?

A Yes.

Q They still had the time off?

A I don't know what time you're referring to.

Q When they were in the bed, but you're saying their sleep was disrupted?

A Well, you have to take into account that in any environment where someone's working, that if they have an opportunity to sleep and they take that opportunity, that in and of itself doesn't guarantee they will get the sleep. Obviously the environment in which they sleep is important so that if you're working in a job where it's very, very hot, when you try to sleep or where there's a lot of movement of a vessel, that can disturb sleep and so you can – you can actually have less sleep than you had opportunity for sleep because of that environment.

Q And are there reports in the literature about 40 foot seas in Alaskan waters, interfering with the sleep of the mates or other persons aboard the vessel?

A I'm aware of one federal transportation report that indicated sleep disturbance from heavy seas in the Valdez trades was common, yes.

Q Now sir, does the federal government pass rules and regulations in the transportation industry to attempt to avoid fatigue on the part of persons engaging in those industry, in that industry?

A Yes.

Q For example, in aviation, are there rules as to the duration of times that pilots may fly and the number of hours that they can put in in the course of a month?

[953]

A Yes.

MR. LYNCH: Your Honor, I have an objection to this line of inquiry. It involves substantial issues of comparability, and I suggested to Mr. Murtiashaw that this might be a matter we could take up with you at the side bar. .

(Bench Conference off the Record)

BY MR. GERRY:

Q And Dr. Dinges, is there also a statute in the shipping industry, 46 USC 8014(a), which attempts to regulate the time and eliminate the fatigue of mates in the industry?

A Yes.

MR. GERRY: And I'd – could I have the Elmo, please?

MR. LYNCH: Could I take a look at that.

MR. GERRY: Yes.

BY MR. GERRY:

Q This is – this is 8104(a) of the federal statutes, 46 USC 8104(a) and could you read that to us, doctor?

A You want the 8104(a) read?

Q Right.

A An owner, charterer, managing operator, master, individual in charge, or other person having authority may permit an officer to take charge of the deck watch of a vessel when leaving or immediately after leaving port only if the officer has been off duty for at least six hours within the twelve hours immediately before the time of leaving.

[954]

Q Did we ask you to, in your research into the documents that we'd given you, to determine whether or not the mates had six hours rest within the last twelve hours prior to the vessel leaving the Port of Valdez on the fateful voyage.

A No, you didn't ask me to do that.

Q What did we ask you to do?

A You asked me to evaluate whether or not the mates had at least six hours off duty during the twelve hours immediately prior to the vessel leaving port.

Q Okay, I misspoke myself and used the word rest; right?

A That's correct.

Q And you won't accept that?

A No, I will not.

Q Because that isn't what the statute says?

A That's correct.

Q So the question is, duty or off duty, not whether they have rest or anything else?

A Off duty is the term.

Q All right, and we did ask you to determine whether or not these mates fell – on which side of the line these mates fell; right?

A Yes.

Q And did you make a determination as to whether any of them had six hours off before the 12, that's 2112 p.m. on the date of sailing, March 23, 1989?

[955]

A Yes, I made that determination.

Q What was your determination?

A My determination was neither the chief mate nor the second mate nor the third mate had received six hours off duty in the twelve hours immediately prior to leaving the port.

Q What documents did you derive that opinion?

A The primary documents for me were their depositions. In addition, however, because there were some questions regarding specific times not asked in the depositions, I looked at their NTSB testimonies.

Q And did we then together make up a board to show all of this?

A We did.

MR. GERRY: Whether or not we can get this big monster in here, I don't know. We're going to try. I told them I didn't know if this would work.

MR. TODEY: I feel just like Vanna White.

THE COURT: You don't look like her.

MR. GERRY: Stipulated, Your Honor. We all agree to that. I think that's about the best we can do with that.

THE COURT: Lynch, come over here.

MR. LYNCH: Thank you, Your Honor.

MR. GERRY: Can you all see this?

BY MR. GERRY:

Q Now, doctor, you determined from the record that the vessel

[956]

arrived in port at 2335 on the 22nd?

A Yes.

Q And left at 9:12 or 2112 on the 23rd; right?

A Yes.

Q And that it ran aground at about nine minutes after midnight on the 24th?

A Yes.

Q So what we're going to talk about is the period from midnight on the 22nd to midnight on the 23rd; all right?

A Okay.

Q Now, the – could you tell me what the different colors are when we use them on the mates?

A Well, duty is defined by green and red, and I can tell you the difference in a moment, but for now, that's duty. Off duty is defined by white and yellow times.

Q What is the difference between the green on duty and the red on duty?

A The portion of the record that applies to 8104(a), federal statute is the period from 2112, or the time that the Exxon Valdez leaves Valdez dock backwards twelve hours. So from 9:12 in the morning, until 9:12 in the evening is the relevant twelve hour period. To highlight that, the duty periods there have been identified in red, and the rest – or excuse me, the off duty in yellow.

Q So the time that we're really – really interested in in

[957]

the first place is from 9:12 to 2112; right?

A Yes.

Q Now, the depositional testimony of the chief mate had him working from 11 to 1300, and all this used to be red; right?

A Yes.

Q After his testimony this morning, because he reminded us he'd had lunch, we took a half hour off; right?

A That's correct.

Q Then his testimony was that from 1550 to 2000 he stood watch, and then was on the bridge to 2145; right?

A Yes.

Q And if we count backwards, his time on duty is one, two, three, four, five, six, seven hours? Is that it?

A It might be just a little more than seven, but yes, during the relevant twelve hour period.

Q And therefore –

A 6.5.

Q Somebody stole a half hour off of it. The statute requires six hours off before the sailing; right, before leaving port?

A Six hours off duty, yes.

Q Was he off duty the requisite number of hours so that he could have taken the con on sailing from the port?

A He was on duty 6.5 hours, twelve minus 6.5 leaves 5.5. The statute says at least six hours.

Q Let's go to Mr. LeCain. He stood watch and stated that he

[958]

was off at 4:30, he rested this period. At 9:30 he gets up and reads and he works in the steward's department, he's still off work; right? And then at noon he goes to work?

A Well, the work in the steward's department at 9:30 didn't specify time, so I didn't count that as part of the duty time, although to the extent that he worked there, that is duty.

Q And he erased charts, is that part of his duty?

A Yes.

Q We didn't count that against him?

A It was not counted, no.

Q He then went to work at noon, and according to his testimony, worked till five?

A Yes.

Q He worked again from 6 to 6:15, :30, 6:30?

A Yes, again on the charts and navigation equipment is my recollection.

Q Then everybody was called out?

A To let go.

Q And he worked then on up until 10:30?

A Yes.

Q Did he have the requisite six hours rest in the twelve hours?

A No.

Q How about Mr. Cousins? Mr. Cousins was on watch from 8 to 12; right?

[959]

A Yes.

Q Only three of those count against him on the six hour rule?

A Yes.

Q He went to lunch and then did he do something else?

A Yes, he testified that he performed a salinity test and did some paperwork in his stateroom.

Q So now, at various places in his depo, he – did he testify to different amounts of paperwork?

A Yes, he did. He indicated at one point in it was a half hour, and at another point it was 15 minutes.

Q So we gave him the least of that?

A 15, yes.

Q And the salinity test was something that he did for the benefit of the vessel, not for the benefit of himself; right?

A Yes.

Q Part of his duty?

A Yes.

Q All right. Then he turned to – to relieve the chief mate?

A Yes, he relieved the chief mate for supper, for the chief mate's supper.

Q And did he say when he went back to his room, then?

A Well, he was in the cargo control room for some minutes after that, and – but there was some time off suggested in the record before 1800.

[960]

Q Then you heard Mr. Kunkel testify that he called him at 1800 to come down and go to work; right?

A Yes, Mr. Kunkel testified he called him for topping off around 1800.

Q All right. And this gives him 12 minutes to shower and get there; right, that we didn't count, although it's red?

A Yes.

Q And one, two, three, four, five, six, seven and a half; is that correct?

A I'm reluctant to say with you standing in the way, Mr. Gerry.

Q I'm sorry.

A Yes. That's correct.

Q So when Mr. Cousins went on watch at – when the vessel sailed, had Mr. Cousins had the required six hours sleep in the twelve hours before sailing?

A I don't know what sleep he had.

Q I mean had he been off duty. I'm sorry, had he been off duty for six hours in the twelve before sailing?

A No, he had not.

Q And he, in fact, had been off duty only four and a half hours?

A Yes, that's correct.

Q Then, however, after that, he continued on until the vessel ran aground; right?

[961]

A Yes.

Q And that's another three hours?

A Yes.

Q So what was his total time at work or on duty during the time he first started here at 8:00 until the vessel ran aground at nine minutes after midnight?

A About 11 and a half hours.

Q Out of 16?

A Out of 16.

Q So in 16 hours he had 11 and a half hours on and about five off, four and a half off?

A Yes.

MR. LYNCH: Thank you, Your Honor.

BY MR. GERRY:

Q Without overtime record or some record being kept of the mate's time on duty, outside their watch hours, was there any way that Mr. Kunkel, for example, or the master of the Exxon Valdez could keep track of whether or not his mates were in violation of the 8104? I made another mistake; didn't I? Could we have this on?

Now, the mates themselves don't violate the statute; is that correct?

A Statute applies to the owner, charter, managing operator, master, individual in charge.

Q Okay. So that would be the company or the persons they've

[962]

delegated, the master and the first mate, the chief mate, right?

A I would read it as the company and the master. Whether the chief mate qualifies as the individual in charge – I heard the chief mate testify that it is the master who is ultimately in charge.

Q In any event, without any overtime rules or other records, or other records of time off duty or on duty, whichever way they wanted to keep them, would there be any way for that person to have an accurate count of his mates and whether or not they were legal to sail?

A No.

Q If the vessel had remained there at the dock for another hour, then the chief mate would have been legal to sail, take the watch; right?

A It would have been close to it. Probably, yes.

Q If they'd remained – but he – now, did your search of the records reveal whether or not the mates knew about the statute?

A My search did indicate that both the second and third mates were not aware of the statute and could not tell what it referred or what it was.

Q To the extent that the mates were fatigued – let's turn our attention now to Third Mate Cousins.

Did you come to any opinion or conclusion as to whether or

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not Mr. Cousins, at the time of the grounding, was suffering from fatigue or –

A I did.

Q – was fatigued, however you put it?

A I did.

Q And what was your opinion or conclusion?

A My conclusion was that Mr. Cousins suffered from performance impairing fatigue that led to mistakes that led to the grounding.

Q And what items did you take into consideration that would lead up to this? What do you think caused this fatigue?

A Well, to make this kind of an assessment, I needed first to establish what the context was in which Mr. Cousins was performing his duties, and by that, I mean, could we rule out other explanations for why he didn't do some of the things he should have and did other things. And it was clear from the record that Mr. Cousins, at least there was no evidence in the record that he was impaired from drugs or alcohol.

Moreover, he testified in his deposition that he understood his task. He had helped the captain formulate what their – that critical 15 minutes would involve in terms of the vessel. He knew what he was supposed to do, turn abeam of Busby Island light. He thought it was a straightforward maneuver, he didn't think it was beyond his skills, both his – both the master and the other mates had confidence in him as he had in himself that

[964]

he could do it. So there was every indication in the record that this was not something that was outside at least his perceived range of ability, and hence he accepted it as part of what he could do. So I couldn't explain it away from the standpoint that, well, he didn't really understand or he just was confused about it.

I then looked at to what extent his own statements about the fact that he wasn't fatigued may have played a role in it, but as I've already said, an individual has a very hard time assessing how fatigued they are. This happens especially if you're chronically fatigued, working 12 hour days, for example. It's not that you never know whether you're fatigued but you don't know at the beginning sometimes of a task and if you're a professional, in quotes, and you take your job seriously and you're dedicated to your job and you take the view that you can do it no matter what, that clouds to some extent your ability to know how tired you may be at a given time for a critical task.

I then looked at his records during the day to understand how much fatigue he may have had present. And it was clear that not only did he not have the hours that would qualify his vessel or his company vis-a-vis the federal statute, 8104(a), but that it was likely from his 12 hour work days that he was suffering some cumulative or chronic sleep debt. Finally, I noted that Mr. Cousins testified that in his

[965]

deposition, that he extended his watch into that of the second mate's. This is critical. The critical time prior to that grounding, that 15 minutes prior to nine minutes after midnight, was technically the time the second mate should have been on watch. But because the seconds mate was tired. Mr. Cousins made the decision to tell the second mate to take his time coming up. And made the decision that he would call him later on. And as we heard Captain Kunkel testify to this morning, he was unaware of that arrangement, and the master, I think, was not entirely aware.

Captain Hazelwood's deposition indicates that he had been told that Cousins was going to be allow Mr. LeCain to come up later, but he testified here in this courtroom that when – when Mr. Cousins called him from the bridge moments before that grounding, one of the things he asked him was, was the second mate up yet. So that it appeared that both the master and the chief mate were unaware of an arrangement arbitrarily made by the third mate and second mate regarding something that was very important.

Now, the reason it's important is usually the third mate finishes his watch at ten minutes to midnight, about the time he took that vessel alone on the bridge. That's when he gets ready for bed. And as he testified to the night before , he was asleep by 1:00. So that typically – that's the wind down time and that's the time when biologically, your brain, even –

[966]

whether or not you have a sleep debt you're carrying, is preparing you for sleep.

Most of us go through that every night in a ritual before bed. That's a time when you can have performance impairment from just working that close to a normal sleep time. So the combination of those things led me to conclude that fatigue was definitely present.

Q Was there any record of Mr. Cousins drinking coffee or anything to help him with his sleep problem?

A The record indicated that Mr. Cousins indicated in the record that he typically drank 16 cups of coffee a day. Now, there was not actual depositional material that I saw that talked about how much coffee he had the day of the grounding. And coffee's a double edged sword. It can help you be more alert, but drinking large amounts of it can disturb sleep. And hence, it can actually contribute to a sleep debt problem.

Q And 16 cups of coffee per day, is there any measure of that against caffeine addiction?

A Well, in my report I mention that 16 cups of coffee a day is approximately four times what the Diagnostic and Statistical Manual of the American Psychiatric Association indicates is addiction. I actually meant, and I want to correct the record, intoxification, but roughly a cup of coffee is a hundred to a hundred fifty milligrams of caffeine. I'm talking about caffeinated coffee. Let's split the difference and say 125

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milligrams to a cup. 16 cups of coffee, then, is 2000 milligrams of caffeine a day. At dosages as low as 250 milligrams, one-eighth that you can have insomnia and disturbed sleep, and there's scientific data for that.

So that – let's assume – we know there are individual differences. Some people can tolerate more of it, metabolize it more quickly with their liver. Let's split the difference. If he's sensitive or very sensitive, if it's eight times of what would be required, it's roughly four times.

Q What kinds of errors do you commonly find made by fatigued persons?

A The errors from being fatigued in the scientific studies that have been done, there are a variety of them, but the primary types of errors are what are referred to as errors of omission or lapses.

Q And in study what happened in the early morning hours of – or the late hours of 3/23 and the early hours of 3/24, how would you characterize the errors that were made by Mr. Cousins?

A I paid especially close attention to this issue of what his errors were, because for me, the most salient point about whether this is fatigue is the nature of his performance in that critical 15 minutes, and I would characterize those errors as fatigue errors.

Q And what were those errors?

[968]

A Well, he had what he described as a fairly straightforward task. It was, first of all, a task that involved attention, monitoring. Why – in general, that is referred to as vigilance. He had to be vigilant and he had to be vigilant to the Busby Island light, that's where he was supposed to turn. He had to be vigilant to Bligh Reef, specifically the Bligh Reef buoy because that's what shows up on radar and that's what the eye can see from the vessel. He had to be vigilant as he heard Captain Kunkel say to the helmsman, to ensure that whatever commands he gave the helmsman, that the helmsman enacted those commands, and he had to be vigilant regarding the rudder angle indicator to make sure that even if the helmsman enacted those orders, that the vessel engaged correctly along the line of those orders.

Q And did he, from the record that you've seen and read and heard here in court, was he vigilant?

A No, he was not.

Q What about his time sense, is that a problem with fatigue people?

A Yes, it is one of the things you see in very tired people, is these lapses involve not responding or not responding in a timely manner. Your response is delayed and you can measure them on many kinds of tests. Well, in a task like this where you have only so many minutes to make your turn, any delay in making that, for whatever reason, is going to produce a

[969]

potential of putting the vessel on the reef, so that the lapses led to delays. He lost track of time, and hence, the vessel collided with the reef.

Q Now, did you find any place where Captain Hazelwood, before the left the bridge at 2353 gave Mr. Cousins any particular course to steer?

A Well, my understanding from the depositional record, what I recall is that he, the master, gave Mr.

Cousins the order that when he was abeam of Busby Island, to move it back into the shipping lanes. So I don't recall a specific course, degrees being given.

Q Now, when – you've said before that Mr. Cousins appeared to be able to navigate okay?

A Yes.

Q What happens to a fatigued person when he's given a task

without the task being fully explained to him, what he should do? What does he do then?

A Well, there's a tendency when you're very tired, and we see this in experiments to fall back on an old strategy. It's called perseveration. And it's referred to often time as a failure to be creative. You go back to what worked last time for you. In Mr. Cousin's case, he was a navigator who often worked on the charts doing fixes, and I think what happened here was he was tired, and even though he – he knew, he just had to look to see Busby Island light, he went back to doing

[970]

fixes on the chart and went back into the chart room, and during critical minutes leading up to that grounding.

Q In your opinion, then, was that error caused by fatigue?

A Yes.

Q Were all the errors of which you spoke caused by fatigue?

A Yes.

Q And in your opinion, then, was the wreck of the Exxon Valdez at nine minutes after midnight on the morning of 3/24, was that caused at least by fatigue?

A Yes.

Q And was that fatigue induced by the company, in part?

A I think company policies and practices led directly to fatigue.

* * *

[977]

Q Okay. Did you understand from the testimony that you reviewed that he had slept from approximately 1:00 to about 7:20 in the morning on the night of March 22nd or the morning of March 23rd?

A Yes, that's what he reported.

Q And did you understand that he had a nap in the afternoon of about three and a half hours?

[978]

A That's what he reported.

Q So that's about ten hours of sleep in the preceding 16?

A Approximately.

* * *

[992]

Q Doctor, does it matter whether sleep is lost aboard a ship or ashore as to whether or not there is a build up of sleep debt?

A No. Sleep is a great leveler, Mr. Gerry, king or pauper, shore or landlubber or seaman, it's – you lose sleep, it will show up in performance and alertness.

Q When you were quoted in the Boston Globe, had you done any research into the Exxon Valdez?

A No, other than the fact that as someone who is asked to teach the NTSB periodically regarding not specific accident investigations, but in general how to evaluate performance in an accident and to help with their research, I gather government reports. Not just from them, federal highway and many agencies. So my laboratory maintains reports and their report of the Exxon Valdez was one that we had.

Q When you talked about in your report you talked about the ten hours in the 16 hours prior to the grounding. And here you talk about 11. What changed between the time of your report and the time here that made you change that hourly result?

A Well, Mr. Kunkel's testimony – I'm sorry, Captain Kunkel's testimony this morning that indicated contrary to Mr. Cousins' deposition, that Mr. Cousins was called for topping off at six

[993]

p.m. not seven p.m., and topping off went for an hour and a half approximately, ending at 24 minutes after seven, and that another mate was involved in it, was Mr. Cousins. That's an additional hour.

Q So with the topping off ending at 24 minutes after seven, did you believe that Mr. Kunkel's testimony was more believable and what you should use?

A Well, I did to the extent that that was also consistent with what he said two months after the grounding at the NTSB testimony.

Q You've been asked about this nap that was reported by Mr. Cousins in the afternoon. Did you consider that at the time you gave your opinion?

A I did.

Q And did you see anything peculiar about that nap?

A Well, again, the fact that he had some sleep, frankly, I'd rather make sure seamen get that sleep in the afternoon than not, so it is consistent with certainly the things I've recommended about napping, but Mr. Cousins called that nap a catnap. Now, later in his deposition, he just said nap, but he distinctly the first time called that a catnap. In 18 years of researching napping and writing the first definitive text on it and looking at more than three now people regarding naps, never one time have I or my associates ever heard an individual call a three and a half hour sleep a catnap. People consistently

[994]

use that to define a sleep of 10, 15, 20, 30, maybe 60 minutes but not three and a half hours. That led me that possibly he really didn't know. He wasn't trying to deceive. He may not have been aware as to whether that sleep was – had continuity, was deep or not. Could very well have been fragmented, loose and involved much wakefulness.

Q This report, DX4409, where you determined that persons could get by with sixty to seventy percent of sleep need, for how long a period of time could they do that?

A Well, at the time we were doing that and the military field studies that have been done, people can get by on that that way for about three, four, five, maybe seven days. Now, we have to be careful here, Mr. Gerry. Get by to me means they don't shoot their commanders in a military operation, they still shoot at the enemy. But eventually, protocol breaks down.

What the field studies show is that at that level soldiers begin to refuse taking orders and they'll stop cleaning weapons and they engage in other manners that indicate they're becoming militarily uneffective, so what you mean by they can continue depends very much on your criteria.

Q And in judging Mr. Cousins' performance in the 15 minutes prior to the grounding of the Exxon Valdez on Bligh Reef, have you heard anything to change your opinion from the fact that Mr. Cousins was fatigued at that time?

A No, I have not.

* * *

[996]

DIRECT EXAMINATION OF JAMES SHAW (by video)

BY VIDEO EXAMINER:

Q Are you employed at the present time, Mr. Shaw?

A No, I'm not.

Q By whom were you last employed?

A Exxon Shipping Company.

Q And when did that employment cease?

A December the 7th of '90.

Q All right. How long had you been employed by them?

A 13 years and some months.

Q You do have a seaman's card?

A I had one, yes, somewhere.

Q A seaman's document I guess call it?

A That's correct.

* * *

[1000]

Q The first time you met Hazelwood was on the North Slope?

A To the best of my recollection, it was.

Q When did you next run into him?

A On – I may have run into him on several other – numerous other locations, because we did meetings and stuff ashore. I probably had met him on some of those but when you say the next time or the very next time, I can't really give you an idea. I happened to observe him, I guess, this would be aboard the Exxon Yorktown some latter years, probably around '83, '84 time frame.

[1001]

Q And was he sailing as master of the Yorktown at that time?

A Yes, he was.

Q Now, were you in the capacity of port steward then?

A Yes, I was.

Q Did you have occasion to discuss matters with him while he was on the Yorktown and you were port steward?

A Yes, I did.

Q And what can you tell me about his demeanor and his character, as far as you saw it at that time?

A His demeanor and character was, to the best of my ability, that he was capable of handling and making decisions of everything he was doing. He seemed perfectly fine to me.

Q Okay. Did you smell alcohol on his breath?

A First occasion, no, I didn't.

Q What about the second occasion?

A Yes, I did.

Q And was that prior to the time that Mr. Hazelwood went for rehabilitation?

A No, it wasn't.

Q Okay, it was after he had – you understood he had been to rehabilitation?

A Yes, it was.

Q When he came back, did you find out at some time that he had gone for rehabilitation?

A Yes, I did.

[1002]

Q How did you find that out, sir?

A Through a conversation with port captain Bill Sheehy.

Q And that's S-h-e-e –

A – h-y.

Q h-y, and that was after he'd come back from – from rehab or had gone through rehab?

A That's correct.

Q Okay. The – and prior to having that conversation with Captain Sheehy, you had been aware that Captain Hazelwood had been drinking at the time?

A Yes, I was.

Q That conversation took place in Captain Sheehy's Baytown office, is that right?

A That's correct.

Q What did – what did you learn there about his alcohol treatment, if anything?

A I really didn't learn anything about his alcohol treatment. The way that I found out where he was in a conversation that being in the capacity – the position of port steward I would always frequent the vessels and I just was aware – I wasn't aware of where he was. It was a concern for where he was that asked Captain Sheehy where was Joe. I hadn't seen him lately. And he mentioned to me that he had been in one of the treatment facilities.

Q And did – were you told whether he'd gone in there

[1003]

voluntarily or was coerced into going or –

A No, I was not. I did not know.

Q After having that conversation with Captain Sheehy, did you then have occasion to meet Mr. Hazelwood again?

A Yes, I did.

Q When was that?

A Probably a month or two after this conversation. I'm not exactly sure when this was, it was probably in '84, again, after he had come back from –

Q '84, '85, somewhere in that time?

A Somewhere around that time, yes, probably '84.

Q And what was his position at the time you met him again?

A He was the captain.

Q Of what vessel?

A The Exxon Yorktown.

Q And where did you meet him?

A In Baytown.

Q Aboard the vessel?

A That's correct.

Q And had you boarded the vessel in your official capacity to take care of the problems, any problems they might have?

A Yes, I did.

Q And did you speak to Joe Hazelwood at that time in your official capacity?

A Yes, I did.

[1004]

Q Did you smell anything at that time?

A No, I didn't. He was fine.

Q Was that his first trip on the Baytown, as far as you know?

A That's correct.

Q All right. And then the vessel went out. What was its turn-around time?

A It varied. On some occasions it could be six to seven days, some occasions would be 14 days and back in Baytown.

Q Did you have occasion to go aboard the vessel a second time when it returned to Baytown?

A Yes, I did.

Q And did you again meet with Mr. Hazelwood?

A Yes, I did.

Q What did you notice at that time?

A I got the distinct odor of alcohol on his breath.

Q Could you identify what kind of alcohol from the odor?

A I would say it was a bourbon. Could be scotch or bourbon or whatever.

Q Did you come to the opinion or conclusion that it was bourbon or some alcohol like that rather than something like Moussy Beer?

A I really didn't dwell on, you know, I just got the distinct odor of alcohol on his breath and I didn't even dwell or ponder on trying to render an opinion what it was.

Q And when – in point of time, where was that, how long after you'd had the discussion with Captain Sheehy about his rehabilitation did you notice that?

A It was really recent after that. I guess somewhere in the period of maybe a month or two.

Q Okay. And at that time, when you – when you noticed that, did you report that to anybody?

A Yes, I did.

Q How long had the vessel been in at the time you met with the captain on that occasion?

A I was at the dock before the – before the vessel finished tying up, so it was coming in as I was at the dock.

Q Okay, so had Captain Hazelwood had any opportunity to go ashore and get a drink?

A To the best of my knowledge, no.

Q Did you go aboard the vessel as soon as the vessel came in?

A Yes, I did.

Q And did you see Captain Hazelwood very shortly thereafter?

A Yes, I did.

Q Then did you report that incident to anyone?

A Yes, I did.

Q To whom?

A I talked to Ms. Case, Kimberly Case on the phone about it briefly and –

Q Didn't you – before you talked to Ms. Case, didn't you report it to Captain Sheehy?

A I had not finished. I talked to Ms. Case about this and I then talked to Captain Sheehy.

Q You talked to Kimberly Case first?

A That's correct.

Q And then you reported the incident to Captain Sheehy?

A That's correct.

Q And did you think it important to report that Hazelwood was still drinking even though he'd gone through rehabilitation?

A Yes, I thought it was important.

Q Let me ask you this. Was there any other reason that you reported it?

A I really liked Joe as a person and I – I didn't want what I felt anything to happen to Joe in a manner of being terminated from the company. I knew Captain Sheehy really well. I felt for sure that in talking to Captain Sheehy, that he would get a handle on it if there was a problem.

Q You had a good feeling for Exxon?

A Yes, I do.

Q You found them to be a reasonable employer?

A Yes, I did.

Q Okay.

A And do.

Q They promoted you to a pretty good position?

A Fairly, yes.

[1007]

Q Do you have any reason to want to hurt the company in any way?

A None whatsoever.

Q And you like Joe Hazelwood?

A Yes, I do.

Q Do you have any reason to want to hurt him in any way?

A None whatsoever.

Q Okay. Was anything done about that first incident when you smelled alcohol on Hazelwood's breath and reported it to Sheehy? Was any action taken by the company, to your knowledge?

A Other than Captain Sheehy going down and coming back and stating to me that he had met with Joe and Joe denied it, to the best of my ability, I am not sure if anything else was done or not. I don't know.

Q Okay. Well, when he came back and reported to you that he had talked to Hazelwood and Hazelwood had denied drinking, did you then do anything else about the incident?

A Yes, I did.

Q What did you do?

A Because I had mentioned this to Joe – or to Captain Sheehy, I went to the vessel and I contacted Captain Hazelwood and I told him that it was I that had told Captain Sheehy what I felt I smelled on his breath. I did this because I like Captain Hazelwood. I did not want him to feel that it came

[1008]

from anyone else. I told him that if there was a problem, I hoped he would correct it, because personally I thought that he was a fine person and one of the better captains that we had in the fleet.

Q And after this first incident that you reported to Sheehy, Captain Sheehy, was there a second incident?

A Yes, there was.

Q And how long ago was that, the next trip or the trip after or when?

A It was the next trip.

Q And did you board the vessel again?

A Yes, I did.

Q And did you talk to Hazelwood?

A I met him in the passage area.

Q Did you smell anything about him?

A Yes, I did.

Q What?

A Distinct odor of alcohol again.

Q And did you report that to anyone?

A No, I didn't.

Q Did you call Kimberly Case?

A We talked about it, yes.

Q Who is Kimberly Case?

A She's the port steward at that time on the west coast.

Q Did she have the whole west coast, then, as port steward?

[1009]

A That's correct.

Q All right. Had she – did you know her to be a friend of Joe Hazelwood's?

A Yes, I did.

Q Was she, to your knowledge – what was her relationship to Joe Hazelwood?

A In the past she had been a friend of Captain Hazelwood's, yes.

Q Why did you tell her, I'm sorry, not report.

A During the course of conversation, if we have a problem, not really a problem, if something should happen on either one of the coasts that either she feels I may be capable of handling better than she can, or if there's a problem with someone that I may be closer to than she is closer to, or she is closer to a person than I am, and if we have better knowledge we would converse. It was a intramutual respect that we had for each other and the people aboard the vessel.

I talked to Kimberly because I wanted to see if maybe she would have a better idea of what manner in which we could approach this problem than probably I had done before.

Q What was her reply to you?

A Well, what she said was something to the effect that he's a big boy now and he can handle himself.

Q And did you report this second incident to Captain Sheehy?

A No, I didn't.

[1010]

Q In your discussion with Kimberly Case, did she tell you whether or not she was aware that Captain Hazelwood had been through rehabilitation?

A Yes, she was aware of it.

Q On that second occasion, was there – was there any way that Captain Hazelwood could have gotten ashore and had that drink before you met him?

A This may have possible because I really didn't see him immediately after getting aboard the vessel. I went through the galley and I had a few things to do there, so it could have been possible, yes.

Q Was there a third occasion when you went aboard the Yorktown and –

A Yes, there was.

Q Did anyone go aboard with you?

VIDEO EXAMINER: I'm going to object to the form and ask to clarify. As I understand the witness' testimony, this would be the fourth time?

VIDEO EXAMINER: Yeah. The first time –

VIDEO EXAMINER: Correct. So –

VIDEO EXAMINER: This would be the fourth time.

VIDEO EXAMINER: So we don't get any confusion.

VIDEO EXAMINER: That's fine. I appreciate that.

BY VIDEO EXAMINER:

Q This would be after the first two times that you smelled

[1011]

alcohol. So I'm talking about the third incident but the fourth time when you went aboard when he was on the Yorktown? A Now what was the question again?

Q Was anybody with you that fourth time when you went aboard?

A When I went aboard the vessel, I had an assistant that would do several things with me. This person was Sam Pierpoint. Ellen Share was also in the company at that time. She had something to do with safety. She may have gone aboard with me at that time. Frank Pichalsa, works for Ellis Mitchell may have been – may have gone aboard with me also. Q Can I ask you to do something for me, Mr. Shaw. When you say "she may have", it doesn't really give us your best recollection. Is your best recollection that she went aboard with you on that occasion?

A I think she did, yes.

Q All right. And who else did you mention, I'm sorry I interrupted you.

A Frank Pichalsa with Ellis Mitchell. Sam Pierpoint, who was on – he was temporary, well, he wasn't a permanent assigned employee, he was a contract employee with the company.

Q On that occasion, did you go to see Mr. Hazelwood?

A Yes, I did.

Q Could you see him?

A Not then. The door was locked on this occasion.

Q Was he aboard?

[1012]

A To the best of my knowledge, he was. I don't know because the room was locked, I wasn't aware.

Q Did you find out why the room was locked?

A Well, the personnel aboard the vessel were making remarks to the point that there was a female companion or something in the room with him, and they were having a party and Joe was busy.

Q Okay, then did you finally see him that day?

A Yes, I did.

Q All right, and at that time, did you smell anything on his breath?

A Yes, I did.

Q What?

A Here again, I got the distinct odor of alcohol.

Q And were you close enough to him at that?

A Yes, I was.

Q To make that judgment did you decide right then and there what it was?

A Yes, I did.

Q And you decided it was alcohol?

A Yes.

Q Did you decide it was alcohol?

A Yes, I did.

Q Where did that occur?

A This was on the ladder coming down from his room to the

[1013]

mess area.

Q Did you discuss this with Ellen Share?

A We had a conversation about it, yes.

Q And so that's the fourth time you were aboard and the third incident. Was there a fourth incident when you were aboard the Yorktown?

A When you say "incident", yes, I went aboard the vessel each time it was in. As far as Hazelwood, himself, yes, there was another occasion.

Q And did that involve a chef aboard?

A Yes, it did.

Q What was his name?

A Jesse Watts. He was a temporary capacity, he wasn't sailing on the ship. He was in a step-up position.

Q Tell us about that incident.

A This was in the late evening. The vessel had docked I guess somewhere in the afternoon. Jesse had relieved Warren Adams in Tampa Bay or Fort Lauderdale or somewhere. He sailed back. He was being relieved that evening to go to paid leave. His relief had shown up sometime in the afternoon. We were receiving the stores and myself and Sam Pierpoint were in the lower storage area of the steward department putting stores away, and Jesse came back and he made the statement to me that he had gone ashore and picked up a couple bottles of booze for he and Captain Hazelwood and they were going to have a drink

[1014]

and wanted to know if I wanted to have a drink with them.

Q Did you tell him anything about Captain Hazelwood's rehab?

A I told him that if I ever heard that he had brought a bottle back aboard the vessel again, that he would never sail in that capacity as chef again, and I mentioned to him that I didn't think that he was doing the best thing in bringing booze back for the captain aboard the vessel.

Q Did you report that incident to anybody in the company?

A Leslie Pennington.

Q What was her position?

A When you say "reported", it wasn't really a report, Leslie Pennington was the – she worked in personnel doing assignments, headquarters downtown. What I stated to her was was that we should make every effort not to sail Jesse Watts with Captain Hazelwood on any other vessels in the future.

Q Did you tell her why?

A To the best of my knowledge, I think I did, yes. She was the only person that I talked to in that type of capacity.

Q Was anybody present during your conversation with Jesse Watts do you remember?

A Sam Pierpoint.

Q Anybody else?

A Frank Pichalsa probably. Here again, I don't want to definitely say he was, I can't say that he was not, but he may have been there.

[1015]

Q Have you ever been aboard the Exxon Valdez?

A Yes, I have.

Q Were you aboard there in 1987 or '88?

A Yes, I was.

Q And when was it that you were aboard?

A I was aboard there I guess it was early 1987 and then again in 1988.

Q All right.

A Should I continue?

Q Yeah, go ahead.

A It was during the time that we were demanning the department. We were removing the mess/utility and we were – what we were basically doing was taking three positions and doing some of the duties with two personnel that three people were doing it in the past.

Q Who is the fleet chef aboard at that time?

A On the first location, if I'm not mistaken, it may have been Randy Rockel. On the second occasion it was Joe DeOliveira. That's D-e-O-l-e-v-e-r-i-a [sic].

Q And did you have any discussion with DeOliveira about Hazelwood?

A I didn't have a conversation with him, a discussion.

Q A conversation?

A It was a remark I had with him, yes.

Q What was that?

[1016]

A That he had had a drink with Joe the night prior in his room aboard the vessel.

Q Exxon had a policy about people drinking aboard; didn't they?

A Yes, they did.

Q In your observation, was that policy applied evenly to everybody so if there was any drinking, automatically the person was fired, or was it applied unevenly?

A To the best of my ability it was applied evenly to everyone.

Q When you reported Hazelwood's conduct to Sheehy, was he fired?

A No, he wasn't.

* * *

[1028]

DIRECT EXAMINATION OF ANDRE MARTINEAU
(by video)

BY VIDEO EXAMINER:

Q Captain Martineau, for the record would you state your full name please?

A Andre Philip Martineau.

Q By whom are you currently employed, sir?

[1029]

A Exxon Shipping Company.

* * *

[1048]

Q At this time what was your understanding as to Captain Hazelwood's ranking amongst the other Exxon Shipping Company masters?

MR. FLANAGAN: Did you have any understanding of the rankings?

A No, I didn't. I thought he was on the top or amongst the top, anyway.

Q But you didn't have any specific understanding as to where he actually ranked?

A No, I had no idea.

Q I may have asked you this question in regards to this time frame before. If I did I apologize. At the time that you were

[1049]

speaking to Joe Hazelwood about his transfer to the west coast fleet, had you heard any rumors that he had drank alcohol aboard vessels, that he drank alcohol aboard vessels?

A I may have heard rumors, but I don't recall. I don't know.

Q Do you recall asking Captain Sheehy at some point in time prior to Captain Hazelwood's transfer to the Exxon Valdez whether Captain Hazelwood was drinking again?

A No, I don't recall that.

Q If Captain Sheehy testified at his deposition that you made that inquiry, would you have reason to dispute that?

A No.

Q After you spoke with either Leitzell or Sheehy, what is the next step you took in having Captain Hazelwood transferred to the west coast fleet?

A I think I went to see Harvey Borgen and asked him if he would approve that.

Q What position did Harvey Borgen hold at that time?

A He was fleet manager of the west coast.

Q Do you recall what Mr. Borgen told you?

A The first time I went in he said, let me think about it.

Maybe a week had gone by, I think, and we needed to do something, and I asked him again, and he said, yeah, okay. Something like that. That's all I recall. I don't recall specific conversation that he had with me or I had with him, but the general sense of the conversation was that he approved

[1050]

it.

Q Do you recall whether Harvey Borgen made any inquiries in regards to Captain Hazelwood?

A If he did, I wasn't privy to that.

Q You don't know what Harvey Borgen did between the first conversation with him and the subsequent conversation with him when he approved the transfer in regards to –

A No, I don't know what he did.

Q Just so I understand the nature of your conversation with Harvey Borgen, the initial conversation, when you went in to speak with him were you recommending that Joe Hazelwood be transferred to the Valdez?

A Yeah, that was in the form of a recommendation.

Q Prior to this time did anyone speak with you about making periodic visits with Captain Hazelwood when he was appointed to the Exxon Valdez, to see how he was doing as the captain?

A No. No.

Q Okay.

Now, at that time –

UNIDENTIFIED SPEAKER: Go ahead.

Q At that time no one had indicated to you that Captain Hazelwood had been through alcohol rehab?

A No.

Q Okay.

A I believe – I may have heard, possibly have heard

[1051]

something to the effect that through rumor, don't know who told it to me, that Hazelwood, Joe Hazelwood may have had a problem with – with drinking or alcohol.

Q Do you recall anything more specific than that? Do you recall the scope of the problem that he may have had?

A No. It was just through the rumor mill in the fleet that I had picked something up like that.

Q Do you recall when you heard this, initially?

A It – it was before the transfer.

Q Did you do anything to try to – prior to recommending the transfer of Captain Hazelwood to the Exxon Valdez, did you do anything to try to confirm or disprove the rumor that you had heard?

A I – I may have. As you said, Sheehy said I did or something like that, so it probably did take place.

Q Since your memory has been refreshed, let me ask you: Did it cause you any concern that you had heard these rumors about an individual that you were now recommending be assigned as a master of the newest and biggest vessel in the fleet?

A Well, first they were rumors. I didn't give any credence to rumors.

Q Did you do anything at all to investigate the rumors at any time?

A I don't think I did, no.

Q While you were port captain and after the decision had been

[1052]

made to transfer Captain Hazelwood to the Exxon Valdez, were you involved in any discussions with anyone regarding setting up a monitoring program to monitor Captain Hazelwood's activities as master on the Exxon Valdez?

A No.

Q Going back to Captain Hazelwood being transferred initially to the Exxon Valdez, I believe you said there was a short period of time during which you were still the port captain and Captain Hazelwood was serving as the master of the Exxon Valdez?

A No, I don't think he was assigned to the ship or served on board the vessel while I was port captain. He may have, you'd have the records which testify to that.

Q At some point in time, did you become aware that – let me begin again.

At some point in time did you become aware as to whether or not there was a monitoring system in place to check in with Captain Hazelwood to see how he was performing on the Exxon Valdez, a system over and above what was applicable to the other masters within the fleet?

A No.

Q Prior to being assigned to the Exxon North Slope at the end of your tenure as port captain, did anyone speak with you regarding you performing some monitoring duties of Captain Hazelwood over and above the typical monitoring that would be

[1053]

done for captains assigned to a vessel?

A No. There wasn't any monitoring that I – that I know of.

Q At the time that you were assigned to the Exxon North Slope, at that time had anyone ever told you that Captain Hazelwood had been through alcohol rehabilitation?

A No, I didn't – I didn't hear anything about that.

* * *

[1066]

Q Why do you believe it's prudent seamanship for the master to be on the bridge in the area north of Cape Hinchinbrook and south of Potato Point?

A Well, it's – it's an area of great concern to environmentalists and other regulatory bodies. It had been customary that, in my training and coming up through the ranks there, that the master remained on the bridge in pilotage waters. And I was still under the impression, or considered Prince William Sound in my view to be pilotage waters.

Q Prior to March of 1989, had you heard any rumors as to whether or not Captain Hazelwood would remain on the bridge of his vessel when the vessel was within these areas that you considered to be pilotage waters?

A I had heard rumors that he didn't remain on the bridge the whole time.

Q From whom had you heard those rumors?

A I don't remember.

Q Had you heard those rumors on more than one occasion?

A Possibly, yes.

Q Do you recall when you would have first heard those rumors?

A Year? Or –

Q If you can. However you can – focus it.

A It was certainly after I got on the North Slope that I had

[1067]

heard it.

Q Did you have an understanding as to whether or not that was a current practice? At the time that you heard the rumors, was it your understanding that that was a current practice of Captain Hazelwood?

A Whether it was a practice or whether it had happened occasionally, I don't know. All I heard was that sometimes Joe doesn't stay up on the bridge the whole time.

Q Did you report this rumor to anyone?

A No.

Q Do you believe that it is prudent seamanship for a master holding a pilotage endorsement to be on the bridge of his vessel when transiting Prince William Sound area during ice conditions?

A Yes.

Q Are you aware of any reports or communications which a

captain has to complete or send when outbound from Port of Valdez which would require the captain to leave the bridge of the vessel while still in the Prince William Sound area north of Bligh Island?

A No.

* * *

[1070]

A Yes.

Q Would you agree with the statement that as a master of the vessel, you would have more knowledge regarding the surrounding conditions and other than approaching traffic, other obstacles in the area than what the Vessel Traffic Service would have as you're navigating through the Prince William Sound area?

A Yes.

Q And from your testimony, I gather you did not outside of the narrows, certainly you did not rely on the Vessel Traffic Service to provide you with any information regarding the position of your vessel in relation to the surrounding land masses or reefs?

A I never relied on them for that information, no.

Q So do you know of any Exxon master who was disciplined for violating alcohol policies, any time in the 1980s prior to the grounding of the Exxon Valdez?

A No.

Q Now, did Exxon Shipping Company management, did they encourage officers to report violations of alcohol policy?

A Not to my knowledge.

Q At any time before the grounding of the Exxon Valdez, are you aware of the policy or procedure that Exxon Shipping

[1071]

Company had to monitor a master's use of alcohol?

A No.

Q At the point in time when you became aware, heard information that Hazelwood may have a drinking problem – all right. Did you report that to anyone?

A No.

Q Did you take any action predicated on receipt of that information, that Hazelwood may have a drinking problem?

A Well, during lunch recess my memory was refreshed that apparently I did call Bill Sheehy and ask him about whether Hazelwood was in fact, I guess, okay to come out here and be assigned to the vessel.

Q Did you ask Sheehy specifically about whether Hazelwood had an alcohol problem?

A No, I don't believe I – I think I just referred to a

rumor, if I – if I – yeah.

Q Did you ever act upon, any way that you know of, the information you had that Hazelwood may have an alcohol problem?

A No.

Q Okay. It's true, is it not, that you realized it could be a dangerous situation to assign a master to a vessel the size of the Exxon Valdez where that master may have an alcohol

problem? Is that a fair statement?

A Absolutely. Yes. I – I – what I heard was rumor.

I'm – I'm not going to operate on rumor. I think that as my

[1072]

memory was refreshed at lunchtime, I – I think I called Captain Sheehy and asked him if – if there was any validation to this rumor or I don't know what I asked him to be honest with you, but at any rate, I think things were the signal was given to me that everything was okay.

Q Did he tell you that Hazelwood had been through alcohol rehabilitation?

A I don't recall that at all, no.

Q Okay. Had he told you that Hazelwood had been to alcohol rehabilitation in 1985, would you have done anything differently with respect to transferring Hazelwood to the Exxon Valdez?

A Oh, I don't think I can. I mean, I – I think that that's in the other people above me, in management who had – who had knowledge of this. They were in control. I mean, I just made a recommendation to Harvey Borgen as to who should be – who might be assigned to the vessel. I mean, the final decision was their or his, not mine.

Q Okay, I realize it was Mr. Borgen's decision. Did you tell Mr. Borgen about the conversation you had with Sheehy and that there was reference to the issue of Hazelwood using alcohol?

A I – I don't recall that conversation at all.

Q Is other than Captain Sheehy, did you ever discuss in connection with the transfer, the subject of Hazelwood and alcohol with anyone?

[1073]

A I don't believe I did, no.

Q You said you heard rumors about Hazelwood maybe drinking. Other than calling Captain Sheehy did you do anything to investigate or inquire as to the veracity of the rumors about Hazelwood and drinking?

A No, I didn't.

Q I take it you wanted to put an appropriate person in the position of master of the Exxon Valdez; right?

A That's correct.

Q Okay. And you certainly weren't going to put in your judgment someone who presented a risk to the vessel and the cargo of that ship; right?

A That's correct.

Q Okay. And you knew, did you not, that if you put a master on that vessel who had an alcohol problem, that you may be risking a serious catastrophe?

A First of all I didn't know – if I knew for sure he had an alcohol problem he wouldn't have been even a consideration in my mind, all right? Like I said, people that knew he had a problem and knew about his rehab really had the final decision. Mine was merely a recommendation.

Q Well, why did you recommend someone who you had information, rumor about, that they may have used or may have an alcohol problem?

A Because I didn't consider the rumor to be valid, number

[1074]

one. It was just a rumor. Number two, as I explained before, Joe Hazelwood, in my view, was an excellent seaman, a skilled ship handler. He had unlimited pilotage, been sailing as master for X number of years, he was qualified and capable for that assignment.

Q Mr. Martineau, what did you do to determine whether or not the rumor about Hazelwood having alcohol problems was valid or not?

A Nothing.

Q Now, you mentioned a moment before we broke, you were talking about in your judgment Hazelwood was a capable master, I'm paraphrasing, you said something to that effect?

A Yes. Yes.

Q You told us this morning that at the time you recommended the transfer, you assumed that Hazelwood was in the top of the rankings?

A That's correct.

Q I want to show you the rankings here for a minute. Can you see where Captain Hazelwood ranks 25th out of 34?

A Uh-huh.

Q That in 1987 at the time you recommended his transfer, is it true that you were under the mistaken impression that he was ranked high?

A That's true.

* * *

[1080]

Q Now, what sort of practices – you said that Mr. Iarossi was under the mistaken assumption that a number of masters were doing the same thing that Hazelwood did.

A Right.

Q Okay. And what sort of things did Mr. Iarossi believe that other masters were doing that Hazelwood had done?

A Again, I can't recall. My impression was this, that – that other masters were not on the bridge, other masters were load programming up and in congested or waters where dangers were known to be. Other masters were, in his opinion, running the bridge watch too loosely, were not complying with company policy with regard to the bridge and navigational manual. Just in general, that sort of thing.

Q What do you mean when you say load programming up?

A Well, it's the same thing as – as on a steam ship we go from maneuvering speed to full sea speed. It sort of impedes the – the engines from being answered quickly. However on a diesel ship you nay have an override, an emergency override, so it can be over – it can override it very quickly.

Q Okay. And is it your understanding that is what the Exxon Valdez was doing at the time of the grounding, it was load programming up?

A That's what I heard.

Q Okay. And do you believe that to be a prudent practice in the area of Prince William Sound between the cape and Potato

[1081]

Point?

A If you have clear fairways with no obstruction, I – I don't see where that would be a problem.

Q Is it prudent if you're out of the shipping lanes?

A I would say no.

Q Showing you what's been marked at least for the time being as Martineau Exhibit No. 4, that is a memo from Mr. Klepper to Mr. Borgen dated November 11 of 1985 where I see you're copied on this memo?

A Uh-huh.

Q Okay. And just again so we have our point of r reference clear: At this point in time you were a port captain on the west coast?

A Yes.

Q And were those concerns of yours prior to the grounding of the Valdez, the fatigue of officers and long work hours?

A Yes. Yes.

Q And those are items which potentially can jeopardize the safe operation of a vessel, if you have fatigued officers?

A Yes.

Q At any time before the grounding of the Exxon Valdez, did you ever report or tell anyone in Exxon management about your concerns regarding fatigue of officers and long work hours?

A I remember at a conference masters conference where we were at a certain section with, I don't know, some doctor, whether

[1082]

Dr. Montgomery or some doctor, that I expressed my concerns and feelings toward the fatigue factor, yes.

Q And to your knowledge, did Exxon management do anything based on what you told them?

A I don't – I don't recall anything coming about after that discussion.

Q What did you tell Dr. Montgomery?

A Again, I – I don't recall the exact conversation, but the gist of it was that that fatigue was debilitating, both health-wise and as far as alertness, and ability to think quickly and crisply, if you will.

Q And that conversation occurred approximately when? Do you have a general idea?

A It – it – between '87 and '89, I know that.

Q Prior to the grounding, do you know whether Exxon Shipping Company management considered adding an additional loading mate at Valdez?

A No.

Q You mean meaning you don't know one way or another?

A I don't know one way or another.

* * *

[1086]

Q Okay. The occasions during the three weeks in January, 1989 when you went out to dinner and Captain Hazelwood was present in your group, do you have a recollection of seeing Captain Hazelwood drink alcohol with dinner?

A No.

Q Do you have a recollection of seeing Captain Hazelwood drink alcohol at any time during those three weeks?

A No, he never – he never drank.

Q Okay. Do you recall whether other people in the group, whether you witnessed other people in the group drinking alcohol with dinner?

A Yes.

Q Did you drink alcohol with dinner?

A Yes.

Q Do you have a specific recollection that someone within the

[1087]

group did not drink alcohol?

A Joe Hazelwood.

* * *

[1090]

DIRECT EXAMINATION OF CAPTAIN MICHAEL STALZER

BY MR. O'NEILL:

* * *

[1091]

You're a ship captain?

A I'm retired from Exxon.

Q You're retired?

A Yes.

Q You were a ship captain for many years, isn't is that correct?

A Yes.

Q And just so we know why you're here, you were at the time of the grounding of the Exxon Valdez the other captain of the Valdez?

A Yes, I was assigned to the Exxon Valdez.

Q So that Captain Hazelwood had the duty half of the time and you had the duty half of the time?

[1092]

A That's correct.

Q And for what years were you the – did you share duties with Captain Hazelwood on the Valdez?

A Captain Hazelwood was assigned there I believe in late July of 1987. From that time until the grounding.

Q And during that entire period of time, you were the also the master of the Valdez?

A When I was on board, yes, sir.

Q And Exxon Corporation or Exxon Shipping Company, is that the only shipping company you've ever worked for?

A Or division of Exxon. It was Exxon company USA marine department initially when I went to work with Exxon in 1973, and I continued working with Exxon until earlier this year, retirement from Sea River in the division of Exxon.

Q You said Sea River?

A Exxon Shipping Company has a new name, Sea River.

Q When did it change its name to Sea River maritime?

A I think in the fall of last year.

Q Is the Exxon Valdez – is it still called the Valdez?

A No, the Sea River Mediterranean.

Q What's it called Mediterranean?

A Well, it – it was – yeah. The Mediterranean. I don't know if it's the S/R or the Sea River Mediterranean, but it's the Mediterranean.

Q And the Valdez, the Exxon Valdez was named either the S/R

[1093]

Mediterranean or the Sea River Mediterranean after the grounding?

A No, after the grounding it was named the Exxon Mediterranean when it sailed from San Diego in – in '90, and then I think they changed the name here last year but I haven't followed exactly what they changed it to.

Q Now, you became a master in 1979?

A I received my – I sat for and passed and received my masters license in 1979.

Q And when did you begin to serve as a master?

A 1981, it was my first tour as captain.

Q Would it be fair to say, sir, that prior to the grounding, you had heard rumors about Captain Hazelwood and drinking?

A Yes.

Q And would it be fair as to say, sir, that you heard those rumors from other officers?

A I had heard rumors all through my years from the middle of 1970s up till in the '80s of Captain

Hazelwood. Rumors go around and around the fleet, so I have heard rumors.

Q And you did hear the rumors from other officers, ship officers?

A Yes, sir.

Q And on one occasion in May of 1988, indeed, you had a couple of drinks with Captain Hazelwood?

A Yes, sir.

[1094]

Q And that would be Captain Hazelwood was flying in to Portland in May of 1988?

A He was coming up to relieve me, that's correct, in

Portland.

Q And the vessel was in Portland for repairs in dry-dock?

A It was up in dry dock out of the water, that's correct.

Q Had you picked Captain Hazelwood up at the gate?

A Yes. I met him at the gate, at the airport.

Q On the way back to picking up his luggage, Captain Hazelwood suggested to you that you have a drink while waiting for the luggage, and he had a couple of vodkas, two vodkas?

A As I recollect, that's correct.

Q And you had a beer?

A That's correct.

Q And then you went down to the shipyard?

A Yes. We went to the shipyard.

Q And you met with shipyard personnel?

A It was the afternoon meeting going on and I introduced him to the ship super and the others that were involved in the repair work of the ship.

Q And you went on board?

A As I recall, about five or 5:30 we went on board to come over and check the contents of the safe, and we left the ship about six or 6:30.

Q Then you went to dinner that evening?

[1095]

A Yes, the chief mate picked us up, and I think we picked up Captain Hazelwood about – I want to say seven or maybe it was 7:30 and went to dinner that night.

Q Who was the chief mate?

A George Dowdle.

Q And you did you split a bottle of wine or drink wine with dinner?

A I believe we did at dinner.

Q At that time were you aware that Captain Hazelwood had been through some kind of rehabilitation program?

A I had heard rumors to that effect.

Q Did you ever check up on the rumors?

A No.

Q So at the time that Captain Hazelwood had these two vodkas and you had wine with dinner, you had in fact heard rumors that Captain Hazelwood had been through a rehabilitation program?

A Yes.

* * *

[1100]

Q Are you aware at all as we sit here today, of how Captain Hazelwood was ranked in the formal ranking processes within the fleet in the years 1987 and 1986?

A Not specifically. I did see a designated document that had rankings in that time frame.

Q Would it be fair so say that from an Exxon Shipping Company document, you're aware of the fact that in 1986 he ranked 35 out of 37?

A Could I see the document, please?

Q In your stack, it's Exhibit 104: Exhibit 104 has been admitted and Exhibit 104 is upside down.

You've seen these kinds of documents before, haven't you?

A Only as designated documents.

Q Are aware that this comes from Exxon Shipping Company?

A Yes.

Q Using this document, can you tell me how Captain Hazelwood ranked in 1986?

A If I read it correctly, he was 35 out of 37.

Q And how did he rank in 1987?

A He was 24 out of 29.

* * *

[1111]

It had been reported to you that the other captain of the Valdez, Captain Hazelwood, left the bridge on occasion after coming in by Cape Hinchinbrook, hadn't it?

A No, that's not – not correct.

Q That was never reported to you?

A No, not that Captain Hazelwood. I made the assumption that it was Captain Hazelwood, that he was the other master on board.

Q Tell us about the incident and then I'll sit down.

A Okay. Only – on a previous voyage inbound after clearing the Hinchinbrook entrance, I think it was the second mate, LeCain, said you're going to do down, and I said no, and he mumbled something the other captain. I don't know that he was referring specifically to Captain Hazelwood although Captain Hazelwood was the other assigned master at the time. And that I don't know what he was going down for or how long or for what reason.

Q Mr. LeCain sailed with Captain Hazelwood, didn't he?

A I think he did, yes.

* * *

[1145]

Q Sir, I pulled up on the screen Exhibit 3685, which was the minutes of a seat committee meeting dated 7 February, 1989 and I'm interested in a couple of things about it. The first thing is this signature here which appears to be the signature of Mr. Glowacki. Is that his signature?

A Yes, that's what appears, yes.

[1146]

Q Are aware that he went into Valdez with Captain Hazelwood the afternoon before the fateful voyage?

A Yes.

Q So he was at this safety committee meeting?

A He was.

Q And in the document, you talk about the so called four-hour, rule, is that right, right about here (indicating)?

A Right. If that's the Coast Guard was changing the rules and in the summer of '88 become effective and that they stated that you are not to consume alcohol within four hours of going upon a watch, correct. That was part of that change.

Q Would you consume – as a prudent seaman would you consume alcohol within four hours of going on watch?

A The regulations changed and prohibited it in 1988.

Q After 1988, as a prudent seaman would you consider consuming alcohol within four hours of going on watch?

A No, the – correct. I would not consider it prudent. The rule was you couldn't have alcohol within four hours of going on a watch or on your normal – in the normal duties.

Q Now, as the captain of a vessel, would you consider it prudent captainmanship to consume alcohol in front of crew members within four hours of an assuming your duties on a vessel? Is that a good example?

A No, you shouldn't do that.

Q We were talking about or you and Mr. Neal were talking

[1047]

about he gave you a number of assumptions. The sum and substance of the assumptions was – of which was, if Mr. Cousins would have made the turn when he was told to make the turn he wouldn't have entered the red zone. Do you recall that line of questions?

A Yes.

Q Is that a fair summary of what you talked about?

A Correct. If he started the turn abeam of Busby, he wouldn't have entered the red zone, the red sector.

Q Would it be fair to say if there would have been four eyes on the bridge instead of two that you would have greatly reduced the opportunity for error?

A By four eyes you mean another officer?

Q That's a correct statement.

A Yes, had there about been another officer have prevent a one-man navigation error.

Q With regard to entering the red zone that appears to be a one man navigation error?

A Yes, it does.

Q And the purpose of having two officers, a purpose of having two officers on the bridge is to prevent exactly that kind of error, isn't it?

A Part of it, yes.

Q You talked a little bit about the principle of safety and safety being paramount. Is the four-hour rule a safety-ironed

[1148]

rule?

A Identify a regulation.

Q Is it a safety, on the other hand, regulation?

A Yes.

Q Is the so-called six on, six off requirement in section 8104 of the code a safety rule or regulation in?

MR. NEAL: Your Honor, I thought we had an

understanding on this. I object. I don't get a chance to get back up, and I didn't go into this at all.

MR. O'NEILL: I'll move on.

BY MR. O'NEILL:

Q With regard to the Exxon alcohol policy, you were asked the question did Exxon have an alcohol policy and you answered it two fold. You said it prohibited intoxicant use and possession aboard the vessel and it referred to alcoholism as a treatable disease.

A The policy recognizes treatable, and there was a program for treatment.

Q Would it be fair to say that it is not a safe practice and it is not prudent seamanship to drink and drive on the seas, is it?

A Correct.

* * *

[1150]

DIRECT EXAMINATION OF CAPTAIN MICHAEL CLARK

BY MR. MONTAGUE:

Q Good morning, Mr. Clark?

A Morning.

Q Captain Clark, excuse me.

Could you tell the jury a little bit about yourself?

A My name is Mike Clark. I'm 46 years old. I live in New Hampshire. I'm married. I have a 12 year old daughter and a seven year old son.

Q Are you presently employed?

A No.

Q Are you retired?

A Yes.

Q Could you tell us the last position you held prior to retiring?

A I was master of the tanker Brooks Range.

Q And by whom were you employed?

A Interocean Management Corporation.

Q What is the Brooks Range?

A The Brooks Range is a crude oil carrier strictly for hauling North Slope crude for – out of Valdez to west coast

and central American ports.

* * *

[1159]

Q And as Mr. Stalzer just said, the master or the captain is in charge of the vessel?

A Yes.

Q And responsible for it?

A Yes.

Q All right. What are the duties of this – of a master or a captain who's in charge of a vessel? What are their main duties and responsibilities?

A Well, to encapsulate, its – you're responsible for the safety of the ship, the safety of the crew and the safety of the cargo. And – to break it down even further, maybe at sea for the safe passage of the vessel from port to port or any functions you're performing at sea and in port, safe navigation of the vessel in any in port moments and any port operations

[1160]

you're going to have. Essentially that the vessel is properly manned and operated at all times.

Q Now, you mentioned bolting – I think you used the phrase in port and at sea?

A Yes.

Q What do you mean by in port?

A In port is to me means from arrival to departure.

Q Okay. Now, let's take the Port of Valdez. Is that what it's called, the Port of Valdez?

A Yes.

Q When do you arrive in the Port of Valdez?

A Cape Hinchinbrook.

Q So once you arrive at Cape Hinchinbrook until you arrive at the Alyeska terminal, you're in the Port of Valdez?

A Yes.

Q And when did do you depart the Port of Valdez?

A When you take departure of Cape Hinchinbrook outbound.

Q So you're in the Port of Valdez from the reverse, from the time you leave the terminal, Alyeska terminal, until you've passed the point at Cape Hinchinbrook; is that correct?

A Yes.

Q And what do you mean, at sea?

A At sea is from when you take departure until you take arrival in another port.

Q Now, you mentioned the safety of the vessel in port and at

[1161]

sea. And I take it those are navigational duties?

A Yes.

Q Now, are there also administrative duties that a master or captain has?

A Oh, yes.

Q And what are they? Without going into great detail, but what are they?

A Oh, well, all the logbook entries and paperwork relating to cargo and the operation of the vessel, daily messages. There's a lot of paperwork.

Q Captain, which is more important, safety or paperwork?

A Safety.

Q Is that paramount?

A Yes.

Q Now, you've heard Mr. Neal talk about the safety being so important to Exxon. Is that a novel idea at sea?

A No.

Q That's standard, isn't it?

A Yes.

Q Now, let's talk a little bit about navigating the vessel. How do you navigate one of these vessels?

A With – always safety in mind.

Q And let's talk about navigating the vessel in port, either arriving in port or departing port, okay? That would be from the – in this case from the Alyeska terminal to Cape

[1162]

Hinchinbrook.

What are your duties as the master?

A As master from arriving – when arrive in port, you con the vessel, you – physically direct the movements of the vessel from the –

Q Where do you do that from?

A On that diagram they had from the very front of the bridge it has all your instrumentation right across the front of the bridge so you can see the speed log and the rudder indicator and the – the gyro heading and your fathometer and you're standing the helmsman right behind you and the radar right beside you and you direct the movement of the vessels from there. The third mate is on the bridge with you or junior mate, usually the second or third mate and he constantly fixes the position of the vessel.

Q Could you tell us what you mean, fixes the position of the vessel?

A That means he takes fixes and puts down marks on the chart as to exactly where you are.

Q And is that his main job, when he's on the bridge as watch officer in port?

A When you're conning, I'd say that's his main job, yes.

Q When the second or third mate is on the bridge with the master, is that main job of the second or third mate is to take fixes and chart them?

[1163]

A Yes.

Q And that's what he's trained to do?

A Yes.

Q Is there any teamwork between the junior officer, the second or third mate and the master?

A Oh, yes. It's a team.

Q Can you explain how that works?

A Well, communication going on if I need an a particular distance or a particular course or anything like that I'll inquire of them, or if he's got anything he needs to know from me he'll be asking me. It is a team.

Q And at all times – strike that.

What is your practice about where you are at all times entering or leaving the port?

A On the bridge.

Q Okay. Is that a unique practice of yours?

A No.

Q Is that standard operating procedure throughout the maritime industry?

A Every ship I've ever been on, yes.

Q How would you compare hazards of navigation while going in and out of port versus the open sea?

A Well, they're greatly increased.

Q Where?

A In port.

[1164]

Q They're more in port?

A Yes.

Q Okay. And is that the reason for the needing the time while you're transiting in or out of port?

A Yes.

Q Now, we heard some talk and testimony about a state pilot coming on board the Exxon – any ship coming in at Rocky Point, and then until the – until reaching the Port of Valdez and then from the – from the Alyeska terminal out to Rocky Point there would be a state pilot. Correct?

A Yes.

Q Does the master's job change in any way when the state pilot comes on board?

A Yes. He's not physically conning the vessel any more.

Q Is he – does that give him a chance to leave the bridge and go do something else he wants to do?

A No, absolutely not.

Q What's his job, when the state pilot is on the bridge?

A To oversee what the pilot is doing.

Q And he's to stay on the bridge?

A Yes.

Q Well, the master's cabin traditionally is right below the bridge; is that right?

A Usually, yes.

Q And what would be wrong with the master just going down

[1165]

into his cabin, it's only a little bit away; a short time away?

A Oh, yes.

Q Well, what would be wrong with that?

A Well, first of all you'd have to be called so you have communication involved, and if he's not there, I can't see what's going on, if there's a – something happens and he needs to be called to the bridge, he's got to be advised of what is wrong. Then if he gets up there, if something has happened, he can't – he's got to try to correct it. It isn't something he can prevent from happening, if he saw it happening. It's – the risk is too great for him to be off the bridge, it's – he just can't delegate that to the pilots, can't do that.

Q You said something interesting. If the captain's not on the bridge, then he can't prevent a mishap. Is that correct?

A That's true.

Q He can only try to correct it once it happens?

A Yes.

Q Captain, have you seen a simulation of the voyage of the track of the Exxon Valdez as it left the Alyeska terminal on March 23?

A Yes.

Q And can you compare that with various meetings from the ship to see that that's an accurate course?

A Yes, I looked at it.

Q That is Exhibit 82 and it's pre-admitted.

[1166]

Your Honor, would I would like to do is to – it's

relatively short, I'd like to play it from beginning to end for the jury to see and then rewind it and go through it with the captain then.

THE COURT: If you do what you said the first time we're not going to play it twice, stopping it.

MR. MONTAGUE: No, go ahead. You can stop it there.

BY MR. MONTAGUE:

Q Now, Captain, can you stop it a moment?

What is this – what is that little box in the lower right-hand corner?

A This – this box right here (indicating)? That's the time.

Q Okay. And that is coordinated with the voyage, with the line of the voyage?

A Yes.

Q Okay. And that is not maritime, but a.m.-p.m. time, right?

A Yes.

Q And that's – as it shows there, 9:22 p.m.

A Yes.

Q Now, can we run this until approximately 2100.30, which would be 9:30?

Okay. Now, I – I want you to assume for purposes of this question that Captain Hazelwood about that point leaves the bridge, okay? And goes below without telling the pilot that he's going below, okay? Is that proper seamanship to do that,

[1167]

for a master?

A No.

Q Let's go now and, if you would, run it until 20 – is 11:05. I want you to assume again, Captain Clark, that at this point, 11:05, Captain Hazelwood is called – or is called sometime before then to come to the bridge because the state pilot, Pilot Murphy, is departing and Captain Hazelwood then reappears on the bridge.

For that period of time, from approximately 9:30 until 11:05 at night, Captain Hazelwood's off the bridge. Would you assume that?

A Yes.

Q While the state pilot is on the bridge.

Do you have an opinion as to the judgment exercised by Captain Hazelwood staying off the bridge for that long?

A Yes.

Q What is that opinion?

A It was poor judgment.

Q Is that the kind of judgment that you would expect a captain of Captain Hazelwood's experience, and as Mr. Lynch said in his opening, almost legendary reputation for good seamanship, is that the kind of judgment you would expect a captain such as that to exercise?

A No, I wouldn't.

[1168]

Q Could you explain why not?

A Because it's a disregard of his primary duty to be on the bridge, take the ship out of port.

Q Now, are there some jobs or duties of a master or captain that just can't be delegated to someone else?

A Yes.

Q And what are those jobs?

A Taking a ship in and out of port.

Q Let's talk a minute about how you turn one of these vessels. Now, this we're talking about a vessel here that's in excess of 900 feet long, all right? Over three football fields.

What's it like to turn one of these?

A Well, it's not like turning a car or a fishing boat or something. There is a – as you are traveling in one direction and you put the rudder over, even though the head of the vessel will turn, your actual direction of travel keeps going in the old direction. Sort of like if you're steering a car on ice;

you turn the wheel and you just keep going in the same direction. Eventually you'll start to turn and move in the direction you're headed for.

Q Okay. Is it just as easy as turning a car?

A No.

Q And does it make any sense to try to compare changing course in one of these vessels fully laden to that of turning a

[1169]

corner with a car?

A No.

Q To make it turn on a vessel, there has to be a rudder command given?

A Yes.

Q And once you give that rudder command, is that the end of the turn?

A No. No, you have to watch and make sure that the rudder command is made as you ordered it and to make sure that it's having the desired effect.

Q Is there anything else that has to be done in order to put it on the course that you want it on?

A Yes, you usually have to give counter rudder to slow the turn down.

Q Whose job is that?

A The master's.

Q In port?

A In port.

Q Now, could we run this to 11:45? Okay, that's fine.

Now, is that the point that the master – the pilot gets off of the vessel?

A Yes.

Q Rocky Point? Excuse me?

A Yes.

Q And tell me, which – is this Rocky Point?

[1170]

A No, the one next to it.

Q This (indicating)?

A Yes.

Q And there's a boat there to pick the pilot up?

A Yes.

Q And now the pilot is off the – the vessel and who takes the con?

A The master.

Q Can he delegate that?

A No.

Q And when taking the con, does that include giving rudder orders?

A Yes.

Q Now, you testified a minute ago that to give a – the conning the vessel not only includes giving a rudder order but to see that it's carried out?

A Yes.

Q And to see that it has the effect, the desired effect?

A Yes.

Q And then to give any counter rudder that's necessary to put it on course?

A Yes.

Q Can a master do that if he's not on the bridge?

A No.

Q Now, you heard the testimony in this case that Captain

[1171]

Hazelwood told Cousins to turn abeam Busby light, abeam Busby light?

A Yes.

Q And bring the vessel back into the traffic lane?

A Yes.

Q And then Mr. – Captain Hazelwood left the bridge?

A Yes.

Q Do you have an opinion as to Captain Hazelwood's judgment in taking that course of leaving the bridge at that time?

A Yeah. It was a blatant disregard of his duties.

Q Is that the kind of judgment that you would expect a captain of Captain Hazelwood's experience and reputation to exercise?

A No.

Q Now, let's go to – down to 1 – to 11:30, and almost 11:31.

Okay, you there? All right. We're about a minute off. Go another minute. That's fine.

Now, at that time, Captain Hazelwood advises the VTC that he's going to move – that he's going to move out of the lanes, okay? And let's now go to – I'm sorry. He advises the VTC that he's altering his course to 200 degrees. And at a speed of – well, he reduces his speed to below 12 knots. Now, let's keep that on until 11:40.

What is happening now, Captain, as this is running?

[1172]

A He's crossing the separation zone.

Q And this is at the course 200?

A That's about going on 180 now, I think.

Q Okay.

A They should be starting right there.

Q Okay. Now, in changing a course from 200 to 180, is it general practice that that should be reported to the VTC?

A If it's going to take you out of the lanes, yes.

Q Well, the 200 would take you out of the lanes, wouldn't it, eventually?

A Eventually, yes.

Q But is it good seamanship practice when you're changing a course by 20 degrees to report that to the VTC?

A If it's going to change the point considerably where you're going to leave the lanes, yes.

Q And would that, would that change from 200 to 180, would that change the point considerably?

A Yes.

Q All right. Now, let's go for another three minutes.

Okay. Now, at this point I want you to assume that the vessel is put in autogyro, autopilot?

A Yes.

Q You ever put a vessel in autopilot either while you're crossing over the TSS lanes or departing from them or out of them?

[1173]

A No, never.

Q And do you have an opinion as to whether or not that's a prudent practice?

A It's not a prudent practice.

Q Why is that?

A Because in confined waters like that you want to be able to turn the wheel right away, without having to go through steps of pushing buttons and what have you. It's just not a prudent practice, good seamanship.

Q Does it take so long to push the button?

A No. Just a second. But it's a step and it can always be messed up, misunderstood. It's just not good practice.

Q Do you have an opinion as to the judgment exercised by Captain Hazelwood to order the vessel, the Exxon Valdez being put in autogyro at that position at that time?

A Yes, it was poor judgment.

Q Is that the kind of judgment would you expect a captain of Captain Hazelwood's experience and reputation to exercise?

A No.

Q Now – okay. Let's keep going till we get to – down to Busby Island light. – Actually, if we could stop it at – that's fine. That's fine there.

Let's – without backing this up, at 11:52, Captain Hazelwood orders that the engine be put in load program up. Do you know what that is?

[1174]

A Yes.

Q Did you have that on your vessel?

A No.

Q But you know what it is?

A Yes.

Q And what is it?

A It's on there. Diesel engine. It was a slow increase, it was 40 minutes or so to bring it from maneuvering speed up to full sea speed.

Q So when that order was given, the vessel was probably somewhere about here, two minutes earlier, something like that?

A Yes.

Q And do you have an opinion as to whether that was a – what kind of exercise of judgment that was by Captain Hazelwood to put the vessel in load program up on a dark night leaving the TSS in icy waters?

A It was poor judgment.

Q And why?

A He's coming down, he's knowing he's going to be in ice close to land, he's got a narrow window between the ice and the reef, and if anything goes wrong you're going to wind up in the ice anyway, and as to be – to have speed on the vessel, in ice, is not a good thing to do.

Q By the way, on a dark night – and this was described as a dark night with about eight to ten miles visibility. On such a

[1175]

night, can you see the ice?

A No.

Q And can you see ice on the radar?

A Yes, you can see it on the radar.

Q What you see on the radar, does that tell you the size of the ice?

A No.

Q Putting the program in – the vessel in load program up at that point in time, is that the kind of judgment you would expect a captain of Captain Hazelwood's experience and reputation for good seamanship to exercise?

A No.

Q Can we go, for a minute, Exhibit 85, the board with the overlay.

While that's being done, Captain, let me divert a minute. Let's assume you're on the bridge with a third mate and you give the order to the third mate when you're abeam Busby light, turn ten degrees right, whatever the – ten degrees rudder right, whatever. Is that a simple command to exercise? Is that a simple command to be followed?

A Yes.

Q Now, exposure in the same situation, the captain says, go to when we get abeam Busby light, turn back into the separation lanes or into the TSS lanes.

Is that just as simple a maneuver to make?

[1176]

A No, it's very vague.

Q Can you explain the difficulty that such a – that such a particular command has for someone else to follow?

A Well, it's like I said. It's vague. Could mean anywhere in there. And if he's talking about the window, then it's – the third mate's got to actually con the ship through the window of the ice and the reef.

Q Well, would you have to chart a course to make a turn to follow a command like that? Do you just turn the wheel?

A I don't know about chart it, but you have to know where you're going.

Q I'm not talking about you, I'm not talking about Captain Hazelwood. Captain Hazelwood as a captain, give a command to a third mate, When you get abeam Busby Island light, turn back into the lanes. What would a third mate have to do before he could –

A He might have to chart a course, yes.

Q And that would take time?

A Little bit.

Q Now, Captain, this – do you recall hearing testimony that Captain Hazelwood and Third Mate Cousins were looking in the radar or discussing the ice for a period of time before Captain Hazelwood went below?

A Yes.

Q Okay. I'm going to represent to you that this is the

[1177]

version – this is the leading edge of the ice as Captain Hazelwood said he perceived it?

A Yes.

Q And this is the leading edge of the ice as Third Mate Cousins says – testified or will testify that he perceived it. I can say that because it's a deposition.

Is there a significant difference between those two?

A Yes.

Q And could you explain what's significant about it?

A The third mate's is much closer to the reef.

Q And in order to avoid the ice and avoid the reef there's a very small – what do you call it, a window?

A Yes.

Q And have you figured out what the width of that window was?

A It's less than a mile.

Q And by going – was it prudent to be going 11 or 12 miles per hour to make it through that window?

A Knots?

Q Okay.

A Not in my estimation, no.

Q And why not?

A Because they're close to the ice.

Q And well, that's apparent. What about the fact that you have less time to react?

A Yes, absolutely. Just – having an narrow window and being

[1178]

that close between the ice and the reef, it would not be prudent to have much weight on it.

Q By the way, how could the captain and the third mate be discussing the ice and have such a disparity in where the leading edge of the ice is?

MR. CHALOS: I object to that question, Your Honor. The third mate, Mr. Cousins, who will testify explains it precisely.

MR. MONTAGUE: Well, I'll rephrase the question.

THE COURT: I will allow you to examine this witness on that subject.

MR. MONTAGUE: Okay.

BY MR. MONTAGUE:

Q What does it suggest to you, Captain Clark, that the after – after supposedly having a conversation they come away with such different leading edges of the ice?

A That they weren't in agreement as to their thinking as to where the leading edge of the ice were.

Q Does it at all suggest to you that they weren't

communicating very well with each other?

A Yes.

Q Now, let's take Captain Hazelwood's leading edge of the ice, okay? And while I don't have the chart on this board of the voyage, but am I correct that he said that he wanted to be one mile from Busby light and one mile from the leading edge of

[1179]

his ice and that he was going due south. So he was coming down this way; is that correct, right about here he would pass through those (indicating)?

A Yes, something like that.

Q Okay.

Did you make a calculation that if Captain Hazelwood had stayed on the 200 course rather than divert due south to 180, whether or not he would have safely cleared the leading edge of the ice as he perceived it?

A Yes, I did.

Q And what was your conclusion?

A That it would have cleared the ice.

Q And did you determine whether he had stayed on that course whether he also would have cleared Bligh Reef?

A Yes, he wrote "have".

Q And what was your conclusion? I'm sorry?

A He would have cleared Bligh Reef.

Q And given that, did you form an opinion as to his judgment in diverting further out of the lines by going 180 when he would have safely stayed in the 200 course?

A Yes. Like if the ice was strong it wouldn't be wise to go over that far, nor prudent.

Q By increasing down to 180, did it increase the risks?

A Yes, it got them closer to the reef and land.

Q And is that the kind of judgment you would expect to be exercised by a captain with Captain Hazelwood's experience and reputation?

A No.

Q Okay. Now, let's talk about paperwork for a minute, okay?

Are cargo figures and going cargo calculations the type of calculations that are sufficiently important to warrant a master to leave the bridge while leaving port?

A No, absolutely not.

Q And do you have an opinion as to the judgment of Captain Hazelwood in using that as a reason for leaving the bridge while leaving port?

A Yes, it was poor judgment.

Q Okay. And is that the kind of judgment that you would expect from a captain of Captain Hazelwood's ability and experience?

A No.

Q Now, Captain Hazelwood also testified that the reason he left the bridge after he gave Mr. Cousins the order to turn when abeam of Busby light – Busby Island light, he said – and I'll read this verbatim: I had some calculations I was working on, that I had gotten some weather update and there was a storm brewing in the Aleutians. It was heading toward Prince William Sound and I wanted to make sure either we got out and passed in front of the storm enabling us to make a tide window or an area that we were shooting for in Long Beach; or, in the converse, I'd have to stay in Prince William Sound.

That's what he said.

Is that a basis for leaving the bridge while conning the vessel, exiting the Port of Valdez through Prince William Sound?

A No, it's not. It's primarily duty is get it out of port safely.

Q Well, he was concerned about the weather and the safety of the vessel. Is that a valid concern?

A He's got to get out of port first. That's his primarily job, is getting it out of port.

Q Could you explain that a little more?

A Well, it's the very basic thing, was that – that is, his primary job is to safely navigate the vessel out of port.

Q And then worry about the weather?

A And then worry about the weather.

Q Are these vessels pretty weather sturdy?

A Absolutely.

Q Are they built to take storms?

A Oh, yes.

Q You were even in an earthquake in one of these, weren't you?

A Yes.

Q And what happened?

A We had quite a bit of damage from – electrical damage.

[1182]

All the electrical equipment was shaken up.

Q How did the ship weather the storm? The earthquake? How did the ship weather the earthquake and the seas?

A There were no seas. It was flat calm.

Q Could the – if the – what if the weather – if the charting of the weather or calculating the weather was important? Could that be done on the bridge?

A Yes.

Q Was there any reason that had to be done in a cabin?

A No.

Q And did you form an opinion as to whether it was what kind of judgment it was for Captain Hazelwood to determine that he could leave the bridge after giving an order while outside of the traffic lanes at night trying to divert ice for Mr. Cousins to get back in the lanes, why he could leave the bridge in order to do these calculations in his office or his cabin?

A Yes, it was poor judgment.

Q That the kind of judgment that you would expect to be exercised by a captain of Captain Hazelwood's experience and reputation?

A No.

Q Now, you recall the testimony that Captain Hazelwood left the bridge approximately two minutes before the turn was to be made after he spoke to Third Mate Cousins?

A Yes.

[1183]

Q If – let's assume that there really was something that caused Captain Hazelwood – that he had to leave the bridge. Was there an alternate course of action he could have taken that would have been more responsible?

A He could have turned just before he came abeam of Busby light.

Q In other words, turn and then, if he had to leave, leave after the turn was made?

A Yeah. There's no reason why he had to be there, wait until the ship was abeam of Busby.

Q Would that have caused any further risk to the vessel, if he had turned two minutes earlier?

A No.

Q Now, do you recall the testimony that Mr. Cousins called Captain Hazelwood and told him that he'd started the turn?

A Yes, I do.

Q And did he tell him anything else, you recall?

A Yes, in Cousins deposition he said he was going to get into the ice.

Q Cousins said he was going to get into the ice?

A Yes.

Q And did the captain come up to the bridge at that time?

A No, he did not.

Q Do you have an opinion as to the – apart from the fact that he left the bridge already, apart from that do you have an opinion as to the exercise of Captain Hazelwood's judgment of not coming up to the bridge at that time?

A Yes. I'd say it's extremely poor judgment. If third mate called me up and told me he was going to get into ice – not that I'd be off the bridge any way, but I would have flown up to the bridge.

Q Why is that?

A ASAP. Because he told me was going to get in the ice. That's a danger.

Q And Captain Hazelwood didn't do that?

A No, he didn't.

Q Okay. He stayed in his cabin?

A Yes, he did.

Q Is that the kind of judgment you would expect the captain of Captain Hazelwood's experience and reputation to exercise?

A No.

Q Now, let's go back again to that moment of when Captain Hazelwood left the bridge after telling Cousins to turn abeam Busby light, about two minutes hence.

After Captain Hazelwood left the bridge did Cousins have other things that he has to do besides just stand there and wait to turn it abeam Busby light?

A Yeah, he's got to do both jobs now, con the ship and keep a record of its position.

Q All right. Would you sort of explain again what that is?

[1185]

A The master cons the ship from the front of bridge where he's got the instrumentation. He can watch and be right there beside the helmsman and the radar. And the third mate keeps a running track of the position of the vessel going from fixing it to putting it on a chart.

Q And it's the latter job that the third mate is used to doing; is that correct?

A Yes.

Q And now he's got to do both?

A Yes.

Q Were you – have you looked at the course recorder from the Exxon Valdez on the night of the 23rd and the morning of the 24th of March?

A Yes.

Q And can you tell from that course recorder when the turn was made?

A Yes.

Q And do you recall when that is, or do you have to look? Should I show you?

A Looked like about two minutes past midnight.

Q Now, when – you heard Captain Stalzer's testimony?

A Yes, I did.

Q So I won't belabor it, but when it a turn is made, there's a simple way to – a foolproof way to check whether or not it is carried out; isn't that correct?

A Yes.

[1186]

Q And what is that?

A Well, you mean you're talking about the rudder, right?

Q Yes. Well, when the wheel is turned, if the order is given to turn the wheel X degrees, there's a real easy way to make sure that the rudder responded, isn't there?

A Yes, to look at the rudder angle indicator.

Q Is the rudder angle indicator driven by the turn of the helm or is it driven by the actual movement of the rudder?

A The actual movement of the rudder.

Q So if the angle indicator moves, that means the rudder moved?

A Yes.

Q Is that the standard way of determining, checking whether or not a – a turn has been effected?

A It's a way of telling the rudder has moved to where you want it, but you still got to watch to make sure that that amount is rudder is having a desired effect.

Q And that varies on the speed you're going and the load that you're carrying?

A Yes.

Q Whose job is it to do that?

A The master's.

Q Is there any way a master can do that when he's in his cabin?

[1187]

A No.

Q We've heard an awful lot about Watch Condition C and Watch Condition D and how Exxon has it in their navigation and bridge manual. Have you heard that testimony?

A Yes.

Q Apart from the fact that they have it written down in their bridge manual, is that what they have written there, is that unique?

A No. It's common practice on every ship I've ever been on.

Q So that that's just putting down what everybody knows or the proper ways to con a vessel when you're going in and out of port?

A Yes.

Q And under various conditions?

A Yes.

Q Not something Exxon made up, not novel?

A No, it's not novel.

Q Now, let's talk for a minute about the Coast Guard. I –

THE COURT: Sounds like you're changing subjects. We'll take our second break. Ladies and gentlemen of the jury, please don't discuss this matter. We'll resume in 15 minutes.

(Jury out at 12:00 noon.)

(Recess).

(Jury in at 12:16.)

BY MR. MONTAGUE:

[1188]

Q Captain Clark, I just want to revisit two things very briefly to make sure it's clear.

With respect to the weather report and making weather calculations as to when a storm might be raged?

A Yes.

Q Could that have been done as well on the deck – on the bridge as in Captain Hazelwood's cabin?

A Yes.

Q There was no need for him to be in his cabin to make those calculations?

A No.

Q Secondly, someone suggested, and I've been using the word in port and out of port. Have you understood that to mean going from Cape Hinchinbrook into the Alyeska terminal and vice versa?

A Yes.

Q Now, I'd like to ask you some questions about the VTC.

Have you in your 13 years ever relied on the Coast Guard to monitor or track where you are?

A No, never.

Q And is there a reason for that?

A Yes.

Q Could you tell us –

A Because I'm the master of the vessel, I know where I am. I don't want them telling me where I am, I'd rather rely on my

[1189]

own information.

Q Is your information as good as theirs, with respect to your vessel?

A It would be better.

* * *

[1193]

Q You've given a series of opinions about the conduct and judgment exercised and performed by Captain Hazelwood that evening?

A Yes.

Q Now, I want you to take that conduct as a course of conduct rather than – we've looked at each one alternate a time. I want you to look at it all together and tell us, tell the jury if you have formed an opinion as to whether Captain Hazelwood was a competent captain on that voyage from the time the vessel

[1194]

left the Alyeska terminal until it grounded on Bligh Reef? Have you formed an opinion as to that?

A Yes.

Q And what is your opinion?

A It was incompetent.

Q Okay. And do you have an opinion as to whether Captain Hazelwood's conduct as a whole, his course of conduct on that voyage, was consistent with a captain – with the conduct you would expect of a captain with his experience and with, as Mr. Lynch said, an almost legendary reputation for seamanship?

A Yes, I have.

Q And what is your opinion?

A It was not consistent.

Q Do you have an opinion on the claim that the third mate, Mr. Cousins, was left on the bridge alone with the helmsman, just simply messed up, a simple term, and thus caused the wreck?

A Do I have an opinion?

Q Yes.

A Yes. That's not true.

Q What caused the wreck, in your opinion, Captain?

A Captain Hazelwood not being on the bridge to direct the vessel's movements.

* * *

[1224]

Q Well, you made a judgment that Captain Hazelwood was in blatant disregard of his duties before you even knew what Captain Hazelwood had to say, you say you based that on the assumed facts. What were those assumed facts that you use?

A Well, I base my decision that he walked off the bridge and – and a –

Q That's enough?

A In a – coming down on ice in a dark night with a loaded tanker with a narrow window. I mean, what else can I say?

* * *

[1322]

DIRECT EXAMINATION OF MARK J. DELOZIER
(Read)

BY MR. COHEN:

* * *

[1323]

Q And until October of '89 were you in the Coast Guard?

A I was still in the Coast Guard in October of '89.

Q And then you moved over to Alyeska and left the Coast Guard?

A I detached from the Coast Guard August 15th, '89, went on terminal leave and then physically retired from the Coast Guard November 1st, '89. Began employment with a contractor, an electrical contractor in Valdez in September of '89, and then began work in October of '89 with Alyeska.

Q Now, how long had you been in the Coast Guard before you went to work with Alyeska – for Alyeska?

A 20 years and ten months. 20 years and 11 months.

Q And when you left the Coast Guard, your rank was chief warrant officer?

[1324]

A CWO3.

Q And what does O3 mean?

A There's four grade levels for warrant officers. W-1, W-2, W-3 and W-4, and I was a three. The highest you can go is four.

Q So you were next to the highest?

A Yes.

* * *

[1326]

Q Now, can you tell us, in your approach to the vessel, did you observe any oil in the water?

A Yes, I did.

Q And can you describe the thickness of the oil?

A It was quite thick. I think I estimated it in previous testimony 12 to 18 inches.

Q Did you notice any bubbling of the oil?

A Yes.

Q Now, what about oil vapors? Did you detect any oil vapors

[1327]

as you approached the vessel?

A Yes.

Q And when did you first detect the vapors?

A I believe it was probably – probably before I actually saw the oil.

Q Can you describe the intensity of the odor?

A It was very strong.

Q Did you have any concern that there was any danger of fire?

A Yes, I did.

Q And did you have any other concerns along those lines?

Mr. Carey asks, along the lines of what?

Well, like explosion. Did you have any concerns there might be an explosion?

A Yes.

Q Now, where was it in your approach to the vessel that you saw ice for the first time, generally?

A It was towards the southern end of the entrance of Tatitlek Narrows. The operator of boat that we were on observed it on the radar. We slowed down and the deckhand stuck her head out the window to try to spot the ice and we steered around it. There was one or two blips on the radar.

[1328]

When we passed one of them, it was about four foot in diameter.

Q You actually visually saw that, or was that on the radar you're judging from?

A The operator of the vessel spotted some blips on the radar. I did not look at them on the radar. We slowed down and when we passed one of them I visually saw one of them.

Q Now, when you arrived to the Exxon Valdez which side did you board her on? Do you recall?

A On the starboard side.

Q And all three – who went aboard?

A All three of us.

Q And could you describe where you went after you got aboard the vessel?

A We went up to the wheelhouse.

Q All three of you?

A Yes.

Q When you got to the wheelhouse, who did you observe in the wheelhouse?

A Well, there was Captain Hazelwood.

Q And where was he located?

A He was on the port, port side of the wheelhouse forward, and there was someone else up on the center line or on the starboard side, and I don't recall who that was now.

Q Now, is there anyone else or just those two that you recall?

A As we immediately arrived, that's all I believe I remember.

Q Now, when you say Captain Hazelwood, can you describe his position that he was in; that is, was he standing up, was he sitting down? Can you describe his position?

A He was standing up on the port side forward, up against the

[1329]

glass, kind of leaning over on the windowsill; and as we came up from the rear behind the chart table and around the corner, he turned around and motioned to us. We went over and began to talk to him.

Q Now, did all three of you go over there at one time or did you go over individually?

A We were in a group. We all traveled over at the same time.

Q And who spoke to him first?

A Commander Falkenstein.

Q Did you hear any of the conversation?

A Yes.

Q What was said?

A I don't recall.

Q How long did Commander Falkenstein talk with him initially in this conversation we're referring to?

A Five to ten minutes.

Q And then what happened? Did you talk to the captain then?

A Just briefly.

Q Can you describe what your conversation with the captain was about?

A I don't recall.

Q When you were having this conversation with the captain, did you detect any alcohol?

A I detected an odor of alcohol.

Q At what point did you detect the odor of alcohol – and that is, when you're going up and you're going to talk with him, and I want to know when in the sequence of your talking with him did – did you detect it?

A As the discussion was taking place with Commander Falkenstein and Dan Lawn, we were all kind of huddled around Captain Hazelwood; and during that conversation is when I detected an odor of alcohol. As far as the exact moment or minutes after we arrived, I'm not sure.

Q Now, can you describe the distance you were from Captain Hazelwood when you first detected this odor?

A It varied. Anywhere between two foot from the front of his face to four foot from the front of his face.

Q Can you describe the intensity of the odor?

A I felt it was quite strong.

Q Did you reach any conclusions when you detected it?

A Yes.

Q What conclusion did you reach?

A That I should pursue the matter.

Q Did you – while you were talking to Captain Hazelwood, did he do anything with his hands or anything at all which you felt he was doing to prevent you from detecting the odor?

A I concluded that, because of the way that he was standing and the way that his arm was placed, like this (indicating), that he may have been trying to attempt to hide any odor, but that was my conclusion. That was my assumption.

[1331]

Q Now, you just said he did something like this. Can you describe for the record what did he do with his hand when you said "like this" so we have it on the record?

A He was crouched at the windowsill. Not crouched. He was standing at the windowsill, and he was leaning on the windowsill and he was propping his head up (indicating).

Q With his hand like you have it right now?

A With his hand. And at times he was like this (indicating).

Q Well, let the record show, when you said at times like this, that he put his hand in like a fist-type under his lips. Is that what you're saying?

A Well, you can go ahead and describe it. This is about what I think he did (indicating). He was doing this.

Q He put his hand actually over his lip, his fingers?

A To my recollection, yes.

Q Mr. Carey, the record should show that the witness has said his hand, his chin cupped in his hand up to before and during some of the time that you've asked questions, and I'm not sure the record – what you're talking about, Mr. Blank.

Mr. Burns, the record should also show that he had his hand directly over his lips at some time.

Now, after you had this conversation with Captain Hazelwood, what did you do next?

A As we backed off from the conversation, Commander Falkenstein and myself, we walked out to the starboard bridge

[1332]

to decide what we were going to do; and as we were walking out to the bridge wing, I mentioned to Falkenstein, I asked him if he had smelled the odor, and he said yes, he did. And I said, well, we need to do something about that; and he said, what do you suggest? I don't remember his exact words, but it was something of that nature.

And I said, we need to call back to the base and have someone come in and begin some testing. I said we're bound by – I said, we have these new regulations coming in place. I said this is one thing that we will have to look into, and we need to do it rapidly for the longer we wait, the longer we may not be able to get an accurate test.

Q Now, what did you do after this conversation with Commander Falkenstein?

A We went back to the wheelhouse and talked some more with Captain Hazelwood. We questioned him on the – no, I'm sorry. Back up.

While we were out on the bridge wing we made an attempt to call the marine safety office. We made contact with them and we advised them that we would make an attempt to call the CO by way of telephone. We went back inside and had some more discussions, brief discussions with Captain Hazelwood, and he directed us to the radio officer.

I think he summoned the radio officer, and we went down below and he fixed us up with a telephone.

[1333]

Q And who made the telephone call from the ship?

A Commander Falkenstein.

Q Did you hear what Commander Falkenstein said on the telephone?

A Yes.

Q Let me just back up a minute. When you were up on the bridge, initially on your arrival, did you detect any concentration of fumes on the bridge?

A Yes.

Q Did you detect them in the wheelhouse where Captain Hazelwood was?

A Yes.

Q Did you at any time observe Captain Hazelwood smoking?

A Yes.

Q Did you have any conversation with Captain Hazelwood in connection with that?

A Yes.

Q And can you describe the conversation you had with him?

A It wasn't – it wasn't conversation. It was – at one point in time I walked up to the wheelhouse and Captain Hazelwood was there and he was smoking. The fumes had registered on my mind previous to that. I politely walked over to Joe – Captain Hazelwood, I'm sorry. And trying not to be belligerent or forceful or anything like that, I mentioned to him that it might be a good ideas to stop smoking, that there

[1334]

were fumes that were presented.

Q And what was his reply?

A I don't recall if there was a reply, but he did put his cigarette out.

* * *

[1338]

Q Now, based on your interview with Cousins, did he tell you that the master gave him in effect an approximate position to turn as opposed to a precise position?

A During the interview, it was my interpretation of the interview, that the point in which he needed to turn was an approximate.

Q Now, after the ten degree right rudder, did Cousins ever indicate to you that he telephoned the captain prior to the 20 degree?

A No, he didn't.

* * *

[1340]

Q Did you query Cousins at this time concerning where Captain Hazelwood told him the turn was to be made which you previously referred to?

A Yes, I did.

Q And how did you ask the question to him, do you recall and how did you phrase the question to him?

A I believe the question that I instructed him was where is

the point where he was instructed to begin his turn.

Q And that was the question you asked him and how did he respond to your question? What did he say?

A He indicated this mark right here which is the 38 fathom mark.

Q Now, before you describe it any further, you say he indicated. Tell me how he did this. You asked him the question. What physically did he do?

A I asked him the question, he and I were both leaning over the chart. I believe he took a pencil in his hand, and I believe he pointed to the position that he was referring to.

Q Now, where did he point the pencil to – when you describe that?

A There is a 38 fathom mark which is on a course of approximately 180 which is due south of the 2355 position that he had plotted.

[1341]

Q Okay.

A It is approximately three quarters of an inch below that position on the chart.

Q Now, I have your Deposition Exhibit 1624 which bears Plaintiff's Exhibit No. 843, and ask you if you recognize it just as a portion of the chart? Do you recognize the line and circle on there as positions you put on the chart?

A Yes, I do.

Q Now, can you tell us the circle that you have drawn on the chart, is this the same as what you have just testified to orally about where Cousins pointed the pencil to?

A That's correct.

Q Am I correct – and my question to you is, did Cousins ever indicate to you that Hazelwood told him to turn at the 38 fathom mark? Did he say it to you that way or did he just

point the pencil as you previously testified?

A He pointed to the 38 fathom mark and then I questioned, I questioned him and I said, this mark right here? The 38 fathom mark? And he said yes.

* * *

[1348]

Q Do you have any recollection of discussion with Captain Hazelwood beyond what was taped at the end of the interview?

A I don't know when the tape stopped. At the conclusion of the interview with Captain Hazelwood, the interview was complete and then sometime following that interview, during the afternoon hours, is when I meant with Captain Hazelwood while – while he was already in the wheelhouse. I asked him to come over and to describe to me where the point in which he instructed Third Mate Cousins to turn was.

Q Now, did Captain Hazelwood ever indicate to you during the interview or use the phrase in referring to where he instructed Cousins to turn the 38-fathom mark, did he ever indicate to you, say those words verbally when you were discussing where the turn was to be made? Did he say, refer to the 38-fathom?

A During the interview?

Q During the interview.

A Yes.

Q Mr. Burns: Which interview now?

Continuing.

Either one. The one in the stateroom or the one up in the – up looking at the chart.

A Yes, while he was looking at the chart.

[1349]

Q And do you recall the terminology he used?

A 38-fathom mark.

Q And when did he say that in the sequence of your questioning him?

A I asked him to show me on the chart where the point he had instructed the third mate to turn. He came over and he picked up a pencil and circled the 38-fathom mark and I said this? And he said, the 38-fathom mark, this is it. I don't remember the exact words, okay?

* * *

[1356]

Q Was his speech slurred in any way?

A I didn't distinguish anything of that nature.

* * *

[1376]

Q On the morning of March 24th, 1989, when you and Lieutenant Commander Falkenstein went out to the vessel, were you acting as representatives of the Coast Guard?

A Yeah. Certainly.

Q Now, did you at any time on March 24th, after you got to the vessel, ever recommend to Lieutenant Commander Falkenstein that Captain Hazelwood be relieved of his duties because you believed that he was impaired?

[1377]

A No.

Q Mr. Delozier, on the morning of March 24th, 1989, when you had the opportunity to observe Captain Hazelwood, did you see – did you observe other than the smell of alcohol, any signs of impairment?

A No.

Q On March 24th, 1989 in your observations of Captain

Hazelwood, did you observe any signs of intoxication other than the smell of alcohol?

A No.

* * *

[1378]

DIRECT EXAMINATION OF SCOTT CONNOR
(video)

BY PLAINTIFF EXAMINER:

Q I ask you state your name, please, sir?

A Scott M. Connor.

Q And how are you employed, Mr. Connor?

A I am a chief health services technician with the U.S. Coast Guard.

Q Where are you assigned?

A Currently assigned to Cleveland, Ohio.

Q How long have you been assigned to Cleveland?

A I have been in Cleveland now for two years, four months.

Q How long have you been in the service of the United States Coast Guard?

A Been in the United States Coast Guard 17 years.

Q How long have you been a chief health services technician?

A For two years, five months.

Q Two years.

Well, let me go back to the time of the Exxon Valdez grounding in March of 1989. What was your position at that time?

A My position at that time was – I was a first class petty

[1379]

officer, health services technician. I was the Coast Guard's medical liaison at Elmendorf Air Force Base in Anchorage. I was responsible for the well-being of –

* * *

[1409]

Q You testified about the bottle of Jack Daniels that you saw on the shelf in the captain's quarters. Where was this shelf?

A It was on the forward bulkhead.

Q Okay. Was that where the desk was as well?

A The desk was located forward, forward port quadrant of the room. You split the room in fours, it would be forward port. Right there

(Noise in video.)

Q Okay. And this was in the where was the shelf again? I'm sorry.

A It was along the forward bulkhead.

Q Okay. Is that where the couch was?

A Yes, sir.

Q It was a shelf above the couch?

[1410]

A Yes. It was not – wasn't a shelf. – It was a shelf but I think we've got two different interpretations here. It was built into the structure of the ship. It was not a free hung wall shelf. The bulkhead went up, went in and continued up.

So that would provide a horizontal surface that I am stating to be a shelf. Was a cabinet, I can't recall? Was it a heat register, I can not recall. But it was not part of the steel superstructure that directly led to the outdoors.

Q Okay. How high up was this what you're calling a shelf?

A Four foot.

Q Do you recall what else was on this shelf?

A There were – there were the additional tox kits that I – that had been brought to me. They were separate from the desk.

Q Okay.

How long was the shelf?

A Oh, it was the length of the room. I – no. I'm not sure if it went the full length of the room or if it stopped and there's where the couch started. I can't – I can't specifically recall.

Q Would you have an estimate in feet of how long the shelf was?

A Four, five, six.

Q Okay. When you first came in the room – well, let me withdraw that. When did you first notice this bottle of Jack Daniels?

[1411]

A When I walked into the room.

Q Okay. At that time was there anything else on the shelf?

A I don't recall.

Q Where did the bottle sit in relation to the shelf? Was it in the middle, was it off to one side?

A It was off to the – facing the shelf. It was off to the right side.

Q Was it in the corner on the right side?

A I don't know, sir. I mean, at this point it could have been a lava lamp, but for some reason I just recall seeing a bottle of Jack Daniels sitting there. You know, I hope I just don't have this superimposed with some other event in my life.

Q What makes you think it was a Jack Daniels bottle?

A Because it had a black label.

Q Were you able to read the printing on the label?

A I don't recall if I specifically did.

Q Okay. You said it was open because you could see that it was torn, the paper seal had been torn?

A Because it had less than – it was less than full.

Q Okay. Do you recall – say it was less than full?

A No, sir, I don't recall what the volume was.

Q How big of a bottle was this?

A No idea. It was more than an airplane nip and it was not a half gal on.

Q You said you saw and you thought, damn that was trouble.

[1412]

Why did you think that?

A There is a ship on the rocks and oil is bubbling out of the side, and I'm brought into the captain's quarters and there's a bottle whiskey, bourbon on the shelf.

Q You also said you saw some empty beer cans in the trash?

A Yes, sir.

Q Can you describe the beer cans at all?

A Open, empty – I think I know what kind they were.

Q What kind do you think they were?

A I'm also positive, but I'm not a hundred percent sure.

Q So what kind do you think they were?

A I think it was Meisterbrau. I think I just recall Jesus, what's he drinking that crap for (indicating).

Q Do you recall having that thought when you saw the bottles?

A The cans.

Q The cans, excuse me.

A That it was cheap beer, yes, sir.

Q Do you recall how many cans were in the trash?

A No, sir. I didn't do a count.

Q Now, you said you were throwing things in this trash can?

A Yes, sir.

Q So were you pretty close to these cans?

A Oh, yes.

Q Was your view of these cans obstructed in any way?

A No, sir.

[1413]

Q Where was this trash can located?

A Well, the desk was here and the trash can was – it was not alongside of the desk, it was sort of off and up against the – the wall that – the bookcase heat register, whatever that was, it was up against there because I could stand there and just throw the stuff right now. And I don't recall moving the trash can myself.

Q Were you throwing things on top of the trash on top of the beer cans?

A Oh, yes, sir.

Q And by the time you were done throwing things in the trash can were the beer bans covered?

A Absolutely no idea.

Q Okay. How close were you to the Jack Daniels bottle when you first saw it?

A Ten feet.

Q At any time during your time in the room did you get any closer to the Jack Daniels bottle?

A I can't recall.

Q Did you just look at the bottle, the one time, the initial time you saw it or did you look at it a couple of times?

A No, I – all I can recall is when I walked in I saw it, went Jesus, and, you know, went on my – you know, to do my thing.

* * *

[1557]

DIRECT EXAMINATION OF LEE RAYMOND
(video)

BY VIDEO EXAMINER:

* * *

What is your position today?

A Today I'm president and director of Exxon Corporation.

[1558]

Q And at the time of the grounding of the Exxon Valdez on Good Friday of 1989, what was your position?

A The same as it is today.

* * *

[1562]

Q The top of the page, Mr. Brinkley asked the question, first, let's deal with this. Was it a good policy to leave a man with a substantial record of alcohol abuse in command of a tanker loaded with oil. And your answer was, no, it was not a good policy. Do you see that?

A Yes, I do.

Q Was the question asked and did you give the answer?

A Pardon?

Q Was that question in fact asked and did you in fact give that answer?

A I think that – I think that, as I recall, at the time that question was asked, and that was the answer I gave.

Q And at the time you gave it, you believed it to be true?

A At the time I gave it, given the information I had available to me at that time, I thought it to be true.

Q In the – Mr. Brinkley asked how did it happen. And you

[1563]

give a lengthy answer, and in the answer there is the statement made that Captain Hazelwood came forth and said he had a drinking problem. Do you see that?

A Yes, I do.

Q Did Captain Hazelwood self identify, do you know?

A I do not personally know by my own knowledge.

Q Do you know if at or about the time Captain Hazelwood went into treatment he was under investigation with regard to drinking?

A I do not know.

Q At the time you appeared on This Week with David Brinkley, would it be fair to say that you believed that returning Captain Hazelwood to duty as the master of a vessel was an error in judgment?

A No, I don't believe that's what I said. I said if there was an error in judgment. I don't think I made a conclusion at that time that they in fact had made an error in judgment.

Q Mr. Raymond, would you read the answer from, well, I think there are two or three points here, David, down to the bottom of the answer.

A Well, I think there are two or three points here, David. My English wasn't very good. I think that they are important to try and to put the whole thing in perspective. The early – as I understand it, in going back and trying to find out exactly what happened, as you can expect in the last several

[1564]

days, there have been a lot of questions like this. Captain Hazelwood came forth and said he had a drinking problem and asked that he be treated for that. Under our company policy, I'm sure under a lot of company policies these days recognizing the societal impact of alcoholism, we all try and encourage people if they have a problem to come forth so they will be treated. In so doing he went and was treated, and we were told or the shipping company was told that he had had the treatment and was returned to duty.

If there was an error in judgment, in my view, it was at that point. The people in the shipping company, of course, are the people who really make the judgments about the qualifications of people who operate tankers. Then that's where that judgment should be. Only they can really judge how good these people are. But I'm afraid in hindsight they were probably put in the position of make making a broader judgment, a societal judgment, which in hindsight shouldn't have been made. And that is when someone comes – should be out of alcohol or rehabilitation, he obviously is still a risk. That we all know percentage wise, and there is a risk that he will not recover, and under pressure certain things can happen. I would guess that that's what happened here.

* * *

[1564]

Q Let's have the question completely clear. If Captain Hazelwood was drinking at all after his rehabilitation, did Exxon Corporation, including Exxon USA, have a policy with

[1565]

regard to that?

A Well, let me be clear I understand. You mean at any time during a 24-hour day, whether he was on or off, anywhere.

Q After rehabilitation?

A If a person, him or her, had any alcohol, anywhere?

Q That's right?

A Did we have a policy on that?

Q That's right.

A Not to my knowledge.

Q In one of the statements that was made to the congressional committees by Mr. Rawls, he referred to Captain Hazelwood was the most closely monitored man in Exxon. Do you recall that, or words to that event?

A Yes, I do.

Q Do you know how Captain Hazelwood was monitored?

A Only by what the shipping company has said after the fact, so to speak.

Q Who in the shipping company?

A Who in the shipping company what?

Q Said about him being monitored?

A I believe the source of Hazelwood, the source of the statement in the shipping company about Hazelwood being highly monitored, or monitored frequently, or most monitored, or however you want to phrase it, the source of that was Frank Iarossi.

[1566]

Q Do you know if in fact he was monitored, or do you know?

A My understanding is that in fact he was monitored consistent with the statement that Iarossi had made.

* * *

[1568]

Q Have you caused anyone to be fired as a result of the Valdez incident?

A Are you – me personally?

Q Yes, sir?

A No, sir, I have not.

Q Let me ask the general question. Has Exxon Corporation, its division, Exxon USA and/or Exxon Shipping Company caused anybody to be fired as a result of the Valdez incident?

A Well, I believe Mr. Hazelwood was terminated and some others have been reassigned.

Q Who was reassigned as a result of the Valdez incident?

A I believe Mr. Cousins was reassigned.

Q Anybody other than Hazelwood or Cousins – did anyone other than Hazelwood or Cousins have any adverse personnel action taken with regard to the Valdez incident?

A Not to my knowledge.

Q Are there risks associated with the transit, the transportation of oil from the Valdez terminal?

A There are risks associated with everything.

Q Would it be fair to say that a way to manage those risks is to take care in the selection and the evaluation of the masters

[1569]

of the vessels that you use to transport the oil?

A That's one of several ways to try the and deal with risks.

Q The selection of the master and the evaluation of a master that is in charge of a vessel that takes oil from the Valdez terminal, is a matter of some significance, isn't it?

A Yes, it is.

Q And in light of what you know today, was Captain Hazelwood, in March of 1989, qualified professionally, emotionally and physically to master a vessel from the Valdez terminal?

A Well, I think the point was made earlier today when you referenced the interview that I had on the David Brinkley show, is that the judgment as to who should be ship captains or tank truck drivers or any of those who run control houses and refineries, that's not an area of my expertise, that's delegated into the organization.

Q So as you sit here today, three-and-a-half years after the incident, as the president of Exxon Corporation, you have no judgment as to whether Captain Hazelwood was qualified or not to master the Valdez?

A Based on the information available to me in the ordinary course of business, I do not have a judgment.

* * *

[1571]

DIRECT EXAMINATION OF LAWRENCE G. RAWL

BY MR. O'NEILL:

Q Sir, we've got to quit meeting like this.

In March of 1989, what was your position?

A I was the – can you hear me all right? I was the chairman, chief executive of the Exxon Corporation.

* * *

[1578]

This is from your testimony to the House of Representatives on April 6th, 1989, isn't it?

A Yes, that's what it says.

Q And your testimony at that point in time with regard to the issue we were just talking about is, the other point in that argument is, if as an employee you do not tell your supervisor that you have a drinking or a drug problem, and do not come in for rehabilitation, then when we find out we are going to fire you. This is a pretty serious thing.

Is that a statement you made to the Congress back on 4/6 of

[1579]

'89?

A I'm sure it is if this is a congressional record.

Q It is.

A Yes, I did make that. I made it with, watching Mr. Raymond's testimony on the TV monitor, within the first two or three weeks of that Spill, and some of the important information didn't come out for over a year. I made a number of statements, and based on information that I've subsequently found out was incorrect, so I'll just state right now that I was wrong.

Q Testimony before the Congress of the United States, at least for most of us, is an important event in our lives, is that a correct statement?

A That's correct for me, too. Yes, very important.

Q And at the time you testified before the Congress of the United States you were testifying on behalf of Exxon Corporation, that's a correct statement?

A Yes, sir.

Q With regard to the Valdez incident?

A Yes, sir.

Q After having been advised by your best people with regard to what your testimony was going to be on April 6th, 1989?

A Correct, and I told the truth totally, but I had bad dope, basically.

Q Now, in – with regard to the reinstatement of Captain

[1580]

Hazelwood as a ship captain back in 1985, would it be fair to say that the man should not have been put back on the bridge after his treatment?

A I'm not in a position to say that, no.

Q Have you ever said that?

A Yes, I said that.

Q Who did you say it to?

A I said it to the Congress of the United States immediately post of the spill because I understood at the time, based on a Coast Guard press release which predated my testimony to the Congress of the United States, that there was irrefutable proof by the Coast Guard due to a blood alcohol and drug test that Captain Hazelwood's blood level exceeded that allowed by the Coast Guard regulations to be the captain on the ship. Based on that, based on a lot of information that I got out of the press, which was – of course I knew before, I have known since that you can't always believe everything you read or see, but under the stress of the situation, we had a horrible accident, tragedy, and we felt very badly about it. We had a lot of other things we needed to do. As I said earlier, I said some things, that if I had more time to get information, I wouldn't have said those things.

Q And you also made the statement or a similar statement on Face the Nation, do you recall that?

A I'm sure the thrust of it is probably the same at the time.

[1581]

Q Let's take a look at you on Face the Nation with the Court's permission.

(Videotape Played)

BY MR. O'NEILL:

Q Would it be fair to say, sir, that alcoholism is a disease that you never get over, as you understand it?

A I've read that and heard it, but I don't know whether that's fair to say or not.

Q Did you say it to the House of Representatives?

A I probably did. I'm not sure of course that I've

determined since that Captain Hazelwood is actually an alcoholic.

Q That's from your lawyers, isn't it?

A No. In fact, you'll find my lawyers regret that frequently they tell me things they told me I should have listened too and didn't, but in any event, that's not from the lawyers.

Q Would it be fair to say that when somebody undergoes alcohol treatment, they have to be watched closely on follow up, a better plan, and it can be done within the same policy, is to not give the person that job back but to give them a less stressful job, give them a way to recover and continue to work but certainly not as a captain of a ship or airplane pilot or someone in the control room of a refinery or chemical plant or jobs of that nature. Is that a fair statement?

A If I may, I'll answer it by explaining a little bit more

[1582]

about how Exxon monitors employees, if you'd let me mention this to the jury.

Q My question was, was that a fair statement.

A I don't know whether it's fair or not.

Q Have you ever made that statement?

A I'm sure I did during that period I mentioned to you.

Q Would you go to page 85 of Exhibit 711?

A Yes, I'm on it, thank you.

Q Now, do you see the last full paragraph on the page?

A Yes, I do.

MR. LYNCH: I think you're on 19.

MR. O'NEILL: I'm sorry, is it page 19? Page 79 of the testimony, but page 19 of the exhibit on the bottom.

MR. LYNCH: Okay.

THE WITNESS: Page 19.

MR. LYNCH: No, 79.

BY MR. O'NEILL:

Q Numbered 79 at the top of the page?

A Okay. I was on 85. I'm there.

Q Is that a statement you made to the House of

Representatives of the United States of America?

A I'm sure it is, but do you want me to read the whole thing?

Q Read it out loud.

A Mr. Coble: I was a little late in getting here and you may

[1583]

have already covered this. If so, I apologize for repeating it but I want to shift gears to the captain, and I want to recall –

Q Sir, I'm interested in the full paragraph that begins, "The facts are, though, that in terms of an alcoholic"?

A I'm sorry. The facts are, though, that in that in terms of an alcoholic, it's a disease that you never get over, as I understand it. They have to be watched closely o n follow up. A better plan – and it can be done within the same policy –

is to not give the person that job back, but give them a less stressful back job, give them a way to recover, and continue to work, but certainly not as a captain of a ship or airplane pilot, so forth, that's what you read to me.

Q Yes, it is.

Putting Captain Hazelwood back on the ship was a judgment that was made at the operating level, is that a correct statement?

A Yes.

Q Would it be fair to say that it was a bad judgment on a going-in basis?

A That sounds like something else I probably said in one of these things. Once again, I had information that was incorrect.

Q Let's see what you said.

A What page is that?

[1584]

Q I'm going to just show it to you.

(Videotape Played)

BY MR. O'NEILL:

Q Is that you? That was you?

A Looked a lot like me.

Q Yeah, it did. And you described it as a bad judgment in a lot of people's eyes on a going-in basis, yours being one of them, is that a correct statement?

A That's what I said.

Q Would it be fair to say, in addition, that it was a gross error?

A It was an error.

Q How about a gross error?

A My view at the time, I said it was an error. I don't know the word you use, but I tried to explain that I was wrong in all those statements.

Q There are a lot of them, aren't there?

A They certainly were, and they were all made within a couple weeks of that spill before I had any indication that – some of the things that I thought were facts were not, or certainly some of the tests I thought were valid were flawed, and that's about all I can tell you.

Q Let's see if we can explore the expression gross error for a minute.

(Videotape Played)

[1585]

BY MR. O'NEILL:

Q Your expression was "gross error". That was your expression?

A My definition of gross, of course, may be different than yours, but that's the word I used.

Q Let me offer a proposition to you. The proposition is the first drink the captain had after he had been rehabilitated was a basis for dismissal. That's the proposition. Do you agree with that proposition?

A Of course in the context of being on the job, or on the ship, that was basically what my intention was there.

Q Would you go to Exhibit 182, please. It's the Fortune Magazine article?

A 182?

Q Yes, sir.

A When you get to magazine articles that's a little different than going to the Federal Register where you have an opportunity to read it before they print it. This magazine article was a result of three people interviewing me over about two or three hours, and they took little snippets out of it and they put things in it and they didn't – a lot of them are not quotes. That was their interpretation of what I was saying at the time, you've seen that before and I've seen it before, but I'm here, I'm at this point.

Q And I want to go to the Fortune Magazine article, and I'm

[1586]

going to read the last paragraph and you can follow along and let's see if I can get it right.

A Page 3?

Q It's on the page with – this paragraph here.

A This last page 1?

Q Yeah.

A Thank you.

Q And this article purports to be an interview with you, isn't that right?

A There was an interview. Now, whether I said these words or not is something else.

Q We'll read the paragraph and then if you want to deny it you can deny it?

A No, the thrust of this paragraph is, I've read it, is what I generally said. I don't know whether I've used those words, go back in genesis, but there is no question there was bad judgment involved, and even putting a person with a critical skill back in that kind of work. I said that. Something like that. And whether or not these are my words are something else.

Q Now let's go to the first page of the article, and the paragraph in the bottom right-hand corner reads: Well, take the case of the captain of the ship. We can certainly minimize this type of thing from happening again. We've had a policy on alcohol abuse since 1977. The first drink the captain had

[1587]

after he had been rehabilitated was the basis for dismissal. Someone in management should have been notified and our policy would not have permitted this man back on the ship. Captain Joseph Hazelwood entered an Exxon drying out program in 1985.

Do you see that paragraph?

A This is the same 182?

Q Yes. Yes, sir. Bottom right-hand corner?

A Yeah, I see it.

Q Did you make those statements to the reporters from Fortune Magazine?

A I think in the context of drinking on the job, that policy was pretty clear. In the context of someone social drinking, not overdoing it, what we judge on in our company, and have forever, is employees are sort of continuously rated as to performance. I think everyone here that has a job and has a boss, you got the same kind of a thing. You just continuously make sure that people are capable of doing their job. If they are incapable or don't do it very well, you look for reasons they didn't do it. Now, as I understand it, that was the basis upon which Captain Hazelwood went back on the ship. After he got out of rehabilitation, he had taken the 90 day leave of absence. He came back to work. They put him on a ship, several ships transiting between the east coast of the U.S. and the gulf coast of the U.S. sometimes more than one stop, I presume. Monitored him closely then and continued to monitor

[1588]

him as to his job performance, and his job performance was satisfactory, and then they put him on this run from San Francisco, or thereabouts, to Valdez, and to my knowledge, to this day, he's been a satisfactory performer. In terms of the – I've learned a lot of things since then that says he wasn't drunk at that time.

Q Your next to the last sentence was, and to my knowledge to this day he has been a satisfactory performer. You just said that a minute ago?

A That's correct.

Q You fired him, didn't you?

A For breaking a couple of rules, yes. I was talking about in terms of the alcohol thing.

Q Well, let's talk for a minute. You testified before the Congress of the United States, before the House of Representatives, that Exxon had no reports of Captain Hazelwood drinking after his rehabilitation. Do you recall that testimony?

A I recall that, yes.

Q If there were reports of his drinking after rehabilitation, what should have been done?

A I don't know that there were. It's difficult for me to sit here and not being privy to all the information that management of Exxon Shipping Company had, and for to you give me hypothetical situations and me guess what the right answer is.

[1589]

I'm having trouble with that frankly, but I'm sure that's not your intention but that's the way it's coming across, and –

Q Sir, I'm trying to be fair, and I haven't cut you off and I'm not going to cut you off.

A No, I'm not concerned about that treatment.

Q Would it be fair to say that Captain Hazelwood's impairment created the spill to begin with and also created a situation where the master could have brought another officer to the bridge but he didn't?

A It's my understanding he wasn't impaired.

Q Did you make this statement to the Senate of the United States?

Let's take a look at Exhibit 71, page 49.

THE COURT: Does he have that one or are you calling it up?

THE WITNESS: You want me to look at it.

BY MR. O'NEILL:

Q We can put it up on the screen if you want to do it quicker.

A Which paragraph are you talking about.

Q Let me assume it. It's the one beginning now. Now, the same impairment apparently that created the spill to begin with, created a situation where the master could have brought another officer to the bridge.

Do you see that?

[1590]

A Yes, yes, I do.

Q I want to talk a little bit about this statement. The captain subsequently left the bridge and tests made sometime after the grounding showed the captain's alcohol level was above the limits set by the Coast Guard. That is clear. Did you make that statement to the Senate?

A Yes, I did. Or to the House or both, I'm not sure which.

Q Had you also made that statement to Exxon's employees in an employee information circular at or after the time of the grounding?

A I may have. I made it everywhere – apparently, I said everybody that would listen to me, I said that was true.

Q We can agree as we stand here right now though that at a minimum Captain Hazelwood was terminated because he wasn't on the bridge and he consumed alcohol within four hours of boarding the ship?

A That's my understanding, yes.

* * *

[1609]

DIRECT EXAMINATION OF JERRY ASPLAND
(video)

BY VIDEO EXAMINER:

Q Good morning, Mr. Aspland?

A Good morning.

Q Could you start by telling us your current – how you're currently employed?

A Yes. I am president of ARCO Marine, Incorporated.

Q How long have you held that position?

A I've got this job in December 1st, 1985. Excuse me, September 1st, 1985.

* * *

[1612]

Q Did ARCO Marine, when you were manager of the marine operations, have any policy with respect to alcoholism or substance abuse of its employees?

A Yes.

Q What was that policy?

A We had an employee assistance program in which people could volunteer if they had an abuse problem to go to assist them in helping them get over this abuse problem.

Q You were president or manager, rather, of ARCO Marine operations. Do you recall any circumstances where you had, under your authority, a captain who had a history of alcohol abuse?

A We had a number of cases of all kinds of employees in which we referred to the employee – the employee program. We had a captain who went into the program.

Q While you were manager?

A Yes.

Q How do you know that he went in the program?

A I know because, as part of his rehabilitation, or assistance to help himself, he volunteered himself to do that.

Q Was this employee relieved or put on a leave of absence, or his position reduced in any fashion so that he was not piloting a vessel while he was receiving help for his alcohol problem?

A This person was relieved of their duties.

Q Who made the decision to do that?

[1613]

A Captain Charles Lynch, then president of ARCO Marine.

Q Were you involved at all in that decision making process?

A Yes, I was.

Q Did you concur in relieving the captain of his duties?

A Yes, I did.

Q Why was that?

A Because I felt at the time that the captain needed assistance for his illness and that it would be in everyone's best interest that he not sail as master for the time being.

Q Did there come a point in time when the captain was put back on normal duty?

A Yes, there was.

Q Were you involved at all, Mr. Aspland, in the decision with respect to whether or not that captain should be put back on active duty?

A He never left active duty.

Q Maybe I'm using the terminology wrong, but you mentioned that he was relieved of duty as being a captain or pilot, is that correct?

A That's correct.

Q And he – at some point resumed his capacity as a pilot or captain; is that correct?

A That's correct.

Q Were you involved in the decision to allow him to do so?

A Yes, I was.

[1614]

Q And how did you reach the decision that it was now prudent for him to do so?

A Reviewing his performance and discussing with the medical department, we determined that this person was capable of resuming their duties.

Q Reviewing his performance. You're talking about in the program he was in, the assistance program?

A No. This captain was assigned as chief officer.

Q So in other words, you were able to observe his performance as chief officer, and that was part of the decision-making that caused you to conclude it was now prudent for him to go back to captain?

A That's correct.

Q Did ARCO Marine institute any follow-up procedures after the captain had been put back in his position as captain, to determine whether or not his alcohol problem was recurring?

A Yes, we did.

Q Can you describe that procedure for us, please?

A In this case our procedure was to closely monitor this captain's behavior, and review his performance as a captain as he finished his tours.

Q Let me ask you a few questions about that answer.

When you say "closely monitor this captain", how did you accomplish that?

A Through face to face discussions, through discussions with

[1615]

those aboard the vessels.

Q Did you yourself have discussions with persons on the vessels with respect to the captain?

A Yes, I did.

Q What – can you describe for us what form these discussions generally would take?

A They would generally center around how the vessel was run, what the behavior of the captain was, how people were performing their responsibilities under him.

Q Did you generally try to do this after each tour, or how often?

A There was no set time that we did it.

Q Did you do it more than once?

A Yes, we did.

Q Do you know how many times you did it before you stopped?

A Never stopped.

Q You've been monitoring his performance in this regard ever since this incident arose?

VIDEO ATTORNEY: When you say this incident arose, you mean ever since he returned to his position as master of the vessel?

Q Yes.

A Yes, the master is no longer employed. We continually monitored until he left, and he left last year.

VIDEO ATTORNEY: What he wants to know is what was the

[1616]

period of time from the time he went back as a master until the time he went back in terms of years or months?

A Approximately he returned to be master in 1986 and he finished last year.

Q Was he fired by the company?

A No, sir.

* * *

[1619]

DIRECT EXAMINATION OF FRANK IAROSSI
(video)

BY VIDEO EXAMINER:

* * *

[1621]

Q What was the last position you held with Exxon?

A I was president of Exxon Shipping Company. As I recall that position began in April of 1982.

Q So in April of 1982 you became the general manager of Exxon USA's marine department?

A Yes.

Q And then in July of 1982 you became president of now activated Exxon Shipping Company?

A Yes, sir.

Q And am I correct that that was the marine department of Exxon USA became Exxon Shipping Company?

A Yes.

Q Was one of the reasons that Exxon Shipping corporation was activated was due to tax benefits to Exxon Corporation?

A Yeah, there were a number of factors, I would say both tangible and intangible. Tangible benefits was that it changed the legal structure of the marine transportation activity – U.S. flag marine transportation activities of Exxon. The intangible benefits were that it allowed us to move from a, what I would say a cost center focus to a P&L center focus, profit and loss center focus, and allowed the people within the shipping company to exercise more latitude and direction in

[1622]

optimizing the marine transportation for Exxon USA.

Q Mr. Iarossi, while you were president of Exxon Shipping – strike that.

Prior to Exxon Shipping being activated, was the primary purpose of the marine department of Exxon USA to transport petroleum products for Exxon USA?

A Yes.

Q And after Exxon Shipping Company was activated, did that remain the main purpose of Exxon Shipping Company?

A The main purpose, yes.

Q Other than board of directors being established for Exxon Shipping Company, was the executive structure of Exxon Shipping Company the same as its predecessor, the marine department of Exxon USA?

A I believe the basic management structure of the shipping company in its day-to-day operations was essentially the same as the marine department.

Q Is it correct that prior to 1989 none of Exxon's alcohol policies made any provision for ensuring that employees in safety sensitive positions were evaluated or monitored after treatment?

A The written policy itself I do not believe had any stated provisions.

Q And a tanker master, a tanker captain would be a safety sensitive position, is that correct?

A Yes.

[1623]

Q Now, Exxon Shipping Company is in the business of transporting crude oil by sea?

A Crude oil, yes.

Q And other substances?

A Yes.

Q Substances which Exxon Shipping and Exxon USA were aware created a danger to the environment if released?

A We understood the nature of crude oil, yes.

Q Exxon Shipping and Exxon USA were aware that a master of a tanker where the master had an alcohol abuse problem was a potential for a disaster to the environment?

A We understood the risks in the business, yes. We understood the responsibilities, yes.

Q Now, in 1985 Joseph Hazelwood was a master employed by Exxon, is that correct?

A Yes.

Q He voluntarily went for alcohol abuse treatment in 1985?

A Yes, we learned that subsequently.

Q Could you tell us how you learned of it?

A The then employee relations manager, may have been human resources manager, I don't recall when we changed the title of that department, but he informed me that he had wanted to talk to Hazelwood about some matter, and he was not able to because he was told that Hazelwood was under going treatment in Long

[1624]

Island. It was in-patient treatment. And that was some time in late May when he told me that.

Q Do you recall who that was?

A Ben Graves, G-R-A-V-E-S.

Q Did Mr. Graves tell you for what reason Mr. Hazelwood was an in-patient?

A I think he did. I believe he told me that it was alcohol treatment center.

Q Am I correct that when Mr. Hazelwood returned from his alcohol treatment and reported back to Exxon Shipping for duty, you personally did not want him returned to his position as a tanker master, is that correct?

A My first reaction was that we should not return him to his vessel.

Q And the reason being?

A I felt that – I guess I was really angry with the guy. But I felt that that was not the appropriate thing to do. My first reaction.

Q And were one of your concerns safety?

A Yes.

Q Am I correct that in fact Mr. Hazelwood, or Captain Hazelwood, was returned to his position as a tanker master?

A Yeah, subsequent to my initial reaction. Ben Graves and I had a long discussion about what the policy provided in terms of employee rights, what the risks were in either returning him

[1625]

or not returning him, and in particular the need within the shipping company since we do not have continuous access to people like masters – the overwhelming need to encourage voluntary identification. And the risks that we would incur, if we denied Captain Hazelwood his job back, what that would do as far as the whole future identification program.

And I think we both knew that there were risks on both sides. There was no easy answer. If we did not accord Captain Hazelwood his rights around the policy – in fact, I remember Ben Graves saying to me while we had this discussion, he said Frank, you know what will happen if we do not give Joe his job back. I said yes, that will be the last time we have anybody volunteer for rehabilitation. And clearly after reviewing all the facts and the risks on both sides, I agreed that we would return Joe back to the fleet, but we would have to monitor his performance quite closely, but even before we sent him to a ship to make sure we were comfortable with his disposition, and also during the subsequent periods following his return to the ship.

Q Now, you stated that you weighed the risks of returning him versus the risks of not returning him?

A I viewed it as a question that had no correct answer. We had risks on both sides.

Q Now, what were the risks of returning him?

A We had to make sure that he in fact was remaining clean or

[1626]

not using alcohol.

Q And the risks of his using alcohol were what? What were the risks if he continued to use alcohol?

A Well, the risks if he continued to use alcohol was that it brought in the question whether he could discharge his responsibilities.

Q And it brought in the question of safety of the vessel?

A Yes.

* * *

not using alcohol.

Q And the risks of his using alcohol were what? What were the risks if he continued to use alcohol?

A Well, the risks if he continued to use alcohol was that it brought in the question whether he could discharge his responsibilities.

Q And it brought in the question of safety of the vessel?

A Yes.

Q And the risks of not returning him were that it would be a signal to others who might have a problem not to seek help on their own; is that correct?

A We didn't know how many future Hazelwoods there would be, and our concern was that if we backed away from the policy, we would never see self identification of any of the potential other risks that might be out there.

Q Did you know how many other Hazelwoods you had at that time?

A No. We had discussions about whether we knew or had any reason to believe we had others. We recognized right away it was kind of a useless question, because we didn't know about Hazelwood before the event either as managers. So we recognized the fact that we could not identify risks, didn't mean that they didn't exist.

Q Again, you're using the pronoun we. Who did that include?

A Myself, Ben Graves, John Tompkins, who was a ship group

[1627]

manager, Paul Revere, who was the operations vice president.

* * *

[1628]

Q Do you know whether or not Captain Hazelwood was in fact evaluated by the Exxon USA medical department after Captain

[1629]

Hazelwood returned from his alcohol rehabilitation treatment?

A I don't know what review was carried out.

Q From the time Captain Hazelwood returned, which was some time in 1985?

A Yes, August, I believe.

Q From the time he returned, and up to the time of the Exxon Valdez grounding and oil spill, did you, as president of Exxon Shipping Company, receive any report from the Exxon USA medical department evaluating Captain Hazelwood's condition?

A I personally did not.

Q Are you aware of anyone within Exxon Shipping Company who received such a report?

A It would have probably gone to the E HAP coordinator, which would have been Ben Graves.

Q So you personally, as president of Exxon Shipping, never received a report from the Exxon USA medical department relating to Captain Hazelwood?

A No.

Q Is that correct?

A That's correct. No, I did not.

Q Apart from receiving a report, did you personally have any discussions with Exxon USA's medical department relating to Mr. Hazelwood, Captain Hazelwood, from the time he returned from his rehabilitation until the time of the grounding and the oil spill of the Exxon Valdez?

A About Captain Hazelwood in particular?

Q About Captain Hazelwood?

A No.

Q Subsequent to the grounding and oil spill from the Exxon Valdez you had a discussion with a medical director of Exxon USA?

A Yes.

Q Did that discussion relate in any way to Captain Hazelwood, specifically?

A No.

Q Did that discussion relate to Captain Hazelwood's condition as of March 23 or 24 of 1989?

A No.

Q Am I correct that was the first time you had had discussions with Exxon USA's medical department about a alcohol policy?

A In that relationship, yes. How it went to other companies, how it compared to other companies.

Q Had you had prior discussions with the Exxon USA medical department in any way as it related to the alcohol policy?

A No.

Q After Captain Hazelwood returned from his alcohol abuse rehabilitation treatment in 1985, were you aware of whether he met with the Exxon USA medical department?

A I don't know that he met with the medical department.

[1631]

Q In the alcohol policy of Exxon Shipping, was there any provision for how a crew member could report or should report a master who is drinking on duty?

A I don't believe there was.

Q Was there any kind of a hot line that was available to a crew member to somebody off of the ship?

A No, I believe they all knew the office numbers, but there was no specific hot line for that particular –

Q Is it correct that a master of a ship participates in the ranking of the deck officers?

A Yes.

Q And how about the ranking of the crew members, the non-officer crew members?

A Probably the deck department member, but I don't believe he takes part in the engine department.

Q Did you ever receive a report from Mr. Graves, a written report, allegations?

A Yeah, he gave me a two-page – sent me a two-page memo very late in May, and then he asked for a meeting to discuss it further, and we had that meeting within a couple days of receiving his memo.

* * *

[1639]

Q Did Harvey Borgen personally monitor Hazelwood?

A Yes.

Q And did Dwight Koops personally monitor Hazelwood?

A Yes.

Q Did you meet at all with either Captain Sheehy or Captain Martineau or Paul Myers with respect to Hazelwood?

A No.

Q Now, to your knowledge what training did any of those gentlemen have with respect to monitoring a person who had been

[1640]

rehabilitated from alcohol abuse?

A Formal training I do not know.

Q Do you know whether or not they received training from any other health care professional?

A Dwight Koops confided early on that he had past experience with a member of his family who was an alcoholic. Now, whether he had formal training to help out in that circumstance, I do not know.

Q Were these gentlemen who monitored Captain Hazelwood, were they instructed to report anything to the Exxon USA medical department?

A I do not know. They were to report anything they knew to me. But I do not know if they had instructions from medical department.

Q Did you instruct them to report anything to the medical department?

A No.

Q The only reporting they did was to you?

A Yes. That I know of, yes.

Q And did you have any discussion – I think we went through this, but in this context did you have any discussions with the Exxon USA medical department with respect to the monitoring by these gentlemen of Captain Hazelwood?

A No.

Q Am I also correct that there was no one on board the Exxon

[1641]

Valdez who was instructed to monitor Captain Hazelwood while he was away from port?

A No.

Q Is it your testimony today that neither Mr. Koops, nor Captain Sheehy nor Mr. Borgen nor Mr. Myers nor Captain Martineau ever advised you that they knew that Hazelwood, Captain Hazelwood, was drinking alcohol after his rehabilitation?

A I was never advised by anyone.

Q Did those gentlemen ever advised you that it was reports to them by others that Captain Hazelwood had been drinking on board?

A No. They never advised me of anything other than positive situation, that there was no signs is what they reported.

Q Captain Hazelwood was terminated by Exxon Shipping; is that correct?

A Yes.

Q Whose decision was that?

A Mine.

Q Mark as exhibit –

VIDEO ATTORNEY: 26792.

Q – 26892 a one-page document on Exxon Shipping Company letterhead dated March 30th, 1989 entitled for immediate release, Exxon Shipping terminates captain of Exxon Valdez. And is this a press release issued by Exxon Shipping Company?

[1642]

A Yes.

Q And are you the author of this press release?

A No.

Q Was it prepared by – by whom was it prepared?

A I don't know. It originated in Houston, but I do not know by whom.

Q It states that –

A I did approve it, by the way.

Q You saw it and approved it?

A Yes.

Q So I take it that all matters attributed to you were accurate as far as you were concerned?

A I didn't object to the wording.

Q This states that he was terminated because he violated company policy concerning alcohol?

A That's what it says.

Q Is that correct?

A No.

Q That's not correct?

A No.

Q But you approved this?

A Yes.

Q Why was he terminated?

A When I arrived in Valdez Friday night I spoke, before I went to the press conference, I had an opportunity to meet with

[1643]

Captain Deppe and Paul Myers. At that time for the first time they told me that Captain Hazelwood was not on the bridge at the time of the accident. That was in direct violation to our company policy. At that point I ordered that Captain Hazelwood be relieved of his duties on the ship, that Captain Deppe take over as master of the Exxon Valdez. That Bob Nicholas go to the ship and accompany Captain Hazelwood back to Valdez because I wanted to interview him myself to determine whether he had any defense for not being on the bridge. That was just a courtesy prior to dismissing him. I never did get the opportunity to meet with him.

Q Did anyone on behalf of Exxon meet with Captain Hazelwood?

A Attorneys did, yes.

Q Why did you approve this press release assaying he was terminated because he violated company policy concerning alcohol when your testimony today is that he was terminated for not being on the bridge at the time of the accident as violating company policy?

A I was shown the press release in the middle of the control room on Tuesday morning, and my comment was, well, it's as good as any, go ahead.

Q Are you aware that this was a statement that would receive a great deal of publicity nationwide?

A I was aware of the fact that it was day five of which I had probably an hour or two sleep each day. At this particular

[1644]

point in time this was the least of my problems.

Q What you're saying is that you were harried at this time, correct?

A Yes, and of all the things I needed to do at that point in time, at the time this was the least important to worry about how we got this wording right.

Q Prior to preparing this press release were you advised of whether or not Hazelwood had a defense as to why he was not on the bridge at the time of the accident?

A I had subsequently learned that other members of the crew confirmed that was not on the bridge. The first word I heard about it was Hazelwood's words to Myers. I subsequently heard from the investigators and other crew members confirmed that.

Q What were Hazelwood's words to Myer?

A That he was – as Myer relayed them to me, Myers told me that Hazelwood told him that it was all his fault that he was not on the bridge, and that he was in his cabin at the time of the incident.

Q Did Mr. Myers record that statement on paper?

A It was a telephone conversation from Paul Myers to Hazelwood on the ship. I subsequently learned from counsel that Captain Hazelwood also told counsel that he was not on the bridge.

Q Did Myers write you a memorandum of that conversation?

A No.

[1645]

Q You say that that statement was subsequently confirmed by in the crew?

A My understanding was yes.

Q When an employee or officer is terminated, is it the normal process to have some document placed in the file, in the personnel file of that –

A Yes.

Q – terminated officer?

A Yes. Usually there is a personnel board that meets before I make my recommendation.

Q That was not done in the case of Captain Hazelwood?

A No, and I don't think there is any procedure that requires that, but usually that's what we do.

* * *

[1647]

Q From the time that Captain Hazelwood went through his

[1648]

program to the time of the incident, did you yourself ever meet with Captain Hazelwood and ask him about his fitness for duty?

A I met with him on probably two and perhaps three occasions, all during the time of the ship group managers meetings.

Q Did you ask him whether he was drinking?

A Directly, no.

Q Would it be fair to say that to your knowledge there is not a single piece of paper in the files of Exxon Shipping Company that reflect the monitoring activity?

A If there is I don't know of any.

Q Would it be fair to say that to your knowledge there are no reports that were generated by Exxon Shipping Company to Exxon USA that reflect the monitoring?

A To my knowledge there are none.

Q So we have no paper trail at all with regard to what monitoring occurred?

A That's true.

Q From 1983 through the time of the incident, is there any paper in Exxon Shipping Company, any pieces of paper that you're aware of, that are evaluations of Captain Hazelwood? What paper is there from '83 to the time of the incident?

A There should be performance appraisals by the ship group managers, assuming they were done on a two-year cycle.

Q At the time you made the decision to reinstate Captain

Hazelwood to duty, you didn't know yourself what the events

[1649]

were that led to his disclosure that he underwent treatment?

A I do not know the specific sequence of events that led to Graves' knowledge, and I don't know what the medical department knew of him.

Q And that was the state of your knowledge with regard to his disclosure at the time you decided to reinstate him to duty?

A At the time he came through the second phase of his rehabilitation and was reinstated. I did not reinstate him.

Q Who reinstated him?

A It probably was the employee relations department.

Q Of Exxon Shipping corporation?

A Yes.

Q Did you get a chop on that?

A No, I found out he was back in the fleet about four weeks after he was back on duty.

Q Were you disturbed about that?

A Yes.

Q What did you do about it?

A I asked what steps we had taken before sending him back. I was told that he had been ordered to Houston where he met with John Tompkins and Bill Sheehy, and it was their decision that he had met the terms of the rehabilitation program, and in their view he was ready to go back to sea. I do not know what other steps they took, whether or not they had reviewed that with Ben Graves, but I found out about it by chance about four weeks after he was on board.

Q What did you do when you found out about the fact four

[1650]

weeks after that he was on board?

A I tried to find out who had – what the procedure was to get him on board and what the procedure was to then monitor him from then on. What procedures had been developed by Tompkins and later by Koops, and what steps that had they taken before returning him back to the fleet.

Q And with regard to his assignment to the Valdez, who made that decision?

A That was made between Harvey Borgen and Dwight Koops. I also found out about that after the fact.

Q Were you upset about that?

A Yes.

Q Why?

A Because I didn't understand – I knew that Dwight Koops was keeping a very close eye on him, and I didn't understand why we would want to change his assignment. Harvey explained to me all of his reasons, including – we started out by saying there was an opening on the Valdez because the prior master, I think his name was Bill Greig had left to become a San Francisco pilot. That there was a meeting of the port captains to determine who should fill that that spot, that their recommendation was the spot be filled by Hazelwood, that the division was reviewed by Koops and later Harvey Borgen. That

[1651]

the decisions to move Hazelwood to the Valdez were based on the fact, one, Hazelwood had more big ship experience going in and out of Valdez than any master we had. He was the first master in the entire fleet to receive his Prince William Sound pilotage certificate. That, and this is Borgen telling me, that Dwight Koops had told him, Borgen, that Joe was absolutely clean, and that there was no sign that the rehabilitation was being violated in any way.

Based on all of those, it was the recommendation of the two port captains that Hazelwood be transferred, and both Dwight and Harvey concurred with that and saw no need to tell me about it.

Q Did you have concern about the fact that Captain Hazelwood had had a history of some problem with alcohol?

A Well, that was the basis for my questioning Harvey in the first place.

Q Why would you be concerned about this assignment for Captain Hazelwood in light of his past problem with alcohol? It's an obvious question, but it's a question.

A Well, I just felt that we needed to exercise special care in where we put Joe, and to make sure that the monitoring process continued. I had confident that Dwight Koops had the situation well in hand, and I just wanted to make sure that Harvey knew he had to pick up that responsibility.

* * *

[1657]

Q Did you commit publicly at the press conference to be the one to first tell the public what went wrong?

A To the extent we found out, yes.

Q And did you believe that your commitment to the people at the press conference was to tell them the truth about what went wrong?

A To the extent we knew, yes.

Q And on March 30th you approved press release 2679 – which is Exhibit 26792. Would you read that?

A Yes.

Q Would you read it out loud for us?

A Exxon Shipping Company announced today that it has terminated the employment of Captain Joseph J. Hazelwood. The termination following announcement by government investigators that this employee had failed the blood alcohol test administered on the Exxon Valdez last Friday morning. Frank Iarossi, press of Exxon Shipping Company, said the decision to terminate the employee was made because he violated company policy concerning alcohol. We are all extremely disappointed and outraged that an officer in such a critical position would have jeopardized his ship, crew and the environment in such action. Our policy in this area are very clear as Iarossi explained.

* * *

[1659]

Q Now, from the date you found out about Captain Hazelwood and his treatment program to the date of the accident, is it fair to say that you never talked to Exxon USA medical about that subject?

A To my recollection I do not recall any conversations with the Exxon USA medical department.

Q And you had never seen his medical files?

A No. The medical files are confidential.

Q And you had never talked to him directly about any problems he may have had with regard to alcohol?

A Captain Hazelwood?

[1660]

Q That's right.

A I asked him how he was doing, how things were going, questions like that, but I never asked about. I never mentioned alcohol.

Q And you never looked into yourself the subject of recidivism rates for people that had alcohol problems?

A No.

Q And you never verified in any detail the extent of the monitoring that was going on with regard to Captain Hazelwood?

A I, on a number of occasions, asked Dwight Koops how Joe was going, and what he was seeing. I asked

Harvey Borgen on at least two occasions that I remember, three, three that I clearly remember discussing the subject with.

Q Did you ever ask him how long they monitored him?

A Yes.

Q What did they say?

A They said that they were attempting to get to Joe whenever they were able to, whenever he was in port.

Q Did you ever get a list of the dates that they monitored him?

A No.

Q Now, in the middle of 1985 with knowledge that Captain Hazelwood had some kind of alcohol problem, did you conduct any independent investigation to determine whether any employees of the company may have observed Captain Hazelwood consuming

[1661]

alcoholic beverages?

A No.

Q So as far as you were concerned the subject of any further investigation was over at that time, mid 1985?

A At the time that Graves spoke to Hazelwood, Hazelwood admitted that he had been drinking. There wasn't any need to go back for another investigation.

Q Was there any characterization put on this admission, that is, how much, or how long or where?

A I don't recall.

Q Was that admission to Mr. Graves reduced to writing, to your knowledge?

A If it was it would have been in the report, that memo report of late May. I don't know of any other place that would have been.

Q Now, at the time you returned Captain Hazelwood to service as a master, were there other options available to you, such as a desk job?

A The issue was if Captain Hazelwood requested his job back, would we be obligated to give it to him. The answer was yes. If Captain Hazelwood asked for a desk job, we would have given him a desk job.

Q So as far as you know in this three or three-and-a-half year time period, the only one who talked to any crew members was Mr. Koops, and that would have been in the 1987 to 1989

[1662]

time frame?

VIDEO ATTORNEY: I think it would have been in the 1985 to 1987.

A No, it was 1985 to 1987. And, you know, I don't know who the others did. Koops is the only one who told me that he did.

Q During this period of time to your knowledge, there was no testing for Captain Hazelwood, is that correct?

A There was no alcohol blood testing for anybody.

Q These four people who were charged by you with observing Captain Hazelwood, to your knowledge they have no training in observing somebody in this condition, isn't that correct?

A Training, no, and I think I also in my answer told you that Dwight Koops told me that because of his certain family circumstances, he had a lot of knowledge about dealing with an alcoholic and spent some of his life having to deal with it.

So he explained to me that he knew and understood the circumstances because of certain circumstances in his family.

Q Did you have personnel in your human resources department or in the Exxon USA human resources department to – were able by professional training to do a monitoring program of this kind?

A I don't know.

Q Did you ever make such an inquiry?

A I did not ask.

Q You talked at some length yesterday about the investigation

[1663]

you did in 1985 regarding Mr. Hazelwood being in an alcohol rehabilitation, and I want to ask you some follow up questions Why did you want to monitor Captain Hazelwood after he came out of alcohol rehabilitation, sir?

A To ensure that the effects of the rehabilitation and the intent of the rehabilitation was in fact being followed through. I wanted to make sure that the rehabilitation was effective.

Q Were you concerned about potential risks if in fact the rehabilitation wasn't effective?

A The one time we really addressed the term risks, although we didn't define what risks were, we considered risks on both sides of the question of whether we lived up to his employee rights under the alcohol policy, or whether we denied him those rights under the policy, and we decided there were risks on both sides. There was no easy answer. That's the only time I recall, in my own mind risks.

Q What were the identified risks on the other side of the issue?

A That we didn't sit down and draw up any risks. I think the risk of having a master on board who was in any way using alcohol, we didn't sit down and define what the risks were.

Q And that risk that you just articulated could have posed a risk potentially of a collision, correct?

A It could have posed a lot of risks. Collision, yes.

[1664]

Q Grounding is another risk it could have posed?

A Yes.

Q It could have imposed or posed a risk of loss of judgment on the part of the captain if he was in fact impaired, is that correct?

A We did not sit down and enumerate risks.

Q As you sit here today, and as former president of Exxon Shipping Corporation, do you believe that those were risks that were –

A I think you could categorize them all in one phrase, and that is a risk that the captain did not discharge his duty as he should have.

Q Did you make any attempt to institute a program of random urinalysis with regard to the monitoring of Captain Hazelwood?

A No.

Q Did you institute any attempt to have Captain Hazelwood, after he was back on the ship, after alcohol rehabilitation, submit to either breathalyzer or blood alcohol tests?

A No.

Q Was it anything you even discussed, sir?

A I don't think it was in our right to expect that.

Q And what do you base that on, sir?

A I think there are certain prohibitions on what a company can impose on the privacy of an individual, of its employees. It was just not part what we did.

[1665]

Q So it's not something you even discussed?

A No, we didn't even discuss it.

Q And it's not something that entered into your calculus when you were talking about the monitoring program?

A No.

Q And you mentioned yesterday that Mr. Hazelwood was only monitored in court. When you were setting up this monitoring program, did it ever occur to you that Captain Hazelwood might try to hide alcohol use?

A We never discussed it.

Q I'm asking, notwithstanding the fact that you didn't discuss it, did it ever occur to you as the person who helped set up the monitoring program, that Captain Hazelwood –

A I was not the person who set up the monitoring program, I ordered the monitoring program be established.

Q The person who ordered that the monitoring program be established, did it ever occur to you that Captain Hazelwood might try to hide alcohol use to avoid detection?

A I stated that Captain Hazelwood's – Captain Hazelwood needed to be monitored. I did not place any bounds on it. I did not have any preconceived notion of what those boundaries were.

Q Is it fair to say that other than the conversations that you detailed to us, you did not supervise the monitoring?

A I was not a supervisor, I was a president of the company.

* * *

[1666]

DIRECT EXAMINATION OF WILLIAM DUNCAN (video)

BY VIDEO EXAMINER:

Q Sir, would you please state your full name for the record?

A William George Duncan.

Q Where do you presently reside, sir?

A 15118 Morning Pine Lane, M-o-r-n-i-n-g P-i-n-e L-a-n-e, Houston, Texas 77068.

Q Are you presently in the employ of Exxon Shipping Company?

A Yes, I am.

Q What is your present position, sir?

A Marine advisor.

Q How long have you been employed by Exxon Shipping Company?

A Since 1983.

* * *

[1676]

Q Are you familiar with a regulation that requires six hours of off duty in any 12 hours prior to taking charge of the navigational watch?

A I've read it. It was only since I came to Exxon Shipping Company.

Q Was there any procedure established within Exxon Shipping Company to make sure that was followed?

A I personally don't know if any, but that's part of the codes of the Federal Register, one of the duties of the masters is to do that, yeah.

Q But you're not aware of any procedure that was established by Exxon Shipping internally to come comply with that?

A I'm not aware of any.

Q Hazelwood leaving the bridge was in violation of the watch type that was present?

A That's correct.

Q And you would believe, wouldn't you, that his leaving the

[1677]

bridge at least was a contributing cause to this accident?

A Yes.

* * *

[1683]

Q I believe you stated earlier that watch type C was in effect when the ship ran aground?

A Correct.

Q And watch type C requires two officers to be on the deck?

A Correct, on the bridge.

Q On the bridge?

A Correct.

Q And there were not, is that correct?

A That's correct.

Q Why under watch type C do you have two officers on the bridge?

A Well, the primary reason for that is to guard against a one man error, so you have an opportunity to double-check, and also depends on the extent of – in this particular case where the ship was navigating through ice, there was some unusual circumstances which required the attention of more than one individual.

Q I'm sorry. One of the reasons is to guard against one man error. Is that what you said?

A Yes.

[1684]

Q And the one man you're referring to is the watch officer?

A Yes.

Q If you only have one –

A It's a double check.

Q Just to make sure, for example, there would be something else there to make sure that the rudder was moving?

A I wouldn't necessarily say that that would be a specific – maybe checking on a vessel position, maybe a number of different things to double-check on.

Q But that would be one?

A Could be one, could be one.

Q And Exhibit 27206, and again, I'll just show you my copy to make this easier for you. This is the document that you wrote to Mr. Woody, or at least you signed that went to Mr. Woody?

A Yes.

Q And I believe you testified twice that watch type C was in effect, correct?

A Yes.

Q And that's the position that Exxon Shipping Company indicated to Mr. Woody?

A Yes, leaving the terminal, yes.

Q Right. Well, it was in watch type C at the time of grounding?

A Yeah. But leaving the terminal it had already been set watch type C.

[1685]

Q But at the time it ran aground it was in watch C?

A Yes.

Q What's con mean?

A Con?

Q Yes, con.

A Whoever is in charge of navigating the vessel.

Q When Captain Hazelwood left the bridge did he give the con to Greg Cousins?

A As I understand, Captain Hazelwood gave instructions to Mr. Cousins, and he assumed the con.

Q Cousins did?

A Yes.

Q So Cousins was the watch officer?

A Yes.

Q At the time of the grounding?

A Yes.

Q As soon as Hazelwood left the bridge?

A Yes.

Q When Captain Hazelwood left the bridge, he violated Exxon Shipping Company policy?

A Yes, sir.

Q The master is – let me ask you. Is a master supposed to be on the bridge when the ship – his vessel is coming near hazards to navigation?

A Depends on what you define by coming near.

[1686]

Q How about going down the – in Prince William Sound past Bligh Reef?

A That's open ocean – sorry, open waters.

Q So you don't believe the master has to be on the bridge?

A Yes, the transit down would still require watch condition C, but there may be a situation that in the open waters of Prince William Sound south of Bligh Reef he may have a head call, or whatever. He can leave for a few minutes.

Q South of Bligh Reef?

A Yes, sir.

Q But not going past Bligh Reef?

A I would say that would be an area where, in confines, that's correct.

Q So between Rocky Point and until you pass Bligh Reef, the master should be on the bridge?

A In ideal situations, yes.

Q And Captain Hazelwood leaving the bridge between Rocky Point and Bligh Reef was a violation of Exxon Shipping Company policy?

A Correct.

Q And it was improper in your opinion?

A Yes.

* * *

[1690]

DIRECT EXAMINATION OF NATHAN CARR (read)

BY MS. WAGNER:

* * *

[1692]

Q How long were you on the Exxon Valdez?

A I was there from the maiden voyage, whatever that, December 6, of '86, I believe, until March of 1989.

Q Do you remember when in March of '89 you left the Valdez?

A Not specifically, no. I got relieved off that ship the week before the fateful voyage.

Q Are you aware of a requirement that when leaving a port a person should only be allowed deck watch if the individual had been off at least six hours within the preceding 12-hour period?

A Yes, I believe there was something along those lines, yes.

Q Did you see that implemented by the company during your time?

A No.

Q Do you have any idea if there was a procedure established to make sure that that requirement was upheld?

A Not to my knowledge, no.

[1693]

Q Were you aware of any instances where an individual was allowed to be on the deck standing watch without having been off duty at least six hours within the preceding 12 hours?

A Sure.

Q Was that a common occurrence?

A Yes.

Q Was that necessitated by anything in particular that you were aware of?

A Well, it was necessitated by the fact that you had to sail the ship, and if you had been pumping cargo all day and you were on watch, you went on watch.

Q Was there any effort made by the company to allow those people who were scheduled to stand watch duties to not be involved in loading the cargo and having duties during the day?

A No, that – no, no.

Q You could not do that?

A Couldn't do that.

Q Why couldn't you do that?

A Because you had to go in and stand your watch. You had to relieve the guy that was there, and you had to go and stand your watch. You had your hours to work and you did them. That's all.

Q Do you have any personal knowledge of Captain Hazelwood ever drinking alcohol on board a vessel?

A Yes.

Q Okay. Could you tell me about – first, let me ask you where that knowledge comes from?

A Well, we'll get right to the meat of it. The good captain and I had a beer or two in the Portland shipyard one time.

Q When was this?

A When we were in the yard? '88.

Q And this was on board the vessel?

[1694]

A Uh-huh.

Q Yes?

A Yes.

Q Do you recall how much Captain Hazelwood had to drink on that occasion?

A A beer or two.

Q And it was beer that he was drinking?

A Yes.

Q Where did the beer come from?

A It was mine.

* * *

[1695]

Q Was that the only occasion on board the vessel was where you had a drink with Captain Hazelwood?

A Yes.

Q Had you heard anything that he had had alcohol in his quarters?

A Yeah. You hear things, you know, but that's rumors.

Q Sure, and I understand that they are rumors, but I would like to at least hear about what rumors you heard about Captain Hazelwood having alcohol in his quarters. First, let me ask you, where did you hear these rumors? What people or persons?

[1696]

A I don't recall.

Q What was the substance of the rumor?

A Well, a rumor might be going around that the old man had a drink.

Q This would be during a voyage that someone might say that Captain Hazelwood had had a drink?

A Yes.

Q And you mentioned that you had some drinks with Captain Hazelwood in Long Beach?

A Yes.

Q Was that on more than one occasion?

A I believe it might have been one or two occasions over the years, yeah.

Q Was this at a bar that was in town?

A Yes, Yankee Whaler, ports of call, nice place.

Q The times that you drank with Captain Hazelwood, would he – do you recall what he was drinking?

A No.

Q Did he have more than one drink?

A He might have. You know, I wasn't paying any attention, you're not paying attention, no big deal.

Q When was it that you would have had these drinks with Captain Hazelwood in Long Beach?

A Sometime during those years.

Q Sometime between '88 and '89 probably?

[1697]

A '87, I believe, to '89, that two-year period.

Q Anybody else with you during the occasions that you drank with Captain Hazelwood in Long Beach?

A Well, probably, yes. There is crew members around sitting over there, sitting over there.

* * *

[1706]

THE CLERK: Thank you.

DIRECT EXAMINATION OF KATHERINE HAVEN
(read)

BY MS. WAGNER:

Q Would you state your full name for the record, ma'am?

A Katherine Rose Haven.

Q May I ask your date of birth?

A May 29th, 1961.

Q What is your current occupation?

A I'm a marine engineer.

Q And did you go to sea before you went to California Maritime Academy?

A Not deep sea, no.

Q And after going to the California Maritime Academy, will you tell me your employment experience?

[1707]

A I was hired by Exxon. I sailed exclusively for Exxon. I quit Exxon in April of last year. I worked on a fishing vessel in Alaska for one month, and I most recently worked on a U.S. flag ship out of the east coast operated by International Maritime Carriers, which I signed off of on April 3rd of this

month.

Q Showing you what has been marked as Exhibit 2, it is a copy of your license. Look at it, please. It shows you hold a second assistant engineers license, steam and motor?

A Yes.

Q And then you were recruited and hired by Exxon, you say in 1986. Do you recall approximately what month that was?

A Summer, summertime.

Q In the summer of '86. Will you tell me, as your recollection directs you, the vessels that you served on for Exxon?

A The Exxon Lexington, the Exxon Boston, the Exxon Princeton, the Exxon Valdez, the Exxon Baltimore, the Exxon New Orleans, and the Exxon Jamestown.

Q Were there any regularly held meetings that you were aware of where Exxon's policies about the use of controlled substance, including alcohol, were discussed?

A No.

Q Were you ever instructed by any Exxon supervisory personnel on what the policy of the Exxon Shipping Company was relative

[1708]

to the use of controlled substances, including alcohol?

A No, no.

Q Were you ever made aware, ma'am, or were you ever involved in the searching of any Exxon vessel you served on for contraband or for controlled substances, including alcohol?

A No.

Q Were you every made aware that your room had been – ever been searched for controlled substances?

A No.

Q Apart from receiving the material in the mail relative to the Exxon Company's policy on the possession of and use of, including alcohol, do you recall any other instruction, meetings that you had with any Exxon company officials, either aboard or ashore on that subject?

A No.

Q What date did you join the Exxon Valdez? September you said?

A September of '87.

Q Were you on her continuously? Tell me about your service on board that vessel.

A I was on, let's see, I was on her continuously, I think, except for a week, for a week they sent me as an oiler for the Exxon Baltimore and then I came back to the Valdez.

Q Ms. Haven, in the time that you spent on board the Exxon Valdez, did you ever see any liquor on the vessel?

[1709]

A Yes.

Q Tell me about the occasions you saw liquor aboard the vessel.

A I don't remember a specific occasion.

Q Did you ever bring liquor aboard a vessel?

A No.

Q Do you use liquor?

A In my daily life?

Q Yes. Do you drink?

A Yes.

Q Did you ever drink aboard the vessel?

A Yes.

Q Now in response to my earlier questions that I passed on, you indicated that you have seen liquor on board the Exxon vessels that you have served on. Let us go right through the vessels and you tell me what you recall.

When you first served on the Lexington, did you observe liquor on that vessel?

A I don't remember.

Q How about on the Boston?

A I don't remember.

Q How about on the Princeton?

A I don't remember.

Q And on the Valdez?

A Yes.

[1710]

Q Tell us what you recall about the liquor aboard the Valdez?

A It was there. I don't know, I never saw anybody bring it on board or induce it. I don't know whose it was.

Q Where was it? Where did you see it?

A In different people's rooms.

Q I see. When you say different people, more than one occasion and more than one room?

A Yes.

Q Can you remember any specifically where you saw the liquor, Ms. Haven?

A In, let's see, one, two, three, at least three different rooms.

Q Can you tell me in whose quarters you saw that liquor?

A The first assistant, the second assistant and the captain's.

Q Approximately when did you see the first assistant's with liquor in his room?

A I don't know exactly, I just know there were parties.

Q There were parties?

A Yes.

Q Did you see them drinking?

A Yes.

Q On board while at sea?

A Yes.

Q You said you saw it in the chief engineers room, that's Mr.

[1711]

Glowacki?

A No, I didn't see –

Q I thought you said the first –

A The first, the second and the captain.

Q And the captain, all right. The second – the first assistant was Mr. Jones?

A Yes, on that particular trip.

Q And the second was?

A Graham Oldham.

Q Oldham. When did you see liquor in the master's room, Joe Hazelwood?

A Previous trips.

Q On previous trips?

A Yes.

Q Did you see Captain Hazelwood consume alcohol on previous trips?

A Yes.

Q On board the vessel?

A Yes.

Q While at sea?

A Yes.

Q Now, can you be more specific on any of the occasions? You said parties. Were there ever any parties on board that you observed on the Valdez?

A Yes. I can't be specific.

[1712]

Q Well, generally?

A Generally, yes.

Q And who was attendees at these parties?

A Most of the people on the ship. I don't know exactly.

Q Can you be more specific, if you can. If you can't, I understand, but more specific in time and place?

A No, I have no specific memory.

Q All right, do you have any recollection what kind of liquor it was you witnessed the shipmaster or Captain Hazelwood –

A Various types.

Q At various times, I take it?

A Yes.

* * *

[1791]

DIRECT EXAMINATION OF DR. DAVID SMITH

[1792]

BY MR. MONTAGUE:

* * *

[1792]

Q Thank you. And could you tell us now what your current present – your current professional positions are?

A I am the medical director of the Haight Ashbury free clinics in San Francisco which is a community-based health care and drug abuse treatment facility. I am research director at Merritt-Peralta chemical dependency recovery hospital and I am an associate clinical processor of occupational medicine and
[1793]

clinical toxicology at UC San Francisco.

* * *

[1810]

Q I'm sorry, five or ten percent. In the cases that included both alcohol testing and drug abuse testing, were you required as a medical review officer to reach a conclusion as to the reliability of the chain of custody leading up to the actual testing?

A Yes.

Q And have you done that in this case?

A Yes.

Q And what is your conclusion?

A In my opinion, this chain of custody is intact. All

procedures were properly followed. There was no, what we call a fatal flaw, which would be a reason to reject a specimen, and this is a reliable specimen that can be acted upon.

Q Is the fact that the seals around the tube were intact on the Hazelwood tubes, does that have a significance to you in reaching your result?

[1811]

A Yes. The most critical element is that the integrity of the specimen must be intact. There can be other issues, but these relative evaluations of chain of custody are considered relatively minor in relationship to what we call fatal flaw.

If the integrity of the specimen is intact, the evidence seal is intact, it's properly initialed, then this meets the chain of custody standards and is a specimen that I not only do, but must judge reliable. If I rejected this specimen, I would be medically negligent and subject to legal action.

Q Have you ever heard of the term no test report?

A Yes.

Q What is that?

A What happens is that the laboratory received a specimen and determines that there has been a fatal flaw, the evidence seal has been violated, the integrity of the specimen has been invaded, and again that's the seal over the tube that has the blood in it. That's the critical one. That, because the integrity of the specimen has been violated, there is the potential for tampering and they no test it, and what is reported to the medical review officer, depending on the reporting procedures. In the companies that I work with, no test is reported to the medical review officer, and we take clinical action. For example, we may increase the frequency of testing, have the individuals see the employee counselor, something of this nature, because it's usually the employee

[1812]

that tampers with the specimen, but I cannot act on a no test by any procedure. I can have a clinical response to a no test, but not a legal or regulatory response.

Q Okay. And if there was any evidence of tampering at all with the seal around the tube, would you expect to receive a no test from the laboratory?

A Yes. The lab is required to no test the specimen, and then whatever reporting requirements are in effect, the regulations vary depending on the different specimens being tested. They're much stricter, for example, with the illicit drugs.

Q Okay. Now, there's been talk about red stoppers and gray stoppers, and the difference between what is supposed to be put in those tubes.

A Yes.

Q Am I correct one has serum and – the red stopper is supposed to have serum in it, and the gray stopper blood, whole blood?

A What happens is that in the gray stoppered tubes, they have a preservative and anticoagulant that prevents the blood from clotting. The red stoppered tube does not have the preservative and anticoagulant, and therefore it can clot, which is the red – the clot of the blood separates from the serum, and the serum is clear.

In general, the test is serum for the banned drugs, and they test the whole blood for alcohol. And the standards that

[1813]

are reported are whole blood standards. For example, if in the state of Alaska your drunk driving level is .08 or .10, then that is a whole blood standard.

The technician knows when they pick up the gray stoppered tube and look in it that it's whole blood and it hasn't separated into the clot with serum. The serum is a straw-colored liquid that's easily discernible when you pick up the tube.

Q And in fact, the difference between the serum and the whole blood is easily discernible. Is that another safeguard as far as you're concerned, that these tests were done?

A In a NIDA lab, skilled lab, they have done thousands of these specimens. They know what is appropriate procedure. And laboratory – if a technician picks up what's supposed to be a whole blood sample, they're going to see that is, in fact, serum, and then whatever reporting procedures are implemented would be implemented.

Q Now, I handed you earlier exhibit – was it 3797, I believe?

A Yes.

Q And that is the CompuChem test results?

A Yes.

Q Do you have – do you have an understanding of what time the blood samples were taken from Captain Hazelwood?

A Yes.

[1814]

Q And on what date?

A 10:50 a.m., March 24th, 1989?

Q Now, what does that – what does the test report from CompuChem show as to the blood alcohol concentration of Captain Hazelwood's, and the blood sample taken 10:50 a.m. on March 24, 1989?

A .061 percent.

Q May I borrow that, please, since we don't have a spare one, so I can put it on the machine?

Dr. Smith, I'm showing the first page of 3797. Is that the report that you were referring to?

A Yes.

Q Okay. And that is the report for Captain Hazelwood?

A Yes.

Q All right. Now, I would like to call your attention to the part under – where it says ethanol, parenthesis WV and then blood .061 percent. Do you see that?

A Yes.

Q Could you tell us what that represents – strike that. Let me ask you another question.

Does that indicate that at the time the – this blood sample was drawn, there was alcohol in the blood of Captain Hazelwood?

A Yes.

Q Okay. And what does that number at that point .061

[1815]

percent, mean?

A .061 percent weight by volume is the standard way a laboratory reports a specimen to, in this case, for purposes of our discussion, to the clinician, myself in this context, or whoever they report it to.

Q Okay. Now, this blood was, the blood sample was drawn at 10:50 a.m., and were you asked to make a determination as to what Captain Hazelwood's blood alcohol concentration was at a time earlier than 10:50 a.m. on March 24th, 1989?

A Yes.

Q And can you tell us what method or technique you use to do that?

A The method that I used is a technique called retrograde extrapolation, which is a standard clinical technique that is acceptable, for instance, particularly in terms of calculating what the level of blood alcohol is at some time prior to when the specimen was analyzed. The technique of retrograde extrapolation is part of our training as a medical review officer and is generally accepted by laboratories and clinics to answer certain questions that might be posed, whether it be in a company situation, which is where I work mostly, or a drunk driving situation. Things of that nature.

Q Okay. And that's an accepted method, methodology?

A Yes.

Q Okay. Now, were you asked to form an opinion as to what

[1816]

Captain Hazelwood's blood alcohol concentration was at or about the time of the grounding of the Exxon Valdez on – around midnight? I don't know whether it's midnight the 23rd or midnight the 24th, the evening, morning, midnight between the 23rd and the 24th?

A Yes.

Q Okay. And did you make any such calculation?

A Yes.

Q Could you just tell us the result of that calculation?

A Using the method of retrograde extrapolation and taking into consideration the variables that we were trained to include, my professional opinion is that his blood alcohol at the time of the grounding was .226.

Q That's 226 percent?

A Yes.

Q Okay.

A .226 percent weight by volume.

Q And did we ask you also to make a similar calculation for – for an earlier time?

A Yes.

Q And what time – and actually you selected the time?

A One hour earlier.

Q Okay. That would be 11:00 p.m.?

A Yes.

[1817]

Q On the 23rd of March?

A Yes.

Q Okay. And did you make such a calculation?

A Yes.

Q What was the result?

A Using the same method, taking into consideration the same variables, my opinion, my professional opinion is that the blood alcohol at the 11:00 p.m. area was approximately .241.

Q Okay. Now, could you tell us the significance of those numbers?

A Again, you have certain standards. For example, in the transportation industry for individuals that transport commercial vessels, other than recreational vehicles, recreational vessels, the acceptable level is .04, so this would be approximately six times the acceptable .04 level. Drunk driving in different states, it might be either .08 or .10, but this would be two-and-a-half times the drunk driving level.

Q Okay. To reach those numbers you used this retrograde extrapolation technique?

A Yes.

Q And can that – you've gone back approximately 11 or 12 hours; isn't that correct?

A Yes.

Q And is it possible – is it proper to use that retrograde extrapolation technique to go back so far?

[1818]

A Yes. You have to assume a number of variables, which I will present the variables that we assume in using retrograde extrapolation.

First of all, when alcohol gets into the body, it's absorbed into the gastrointestinal tract, into the blood stream, and then into, after an equilibrium throughout the body, it's absorbed into the brain. The brain is the target organ, because that's the organ that produces the intoxication and impairment.

Blood is the closest approximation that we can have of the brain level. So the focus is on blood, and in this case for each ounce of alcohol that the individual drinks, we use an average of .03 up. This absorption rate is influenced by a variety of factors. For example, if there's no food in the stomach – the stomach empties in about an hour – if there is food in the stomach, it might take up to four hours. So one of the key assumptions is that you have to select a time in which you believe all the alcohol has been absorbed from the stomach into the blood stream.

Retrograde extrapolation is a valid technique only when you're on the descending curve of the metabolism of alcohol. Alcohol elimination, and the way had alcohol is eliminated is it passes through the liver and the liver enzymes break it down and then it is excreted. And alcohol metabolism is a steady state elimination with the average elimination rate

being .015.

So in retrograde extrapolation we are trained and use an elimination of .015 on the descending curve. Therefore if I can have the screen, I can show how I made the calculation.

MR. MONTAGUE: Okay. Can we put the flag screen up and the stylus.

BY MR. MONTAGUE:

Q Before you do that, I would like to just ask you one question, though. You said you used the term, in order to do the retrograde extrapolation, you have to be on the down curve?

A Yes.

Q Does that mean that you can only go back up to the – up to the – you can only go back to the time where the alcohol level has already peaked?

A Yes.

Q You can't go past the peak time? Is that what you're saying?

A Correct. You have to make an assumption, and you can entertain different scenarios and assumptions, but when you're asked to render a professional opinion, you must select a particular assumption in order to give a response. And the assumption would be at the time you believe that all of the alcohol is absorbed into – from the stomach into the blood stream and you're on the descending curve of the elimination rate.

[1820]

Q Okay. Now, could you show the jury how you reach – how you reached the numbers .226 percent at midnight and .241 percent at 11:00 from the .061 percent that came out of the blood samples taken at 10:50 that following morning? Could you do that on the screen?

A Yes. Again, what you do is you take the hours times the elimination rate. You come up with a figure. And then you add the known level that you have from the test result, in this case .061. So if you have an 11 hour retrograde extrapolation, which is the first question that I was asked, it would be 11 times .015, equals 165. You add .061 and you come up with .226.

Q And that's the number for midnight?

A That's the 11 hour –

Q Okay. That's the midnight number?

A That is correct.

Q Okay. Now, could you do the same calculation for 11:00? A In the 11:00 it would be 12 times .015 equals 180. Add the .061, and you get a .241 at the 12 hour rate, which is the 11:00 p.m. time period.

Q Okay. And that's – those – that's the mathematical calculations of how you reached those figures?

A Yes.

MR. MONTAGUE: Could we get a printout of that, please?

[1821]

BY MR. MONTAGUE:

Q Now, in picking the 11:00 figure did you make any assumptions?

A Yes. As I've indicated, you need to make a – an assumption that best fits your perception of the information that you're provided. And the key assumption here is that you must assume that all of the alcohol has been absorbed from the stomach and that you're on the descending limb of the elimination curve. I made the assumption that all of the alcohol had been absorbed by 11:00 p.m. and that he was on the descending limb of the elimination curve.

Q Okay. And are you – by the way, is there any margin of error for those calculations?

A Yes. There is substantial biological variability in elimination rates, producing a substantial range. However, the figure of .015 is accepted and is part of our training, and the error rate would be plus or minus ten percent, so that with great reliability I can say this figure plus or minus ten percent in the sense that a majority of individuals will have an elimination rate, absorption rate, all the other variables that you have to consider, and that we're required to consider as part of our training and education in this area, so that a majority of individuals, the vast majority of individuals, would be within plus or minus ten percent of this figure.

There's a few that will scatter out on either side, either

[1822]

be higher or lower, but given the assumptions and the elimination rates and understanding of biological variables in absorption and metabolism, I believe this is a reliable figure plus or minus ten percent.

Q Okay. Now, let's get back to the original figure of .061. Did you – excuse me.

Did you see any other tests from any other labs that confirm that number for you?

MR. SANDERS: Your Honor, we're going to object to the other tests. No foundation.

MR. MONTAGUE: This is something relied on as an accurate period of time or I'll establish. I'm not offering it into evidence.

THE COURT: I'll allow you to proceed.

BY MR. MONTAGUE:

Q Are there any other tests that you viewed?

A Other lab –

Q Yes.

A Yes. The standard procedure, particularly if there's appeal or some forensic issue.

MR. SANDERS: I'll object to this as being

non-responsive, Your Honor.

THE COURT: Try the question again.

BY MR. MONTAGUE:

[1823]

Q Was there any other test results from another lab upon which you relied?

A Yes.

Q And what was that lab report?

A Center for Human Toxicology.

Q Do you recall what the result was that they had from their blood test?

A .06.

Q Okay. And was that consistent with what the CompuChem test was?

A Yes. The verifying lab, Center for Human Toxicology verified the CompuChem lab.

Q Okay. Now, Doctor, I want to ask you some questions strictly from a – I hope I'm using the right word – physiological point of view.

A Yes.

Q A medical point of view?

A Yes.

Q If a person has a blood alcohol concentration of, let's take the higher number, the 11:00, .241, do you have an opinion, again from a physiological point of view, as to whether that blood alcohol concentration would have impaired that person's cognitive functions?

A Yes.

Q Now that I've asked the question, can you tell the jury what cognitive functions are?

[1824]

A Cognitive functions are the higher cerebral cortex

functions that involve judgment analysis, ability to react to new situations.

Q Okay. Now, at that same level, the blood alcohol concentration of 0.241, is it possible, again from a physiologic point of view, that a person's motor controls would not be affected?

A Yes. An individual can have substantial tolerance to the motor effects of alcohol, but not the cognitive effects, and I would like to diagram this to better explain my presentation.

Q Okay. Before that's removed, has that been printed out? Okay.

A This is the blood which is the specimen that you're measuring with a blood alcohol concentration. As you have increasing blood alcohol, you will have increasing impairment because the brain is affected differently by an increasing blood alcohol. We call this progressive CNS depression.

At the lower levels, the higher thinking levels of the brain, this is a schematic representation of the brain. This is the cerebral cortex, which is the higher levels. Then this is the mid-brain which deals with more basic vegetative functions, and the spinal cord which deals with reflex action and the cerebellum that deals with coordination. So the initial impact of alcohol is on the cerebral cortex, or the higher thinking centers.

[1825]

As the blood alcohol level goes up, you then have progressive CNS depression of the mid-brain, which can produce a variety of different responses. It can produce, for example, a sensation of the vomiting center in the mid-brain, and the individual will vomit. This is actually a protective mechanism of the brain to rid the body of the toxic alcohol. You can produce motor impairment so that you can have an individual that has tolerance, impairment of cognitive function, which involves the judgment and the ability to analyze, without impairment of motor coordination.

There is substantial tolerance to this motor impairment. The tolerance is determined by genetic factors. There are certain individuals that have a past or family history of alcoholism that have what we call an inborn tolerance. They will take more of the drug without having impairment, and that will be demonstrated with the first drink.

Then there is pharmacological tolerance, which the individual repeatedly administers higher doses of the drug. There is a neuroadaptation that occurs in the brain and the body, and this is called pharmacological tolerance meaning that it requires more of a drug to achieve the same effect.

And finally there is behavioral tolerance, which is the experienced drinker, who will learn to moderate their behavior in part to escape detection so that they may be able to walk and function in a motor fashion at a level that to the

inexperienced drinker would produce great motor impairment. However, this tolerance does not occur to the cognitive or judgmental areas, and of course, if the blood alcohol goes high enough, you can actually die of acute alcohol poisoning. This is why we call it progressive CNS depression, of which the effects of the alcohol start at the higher centers. As blood alcohol goes up, the CNS depression goes down through the higher centers, down through the mid-brain and impairment goes up.

Q Doctor, during that discourse, you used the word sometimes drug instead of alcohol. Were you referring to the same, are they interchangeable?

A Alcohol is a drug.

* * *

[1834]

Q Let's fill in another time here. Let's fill in the time that the United States Coast Guard came onboard, and just to make it easy for me at least, let's say it was 3:45 approximately. And if you take that as seven hours, seven times .015, plus .061 comes up to .166. Does that sound right to you?

A Yes.

* * *

[1837]

Q Dr. Smith, we're going to leave it to the jury to determine from the testimony of Captain Hazelwood and the other information exactly whether he falls within one of your exceptions or not, but let me ask you specifically. Let's just

[1838]

assume a normal person, a normal person at .166 this morning of March the 24th, 1989, would be exhibiting those characteristics that you listed in your chapter in the book for the range of .100 to .199, correct?

A Yes.

Q And then at this level, that hypothetical normal person would be exhibiting nausea and vomiting, diplopia; is that right? Did I say it right?

A Yes.

Q Is that blurred or double vision?

A Blurred and double, same thing.

Q Both?

A Yeah.

Q As well as marked ataxia at this level?

A Yes.

Q Stumbling and staggering?

A Yes.

Q Now, you understand based on your review of the testimony that when the Coast Guard came aboard at this time that they were investigating the grounding? You understand that, do you not?

A Yes.

Q And you also understand that they had the power and the duty to remove Captain Hazelwood from the command of that ship if they saw grounds for it? You understand that?

[1839]

A Yes.

Q And you also know that when they made the decision they made not to remove him, they also were putting their lives or safety on the line when they did that. You understand that?

A I have no opinion on that.

Q Well, you do understand that they're more than casual observers there at 3:30 or 3:45 in the morning?

A My understanding, based on my review of the record, is that they have the authority to remove him. Why they didn't, I have no opinion on that. It's outside of my area of expertise.

* * *

[1872]

DIRECT EXAMINATION OF CHARLES HUNTER MONTGOMERY

BY MR. O'NEILL:

Q Sir, we've never met. My name is Brian O'Neill and I represent the fisherman and the Natives who are plaintiffs in this case. Just so we know who you are, you're the one that did the fitness determination for Captain Hazelwood in 1985, isn't that correct?

A I was involved in that decision, yes.

Q From '60 to – 1960 to 1992, you were employed by Exxon Corporation?

A That is correct.

Q And you were in the medical department of Exxon U.S.A.

A That's correct.

Q And would it be fair to say that Exxon Shipping Company didn't have its own medical department so Exxon Shipping Company had to use the medical department at Exxon U.S.A.

A I think that's basically correct.

* * *

[1879]

Q In 1985 with regard to Captain Hazelwood's medical records, let's take a specific example, would it be fair to say that Captain Hazelwood's medical records in 1985 were 12 years out of date?

A I don't know whether they were – you could say they were out of date. There had been no entries into his medical record in 12 years.

Q Thank you, sir. Now at the time someone, let's take a hypothetical, someone coming back from treatment, from alcohol treatment, was there a specific written policy at Exxon Corporation or Exxon U.S.A. or Exxon Shipping Company that

[1880]

required you to bring the individual in and talk to him about it?

A No.

Q Was there a specific written policy that required you to bring the individual in and examine him?

A No.

Q Was there a specific individual – was there a specific policy that required the medical department to play a rôle in, for example, whether he would be reassigned to a safety sensitive position?

A No.

Q What is a safety sensitive position?

A Well, in my opinion many of the positions, most of the positions really within Exxon, were safety sensitive.

Q Is a tanker captain a safety sensitive position?

A Yes, in my opinion.

Q But a tanker captain, the fellow who is in charge of a 125 million dollar supertanker has a lot of responsibility, doesn't he?

A Yes, sir.

Q Now, some time in 1985, someone from Exxon Shipping Company asked you for a clarification with regard to Hazelwood's need for treatment, that's a correct statement isn't it?

A That's correct.

Q And at some point in time you got what we referred to as the IDR, which is in front of you as Exhibit 10. Not in the volume, it's a clean sheet of paper up there.

A Correct.

Q You've seen the IDR before?

[1881]

A Yes, I have.

Q You saw it in 1985?

A Yes, I did.

Q And you studied it before your deposition?

A Yes.

Q And you studied it before coming in here today?

A Yes.

Q I want to go over the IDR if we could. Up on the top – this is an Exxon form, isn't it an Exxon Shipping Company form.

A Yes, sir.

Q And up on the top there's a check mark there that says Mr. Hazelwood was in a sea going position?

A Yes, it did.

Q Is that what it indicates? And then your initials are on the bottom of the IDR?

A That is correct.

Q And you got this IDR in May of 1985?

A That's correct.

Q And you read it?

A Yes.

Q And you called or have a faint recollection of calling a Doctor Vallury?

A That is correct.

Q And you had or may have had a five-minute telephone

[1882]

conversation with Doctor Vallury –

A That is correct.

Q – in May of 1985. And your recollection with regard to the telephone conversation is faint?

A The details of the call are faint, let's put it that way. I could not give any quotations from what I heard.

Q Now, with regard to the Vallury conversation, would it be fair to say that you didn't document it?

A Well, as you said, my initials are at the bottom of the sheet. I did not make a specific documentation, I must admit.

Q In point of fact, I think, I'm not arguing that you didn't call him or not his, phone call is on the bottom?

A Right.

Q My point is, with regard to what you and he talked about, there's no memo for the file?

A That is correct. We've been unable to find any memos.

Q And you've looked?

A And we've looked.

Q With regard to a specific written fitness for duty

determination, we can't find a memo or a fitness for duty determination either, can we, a written one?

A Not within the medical department.

Q So we have in the medical department the IDR, and a conversation with Doctor Vallury, and on the basis of the IDR and the one five-minute phone call for Doctor Vallury, you made

[1883]

a fitness determination?

A Let me rephrase that, if I may. Doctor Vallury made the fitness determination. I tended to agree with it, accepted it, but I felt it was his determination. I had not seen Hazelwood, I had not talked to Captain Hazelwood, I had to rely on his individual physician who had been treating him for at least a month, we know, in the hospital.

Q We'll talk about that.

A Okay.

Q But in point of fact, you had one five-minute phone call, and this piece of paper, and at least with regard to Exxon was concerned, you made the fitness determination. You were the person in Exxon to clear the fitness determination?

A That would be true.

Q And you're a medical doctor?

A That's right.

Q Now, let's talk for a minute about what the IDR told you about Captain Hazelwood. It told you that at some point in time he had or was going to have individual psychotherapy treatment?

A Right.

Q And he had or was going to have group therapy treatment?

A Uh-huh.

Q That's a correct statement?

A That's right.

[1884]

Q And he had or was going to have marital therapy. That's a correct statement?

A Right.

Q And there was a prescription for AA, Alcoholics Anonymous, that's a correct statement?

A That's correct.

Q And he was to either attend in the future or had attended lectures, seminars, workshops pertaining to alcoholism?

A Right.

Q You see that? And there was a diagnosis on it from the DSM that was 300.40 and 300.52, do you see that on the form?

A That's correct.

Q And the first is for dysthymia?

A That's right.

Q And with regard to dysthymia, that's a form of depression?

A It's a subtle mild depression, it's on a wave, comes and goes.

Q Comes and goes, but lasts a lifetime, doesn't it?

A It lasts pretty much a lifetime.

Q And episodic alcohol abuse is the only one –

A That's correct.

Q That's a correct statement. And on the bottom of the form you were advised Mr. Hazelwood will complete our 28 day program, do you see that?

A Yes.

[1885]

Q Are you aware of the fact that at least in the alcohol rehabilitation business a 28 day program is a term of art? There is such a thing as a 28 day program and people who are in the business refer to it as that?

A Yes, I would say that's correct.

Q And it's an alcohol rehabilitation program, isn't it.

A That's correct.

Q And it was recommended given the nature of his job that after discharge Mr. Hazelwood be given leave of absence to get involved with AA, and aftercare. And that recommendation was made on the IDR and –

A That's correct.

Q And you reviewed that recommendation?

A That's right.

Q And he was in fact given a 90-day leave of absence, that's a correct statement?

A To the best of my knowledge, that's correct.

Q And he wasn't paid during that leave of absence?

A I don't know.

Q Okay. Now, let's talk about the things that you may or may not have done with regard to the fitness for duty determination. Did you look at his job evaluations?

A No, they were not available to me.

Q Did you have an updated medical file on Captain Hazelwood?

A As I've indicated earlier, there had not been an entry in

[1886]

the file in 12 years.

Q Did you talk to Captain Hazelwood?

A No, I didn't.

Q Did you evaluate Captain Hazelwood?

A No, sir.

Q Did you allow for or direct an examination of Captain Hazelwood?

A Say that again.

Q Did you say to a bunch your colleagues or to an outside person, let's get an independent evaluation of Captain Hazelwood?

A No, I did not.

Q And indeed up to the time of your deposition, you'd never even met Captain Hazelwood?

A Not to my knowledge. I might have visited with him in a group meeting when captains might have come to Houston and I might have been invited, but I do not recall having met him.

Q Now, at the same time that the individual disability report was in your office, we have what we refer to as the Graves' report over at Exxon Shipping Company and you're aware of that, aren't you?

A I'm aware of it now. I was not aware of it at that time.

Q Okay. I understand that, and I'm not trying to trick you. My question was, that is over in your office, this is over at the shipping company?

[1887]

A Okay.

Q That's a fair statement, isn't it, you're aware of that?

A That would be true.

Q And in the Graves' report, there is a report that Mr. Hazelwood occasionally drank aboard ship and that he came back to the ship from port drunk on several occasions?

A That's what the exhibit says.

Q Would it be fair to say that in 1985, if you had known about the Graves' report, you would have had further misgivings with regard to Captain Hazelwood's fitness for duty determination?

MR. NEAL: Objection to the form of the question, Your Honor, further misgiving.

THE COURT: Change the wording around a little bit.

BY MR. O'NEILL:

Q Would you have – would it be fair to say you would have been concerned, more concerned about Captain Hazelwood's fitness duty determination, it was a relevant piece of information?

A Yes.

Q And putting the two together may very well have resulted in a different fitness determination?

A I guess that's possible.

Q In 1985 if an employee at Exxon Corporation was caught as opposed to self identifying with regard to alcohol, that was

[1888]

grounds for termination, wasn't it?

A I believe that's correct. I think the wording of the policy was that it was grounds for discipline up to and including termination.

Q But the policy draws a distinction between those who self identify, that come in and say, I have a problem, and those whom the company goes to and says, either we're investigating you or you have a problem, there's a distinction between the two?

A Right the distinction was there.

Q Did I state the distinction fairly?

A I think so.

Q Thank you. Now let's talk a little bit about Alcoholics Anonymous. In 1985, you knew that alcoholism was a disease, a continuing disease that like dysthymia, may last a lifetime?

A Yeah, may.

Q And you'd read literature, while you hadn't had any specialized training, you had read the literature, you were a medical doctor and you kept yourself up to date?

A Certainly tried to.

Q And you were aware of Alcoholics Anonymous?

A Yes.

Q And its successes with regard to the treatment of alcoholics?

A Yes.

Q And that those who attended Alcoholics Anonymous had a better chance of success than those who didn't?

A Yes.

Q And that Alcoholics Anonymous believed that people who have the problem of alcoholism or the disease of alcoholism should go to Alcoholics Anonymous for life?

A By large that's the belief of the organization.

Q And they shouldn't drink?

A They shouldn't drink.

Q And that family support was important to recovery?

A That's correct.

Q And at the time you made the fitness for duty determination, you knew it had recommended that Captain Hazelwood participate in Alcoholics Anonymous?

A That's right.

Q And you did not discuss with anybody at Exxon Shipping Company the recommendation that he participate in Alcoholics Anonymous?

A No, that would not be correct. I think I did.

Q Let me ask it this way. You didn't think that if Captain Hazelwood stopped going to AA that would have any impact whether or not he remained fit for duty?

A I don't recall saying that, but, actually I supported strongly the recommendation that he be given the leave of absence to attend AA I thought was my testimony.

[1890]

Q Okay. Let's go to page 447 of your deposition transcript.

Beginning at line 12, the question was: I'm sorry, you didn't think that if Captain Hazelwood stopped going to AA that that would have an impact on whether or not he remained fit for duty.

And your answer was: At that point in 1985 I didn't. That was not really the custom that was taking place nor that was carried out. Do you see that?

A Yes. I don't think that I felt that his continued attending AA was a criteria on which he would be judged as to whether he was fit for duty.

Q It was even worse than that, wasn't it. In point of fact, you knew in 1985 that because Captain Hazelwood was being reassigned to sea duty, that he couldn't attend AA?

A That was the reason I was supporting the leave of absence, was to allow him to opportunity to get an enhancement to the program he had received while in the hospital.

Q So he could go to AA for 90 days and then return to sea and not go to AA?

A Well –

Q Is that a correct statement?

A He would have had – he has leaves of absence, or leaves – paid leave I guess what I mean to say, after between sea duty. There might have been occasions when he arrived in port where he might have been able to attended AA, I do not know for

[1891]

sure. It would have depended on the port perhaps.

Q Have you ever made the statement that the nature of the occupation does not allow for AA? You made that statement in your deposition?

A I think that's in the deposition, yes.

Q That was a statement you made, the nature of the occupation does not allow for AA?

A If I may?

Q Did you make the statement?

A Yes, I made the statement.

Q And you knew that AA was part of his treatment plan?

A That's right.

Q And you knew that AA recommended that people go on a lifetime basis?

A That's correct.

Q And you knew that AA was part of recovery?

A That is correct.

Q Did you make any provision with Exxon Shipping Company to insure that Captain Hazelwood attended aftercare, other than the 90 day leave of absence?

A No, not other than the 90 day leave of absence.

Q Did you make any provision with Exxon Shipping Company to meet with Captain Hazelwood face-to-face and talk about his recovery, his AA, his aftercare?

A No, sir.

[1892]

Q That was what you did some years earlier when you had an employee that had a drinking problem, isn't it?

A That was done at that time at the request of management that I do so. I had no such request in this case.

Q It wasn't your problem, it wasn't your watch?

MR. NEAL: Objection, argumentative.

THE COURT: Sustained.

MR. O'NEILL: I will move on.

BY MR. O'NEILL:

Q Now would it be fair to say that in 1985 there was no good reason that you could think of not to give him a shoreside assignment so he'd have the opportunity to go to AA, isn't that right. You could not think of a good reason not to give him a shore side assignment? You want me to re-ask it so there aren't two negatives?

A Re-ask it so I don't get those nots in there.

Q Let me re-ask it.

Have you ever said, quote, there was no good reason not to give him a shoreside assignment.

MR. NEAL: What page.

THE WITNESS: I would say he could have been given a shoreside assignment, let's put it that way.

BY MR. O'NEILL:

Q Would you go to page 461 of your deposition transcript, and we'll go to line 24, and I'll read the question and answer,

[1893]

and if you could follow me and make sure I read the question and answer correctly.

A Wait a minute.

Q 461. It's in volume two. You got two volumes up here.

A Yeah.

Q Line 24 question, by Mr. Nolting: As you sit here today can you think of any good reason why Joe Hazelwood was not given a shoreside assignment in 1985 when he returned to work?

Your answer was: I don't know. You see that?

A Yes.

Q Now, after May of 1985, you had no discussions with anyone concerning drinking reports?

A You mean referrable to Captain Hazelwood?

Q Yes, sir.

A I don't recall any.

Q The medical department in fact had the power to yank somebody off of a ship, didn't they?

A I'm sure we had the authority, but whenever I had asked, you know, literally, but whenever I had suggested or recommended that someone be taken off the ship, they took – they were off the ship.

Q After you made the fitness determination in May of 1985, did you take any other further action with respect to Captain Hazelwood or this particular claim or situation?

A I don't recall that I did. And shortly thereafter,

[1894]

probably early '86, actually, I no longer had direct

responsibility for the shipping company, Doctor Nealy then took it on.

Q Okay, and would it be fair to say that other than the one conversation with Doctor Vallury that we talked about, you had no further conversations with Doctor Vallury?

A It's possible. I only recall the one.

Q And you were not aware of yourself with regard to Captain Hazelwood, the installation of any monitoring program, no one talked to you about it at that time?

A You mean referable to Hazelwood.

Q Hazelwood?

A No, I did not recall any.

Q And you didn't have any conversations from May of '85 thereon with regard to Exxon Shipping Company with regard to monitoring Hazelwood?

A I do not recall any.

Q And from May of '85 thereon until – was it Doctor Nealy took over in '86?

A I think it was early'86, I could be off a little.

Q Nobody from Exxon Shipping Company came to you with any reports of or rumors of Captain Hazelwood drinking?

A I do not recall any at all, no.

Q Now if there had been reports of drinking, such as ordering beer over a walkie-talkie, or that he was allegedly drunk or

[1895]

that he was loud or abusive and that had been reported to you, at a minimum you would have brought him in and evaluated him, is that a correct statement?

MR. NEAL: I'll object to that, Your Honor. If he's asking a hypothetical I object to mischaracterizing the

record. He's not –

MR. O'NEILL: If that resolves, the objection I will ask the hypothetical.

BY MR. O'NEILL:

Q Let's assume hypothetically that a port steward comes in and reports he's fallen off the wagon, he's drinking again, the cure didn't take, because of what the port steward says are drinking incidents. At a minimum hypothetically, you'd bring the man in and interview him and possibly evaluate him, wouldn't you?

A That's a possibility. Another possibility, under those circumstances, would be my judgment as to the nature of what I had heard. You made it sound fairly severe. If that was the case I think I would have gone back to someone in management who was aware of the problem, and called it to their attention, what I had heard.

Q How about calling the man in and talking to him and just getting his side of the story?

A That's a possibility I could have done.

[1896]

Q That's a decent thing to do?

A That's a decent thing to do. One of those two would probably have happened. But if I brought him in and it was as severe as you claim, I think I still would have wanted to talk to someone in management who was aware that this problem occurred.

Q The rumors may indicate a serious problem?

A That's correct.

Q Let's assume we had a second hypothetical situation in which a port steward comes in and says, I was on a launch with him, I was on a launch with him, and he was loud and abusive and smelled of alcohol, so now we have cumulative, a second situation, problem's more serious, isn't it?

A Yes, and I think the answer would probably be pretty much the same as on the first instance.

Q And let's throw a third instance on top of that to where you get a report that, A, management knows he's drinking again, and, B, he orders beer over a walkie-talkie from a company ship.

MR. NEAL: Objection unless it's a hypothetical.

MR. O'NEILL: Hypothetical.

THE WITNESS: I think in that instance we're talking about a violation of company policy and I would probably have called it to management's attention that I felt there had been a violation of company policy.

* * *

[1901]

A I, as best I can recall, remind you nine years later, and four years before this even came up, I think an individual in that section probably –.

Q Excuse me, let me put this up on the screen because this is only part of it, except for a little card. Would you flash that up here okay. Now –

A This form, as I say, came into shipping and then it's sent to medical. The medical department received the form on May the 14th, 1985, and following that stamp it was sent to me for review.

After that I believe that a woman by the name of Gabby Guerra, as best I can recall, was the one who called and asked me if I would call and talk to Doctor Vallury. I'm busy and that wasn't the prime thing one likes to have to do on the spur of the moment. I said, fine, I will, but I have some concern, because actually this form has more detail completed on it than I generally got on this type of form. And she explained to me

[1902]

that there was a special reason they had that I needed to make this call to Doctor Vallury.

If you look at the form it says, the beginning date of Captain Hazelwood's disability was April the first, which was the date he went in the hospital.

Q Okay.

A The form was completed on April the 16th at a time when he was still in the hospital. I was receiving the form a month later. I do not know why it was such a delay, I cannot answer that. The problem they had in that disability section revolved around the fit for duty status. The form indicates that Captain Hazelwood was not fit for duty. Well, obviously, on April the 16th he was not fit for duty, he was in the hospital. Okay.

There is a benefit plan arrangement with regard to leaves of absence, that one really cannot grant a leave of absence unless one is not disabled, or in other words is not – is fit for duty, so that this question needed to be resolved before they could grant the leave of absence.

Myself or anyone that I know of, at least in the shipping company, took no exception to the leave of absence because they needed to clarify this issue. They also wanted to know how he was doing, if I could get the information. So I placed a call to Doctor Vallury.

Q While we were on that, let me see if I can – you've got

[1903]

this form in front of you, right?

A Right.

Q And it's received on May the 14th?

A Right.

Q The date of the form is May 1?

A The date of the form is May 1. Where do you see that?

Q The date that he's entering the hospital.

A April 1.

Q I'm sorry. And he's to be there, you can tell by the writing, for 28 days, is that correct?

A That's correct.

Q The date that Doctor Vallury signed this form is April 16th?

A That's correct.

Q So when he signs this form and presumably sends it to Exxon Shipping Company, Captain Hazelwood is in the middle of his South Oak stay, is that correct?

A That would be correct.

Q However, by the time you get it on May 14, presumably he has completed that stay of 28 days?

A That's correct.

Q All right. Now, you're asked to call Doctor Vallury. You have this form in front of you. What do you do?

A I call Doctor Vallury and talk to him. I can't – you know, it's been a long time, but the gist of the conversation,

[1904]

the best I can recall it, is that he indicates that Captain Hazelwood had done well in the program, that he had entered it voluntarily of his own free will, that he had participated well in the program, he felt his outlook or his prognosis, if you want, was good, but that because of the nature of his job, meaning that he could not get to AA meetings, not attend the things that – the aftercare program that he wanted him to attend, that he had recommended that he take the leave of absence.

Q Now, at that time did he say – did he tell you that he was fit for sea duty?

A At that time we discussed the fit for duty, and he indicated to me that he was fit for duty. And I in turn then called back, I assume Gabby Guerra, as I'm not sure which person it might have been, and advised them that on the basis of that, that I agreed with that determination and that I recommended that he get the leave – they grant the leave of absence. And I remember this better than average, I guess, because when I did get to them, and I'm not sure of the exact time, how long it took to do this, but I think it was the latter part of May, when I got back to them.

Q To "them" you mean back to Exxon Shipping, Ms. Guerra?

A Back to Exxon Shipping. They'd already granted the leave of absence which sort of hacked me a little bit, which is why I remember this call as well as I do.

[1905]

Q All right. So then Doctor Vallury called you, as I

understand it, he says Captain Hazelwood is fit for duty?

A That's right.

Q But I recommend that he be given a leave of absence so that he can have the AA and aftercare, is that correct?

A That's correct.

Q All right. Did you understand that AA and aftercare was a condition to be fit for duty, or he was fit for duty but it was a recommendation that he continue that?

A I thought he was fit for duty and that it was a recommendation that he be given this leave of absence so that he could stay shoreside and get that AA and other aftercare.

Q Now, Doctor Montgomery, Mr. O'Neill kept saying you determined that he was fit for duty, that's that a fair statement, or did Doctor Vallury determine – his physician determine that he was fit for duty?

A His physician determined he was fit for duty, and I accepted that as adequate for Exxon's purposes to allow him to be declared fit for duty.

Q All right. And then you called Ms. Guerra of Exxon Shipping Company and told her that you – in effect, that his doctor says he's fit for duty his doctor recommends this leave of absence and you endorse that?

A That's right.

Q Doctor, Mr. O'Neill said that pulled up an Exhibit 160.

* * *

[1906] Q Doctor, Exxon Shipping Company employees, I suppose like all employees, are entitled to have their own doctor, correct?

A Encouraged.

Q Encouraged to have their own doctor. And the medical department is there for – to aid, but not as a substitute for

[1907]

their own doctors?

A That is correct.

Q All right. Is there anything – if a person – if an Exxon Shipping Company employee had some kind of medical problem and went to his doctor and then his doctor – you talked to his doctor and his personal doctor said he's fit for duty, would you be inclined to accept that?

A Yes, I would. Unless I saw some reason to really take exception to it. That was generally the accepted program.

* * *

[1909]

DIRECT EXAMINATION OF KENNETH D. GOULD

BY VIDEO EXAMINER:

Q You've stated your full name for the record already. It's Doctor Kenneth G. Gould, Junior?

A Correct.

Q Could you tell us where you presently reside?

A I currently reside in Houston, Texas.

Q Are you currently employed by Exxon Corporation?

A No. I'm employed by Exxon Company USA, which is a company of the Exxon Corporation.

Q In what capacity are you employed by Exxon Company USA?

A My current title is director of health services.

Q How long have you held that position?

A Since December 1st, 1985.

* * *

[1912]

Q Let me step back for a moment. What were the general ways that the medical department in 1985 may have learned about an employee coming out of a rehabilitation program for alcohol?

A I may have been confused earlier when I answered with regard to the three days that I said I thought the department might have learned about it when they went in. And because I'm not usually used to hearing about it at that point, but when they come out, and I may have misspoke in that regard –

but I think we said that the employee would tell us, we would get a note from the doctor or we might hear about it from management.

Q Are you referring now – you say – are you saying that that's the way you might learn about – are you saying that those are the three ways that the medical department might typically learn about an employee emerging from an alcohol rehabilitation program?

A Yes.

Q Are you saying that it's very possible that the medical department would not even learn about the fact that an employee had been admitted himself to a rehabilitation program until after he completed the program?

A Yes, and I'm not excluding the fact that we might not have learned about it at all.

Q Now, assuming an employee has been admitted to an alcohol

[1913]

rehabilitation program and has now emerged from the rehabilitation program and has been absent from work during that period of time and is returning to his place of employment, what procedure would the medical department undertake at that time?

A 1985?

Q Yes.

A The procedure is as previously described, when somebody is absent from work, his supervisor will send or give the absent employee the form for the absent employee to sign the release and for the doctor then to complete it and send it back. I told you about the ways we would learn about it. There's no other mysterious way I would know about it.

Q Would the medical department, in the instance of an employee who had undergone rehabilitation for alcohol, have conducted its own examination to ascertain whether that employee had successfully completed his alcohol rehabilitation before allowing him to return to his job in 1985?

A I think that the forms that we get are subscribed to by the physician, an M.D. Our general process, whether it's related to alcohol or a hernia or something else, is to take the word of the physician and his description of fitness to work. The one major exception to that is when we have someone who has seen a chiropractor, we may in fact refer people who have been treated by chiropractors for another opinion by a physician

[1914]

with an estimate of potential disability.

Q In 1985?

A Right.

Q Was it necessary that – that there be a determination of fitness for work before an employee who had undergone alcohol rehabilitation could return to his job?

A Not if the physician said he was fit to return to his position. You got to remember, we have five doctors essentially, reviewing all the absences for the company of 20,000-plus people. And we cannot see everybody who comes back for something.

Now, if management decides that they want to have that person further evaluated, they may contact the medical department and say, Please evaluate so and so for his fitness to work.

Q My question was literally, was there no requirement that the medical department itself make a determination of fitness before an employee who had been rehabilitated for alcoholism could return to his job?

A Not that I'm aware of.

Q One should look at that answer in the light of the fact that where we found out about it, through the process of an individual disability report or ER-5, that we would have on record a physician's signature which the physician said he was fit to return to work or not fit to return to work. And if the

[1915]

physician said that he was not fit to return to work and he shows up to work, then we might get involved.

Is that a clarification which helps?

A I suppose.

Q My question is, then –

A But see, management would know that at that time because they would have had their part of the form which the physician would say he's fit to work or not fit to work.

Q Where the medical department had received notice of an employee's determination of his fitness to return to work in the instance of his having completed alcohol rehabilitation, would the medical department ever speak to that employee's private physician about his determination?

A Unless there was some unusual facet, probably not.

Q My question is, simply, did the medical department

independently have a requirement about the level of detail that it would have wanted to receive or needed to receive in terms of that determination of fitness for work by that employee's private physician?

A I think practicing law or medicine or driving a bus or whatever you're doing, there's a certain degree of judgment which enters the picture. And if one lays down restrictive criteria or instructive criteria, one frequently misses the essence of the problem.

We try to stay alert to unusual situations, but there were

[1916]

no jot-and-tittle requirements on each and every person who comes back to work.

Again, I reiterate that if there was some unusual facet mentioned in the diagnosis or in the information we were given, we may or we may not choose to try to get in touch with a physician or get in touch with the employee and to clarify that depending on the judgment of the individual reviewing health practitioner.

Q In 1985 did the medical department consider that it was important in terms of successful rehabilitation of alcoholism employees that they receive counseling after their return to employment?

A I think as a general rule we would have felt that counseling would be wise after such a visit, but then you have to describe what you mean by counseling. In a certain celebrated case I recall that, you know, what is usually – what was usually the recommendation of – of rehabilitation programs was that someone participate after that rehabilitation in a 90-and-90, which is 90 visits to Alcoholics Anonymous chapter in the next 90 days in order to solidify the gains made with regard to the individual's thinking during the rehabilitation process.

I don't think anybody considered even in 1985 the rehabilitation was complete, complete when you stop the hospitalization or the outpatient phase of the rehabilitation

[1917]

treatment, that this was an ongoing life situation in which one needed to continue to strengthen one's resolve not to return to the bottle or the pills.

Q Did the medical department in 1985 have any system in place to determine for itself that an employee who had undergone alcohol rehabilitation on an outpatient basis had followed his program before returning to work?

A No. I don't know how you can determine that today.

Q Doctor Gould, after reassignment of an employee who had completed alcohol rehabilitation, did anyone within the medical department have a responsibility to monitor that employee to detect relapse, possible signs of relapse? And I'm talking about the period 1985 to 1988.

A No.

Q Do you have an understanding about whether or not anyone else within the Exxon organization other than the medical department had such a responsibility – and again, I'm referring to that period of time, 1985 to 1988?

A It is the responsibility of the first-line supervisor to determine the fitness of his employees to do the job that they're supposed to be doing. In the sense that he's with them and he's observing them. If he has a problem, he's supposed to get in touch with the medical department, or with his supervisor in order to determine if any other procedure needs to be followed.

[1918]

Q With regard to that situation, is it important in your opinion that the supervisor have knowledge that the employee that he is monitoring is a rehabilitated alcoholic?

A I think it would be useful if the first-line supervisor knew that somebody had been to rehabilitation, that he then was able to have that information in order to attempt to understand what action his employee was taking.

Q In terms of the medical department evaluating an employee who had returned to the job but undergone alcohol rehabilitation, is it correct based on your testimony that the medical department was essentially relying on the non-medical supervisors to alert it to the problem concerning use of alcoholism – alcohol?

A I believe this was the tact that management had decided to take.

Q In the period between 1985 and prior to the time of the spill, did the medical department have any policy or requirement that an employee who had undergone rehabilitation for alcohol be abstinent and refrain totally from use of alcohol when he returned to his position?

A No.

Q Did the medical department in this same time period, between 1985 and up until the time of the spill, have any requirement of its own that an employee who had undergone rehabilitation for alcoholism attend Alcoholics Anonymous or

[1919]

similar meetings before being returned to his job?

A No.

Q Do you have an opinion about whether or not an alcoholic can suffer a loss of cognitive efficiency, but at the same time not exhibit any overt signs of gross motor impairment?

A Yes. I have an opinion.

Q Would you please explain it?

A I believe it can happen. I also believe that the other half of that is true, that you can suffer motor inabilities and not be able to show any cognitive difficulties. And I don't know which one is dominant in an individual – given individual, because of the variation within individuals.

Q Doctor, do you have an opinion about whether or not the greater number of drinks that a rehabilitated alcoholic consumes following rehabilitation, the greater likelihood of relapse?

A I know about the arguments that have gone on in some of the literature with regard to this kind of thinking. There are some folks, some experts who believe that any amount of alcohol, in fact, indicates a relapse and others who feel that after rehabilitation is complete, that some small amount of alcohol can be periodically drunk by someone who's previously been designated as an alcoholic. I don't know what the long-term outcome of these academic deliberations will be, but it seems to me that from the standpoint of operational

[1920]

efficiency within the corporate setting, that abstinence is to be desired.

Q Could you tell me what role, if any, the medical department played in the development of the alcohol and drug policy that came into effect in 1985?

A We were asked our opinion on various parts of the proposed policy and provided that opinion. Principally through the manager of the human resources department.

Q Do you recall the opinions that you offered at that time in terms of the development of the policy?

A Without having my notes in front of me I'm really unable to state with clarity the individual comments that I offered.

Q Do you have any recollection about whether or not your opinion was solicited with regard to institution of an aftercare or follow-up program for rehabilitated alcoholics who have been returned to the job?

A I don't believe in 1987 that our concept of aftercare within the medical department was well enough developed for us to have provided any particular input with that – with regard to that subject.

* * *

[1930]

Q Do you have an understanding about whether or not the 1987 alcohol and drug policy prohibited testing of employees who are rehabilitated alcoholics and had returned to their positions?

A Doesn't say anything about that.

Q Is it correct, then, that because the policy, in your opinion – that because the policy is silent with regard to testing after rehabilitation, that it was permissible under the policy?

A I don't think the policy, in my own view, does not prohibit testing of somebody in a rehabilitation program, but it also doesn't speak to it.

Q Let me refer you to document number 18, which should be a memorandum dated October 5th, 1988, from J.C. Bowen to a number of individuals, attaching the then-latest revision of the drug and alcohol use package.

A Uh-huh.

Q You're noted as being a recipient on that document?

A That's right.

Q Do you recall receiving this?

A Yes, indeed.

Q In terms of your understanding today about the treatment of alcoholism, how important is, in your opinion, is aftercare follow-up in terms of a successful recovery process?

A From alcohol?

[1931]

Q Yes.

A I think it's exceedingly important. I think that's one of the things we learned in the middle '80s. We learned a lesson and we brought it.

Q Did you testify earlier today about a conversation with Mr. Iarossi after the oil spill?

A That's correct.

Q What did the discussion concern?

A I can't remember the details of the discussion, but I can remember that Captain Hazelwood entered into the discussion.

Q Do you recall whether or not you discussed with Mr. Iarossi, after the time of the spill, whether or not the alcohol and drug policy in effect at the time of the spill had mandated that an employee who had undergone rehabilitation for alcoholism be returned to the exact position that employee had held before rehabilitation?

A I don't think I ever had that conversation.

Q Did Mr. Iarossi, if you recall as part of these discussions, ever express concern to you that Exxon Shipping Company had believed that the medical department was in some fashion conducting continuous monitoring of employees who had been returned to employment after undergoing alcohol rehabilitation?

A No.

Q Do you recall having any discussion with anyone in

[1932]

management in either Exxon Company USA or Exxon Shipping Company concerning that last topic?

A In the medical department? I think there probably were some discussions around that issue with others.

Q Do you recall what their reaction may have been after you shared information about the fact that the medical department does not undertake to perform continuous monitoring of employees that are returned to their positions after alcohol rehabilitation?

A Well, I think that the general appreciation was that they knew that we were not, but they were just verifying with us that we were not and in fact that was a management responsibility.

* * *

[1938]

DIRECT EXAMINATION OF WRENDELL NEALY
(Video)

BY VIDEO EXAMINER:

Q Good morning, Dr. Nealy.

A Good morning.

Q Can you state your name for the record and home residence for the record, please?

A Wrendell Nealy, Senior. Home address is 795 Leeward Drive, Baton Rogue, Louisiana, 70808.

Q Why don't we first review your educational background, starting with college, please. Please tell me the college you attended, the years that you attended and your major.

A The first B.S. degree in 19- – well, I began school at LSU, Louisiana State University in 1951 through about the middle of ', 54 and came back to LSU in '58 through '60 and got a B.S. degree.

Then proceeded to LSU Medical School in New Orleans, got my M.D. degree in 1963. And you want to go further than that?

Q Can you please describe briefly your educational history since UCSF?

A In 1980 – 1980, I joined Exxon Company USA as a plant physician at Baton Rogue refinery. One to two years later was promoted to medical director of that refinery.

Q Did you, in your family practice or in your practice prior to 1980, did you have any experience treating an alcoholic?

A Well, yes, I did. I was the medical director for a treatment center in Salem, Oregon, rehabilitation center. I forget the name of the center, but I held that position as apart-time job probably, I would guess, three years. Other than that, treating alcoholics in my practice.

Q Did you at Dammash and then at the rehabilitation center in Oregon, come to any conclusions with respect to the rate of

[1940]

recidivism of alcoholics?

A Only that it was high.

Q At that time what was your position with Exxon?

A When I went to Houston in 1986 I was associate – assistant medical director of Exxon Company USA and I remained that title through until I resigned, so that was my primary title. I was also medical director for Exxon Shipping Company at that time, and that was more a contact for Exxon Shipping on medical issues.

Q In 1986 when you went to Houston, did you take over Dr. Montgomery's duties and responsibilities?

A With regard to?

Q To the role of contact for refining and shipping.

A Yes, and then I – and initially I reported to him. At some point in time that reporting relation changed where I reported directly to Dr. Gould. I don't remember exactly when that was. Certainly by the time I was – by the time I was full-time contact for Exxon Shipping Company, my recollection is that that reporting relationship changed to Dr. Gould.

Q Upon discharge of your patients at Dallas and at the Salem center, and I'm talking about your patients who were inpatients with respect to alcoholism, did you recommend or recommend that they remain abstinent thereafter?

A Certainly.

Q Why did you make that recommendation? As a preliminary

[1941]

question, and I say abstinent as opposed to would it be sufficient that they just drank in moderation thereafter as opposed to remaining abstinent?

A No.

Q Why should they not drink in moderation?

A Even – well, we say in general that an alcoholic or substance abuser is not ever cured, that they're always in recovery, those words taken broadly to mean that one can be cured of all the medical symptomatology, all the affects and effects of alcoholism, but never escapes the susceptibility, unique susceptibility to the addictive substance again.

Is that clear enough?

* * *

[1946]

Q Did you have an understanding as to which rehabbed alcoholics, what categories of rehabbed alcoholics were referred to medical subsequent to rehab?

A No.

Q Who at Exxon Shipping, and I'm referring from, let's say 1984 to 1989, made this determination, that is, to refer the rehabbed alcoholic to medical for re-evaluation?

A I don't know. I mean I don't know that they did.

Q Have you ever seen a rehabbed alcoholic referred to you by Exxon Shipping – again, in the time period '84 to the grounding in'89?

A I don't believe.

Q You don't believe you –

A That I have ever seen an alcoholic who had been rehabbed returning. I don't believe that I had seen him on their return from rehabilitation; that's the context in which I view this.

Q Earlier you testified that you were responsible for determining fitness for duty?

A When asked by management.

Q When you got to headquarters, that was approximately 1985?

A No, that was August of '86.

Q '86. Did you, in fact, make a strong recommendation to get

[1947]

an aftercare or follow-up program so that you'd give employees more help in remaining abstinent in 1986 or thereafter?

A To my boss, Dr. Gould, on the way to the cafeteria I remember saying one of my goals is to get an aftercare program started. And he said, what do you mean by this. And I said, some kind of program so that people returning from rehab centers would be followed up; there would be some structured follow-up, and suggested that probably the EHAP counselor would be the people to do that.

Q What, if anything, did Dr. Gould say to you or suggest to you?

A My recollection then was he said that's not our job, we're not – that's not the medical department's job. That's about as strongly as it was presented and as far as it went.

Q Did he indicate to you why it was not medical department's job?

A I don't recall. I think the brunt of that, the gist of

what his opposition was that medical department can't be checking into everybody to find out what kind of therapy they're in, and if they're going to their AA meetings or if they're going to groups; and, you know, relatively the policeman function. That's a line management function, more or less.

Q Did you disagree with Dr. Gould?

A Yes, I disagree and did disagree that, but I don't recall

[1948]

that I disagreed with him verbally or certainly wrote no memo to the effect. It was my feeling that there was a need to put together a program to more closely follow and give added motivation and support to people in recovery.

Q Why did you feel there was that need?

A Well, almost – all the treatment centers that I had been connected with very closely – here in Baton Rogue, for example – have an aftercare policy, and some range from six months to two years in which they have regular groups that meet and people at discharge are required to sign up for that program, and that helps them maintain their sobriety.

However, there is no – there's no way to check to see and there's nobody checking to see that people comply with those programs. And to my – in my view, since the cost of the inpatient therapy covers the cost of the outpatient follow-up, they get no more money whether the follow-up is completed or not, and so nobody has much of a motivation to go back.

It's left up – it's provided, the employee can do it or not, and I thought we needed something a little more structured so that –

Q By something "more structured", do you mean that attendance would be required or mandated by the employer?

A Right.

Q And that there would be some sort of, if you want to call it, police function, to –

[1949]

A Right.

Q – understand that an employee did or did not attend?

A Yeah, bring a note from the AA meeting that he did attend, for example, if he was recommended to have 90 days and 90 visits, he had to produce some kind of documentation that he could. It's not very practical, but I was trying to work with some way to achieve some sort of order and structure to that.

Q Have you ever met Joseph Hazelwood?

A Not to my knowledge.

Q Prior to the grounding, had you ever heard of Joseph Hazelwood?

A No, I don't think so.

Q Subsequent to the grounding, did you have conversations with other doctors at Exxon USA's medical unit with respect to Joseph Hazelwood?

A Yes.

Q Who did you speak to?

A Spoke with Dr. Montgomery and probably – I can't think of any of the doctors specifically excluded. Surely Dr. Douglas and Dr. Montgomery, and probably Dr. Gould, but I can't – I don't remember the – it would have been infrequent, but it would have been possible that Dr. Gould was in the conversations.

Q Did Dr. Douglas have knowledge of Joseph Hazelwood's rehabilitation prior to the grounding?

[1950]

A No, not – well, I don't know if he did or not.

Q Did you ever learn that he did?

A No.

Q Okay. Is it your testimony that Dr. Montgomery told you and Dr. Douglas at the same time in the same room that he had knowledge of Joseph Hazelwood's rehabilitation prior to the grounding?

A Yeah. That's what I think I said.

Q In the course of this conversation with Dr. Montgomery about the rehab program, did he mention the fact to the best of your recollection that it was alcohol rehabilitation?

A Yes.

Q Have you ever consulted with any Exxon manager with respect to the monitoring of a rehabilitated Exxon Shipping Company employee?

COLLOQUY: Prior to 1989.

Q Prior to 1989.

A No, not that I recall.

Q Did Exxon USA's medical department provide any information, hold any seminars, hold discussions with respect to how a manager should supervise an employee of Exxon Shipping Company that had been rehabilitated?

A Not that I'm aware.

Q Do you agree with the statement that post-rehabilitation testing aids successful rehabilitation?

A Yes.

[1951]

Q Are there schools of thought that say that part of any rehabilitation can be – making that particular person a social drinker rather than a person who drinks to excess?

A I've never heard of any rehabilitation program's goals that would make them a social drinker.

Q Maybe I phrased that wrong. In the other schools of thought that you spoke about, is there a view that you can take an alcoholic and they can drink again and they can do it in a moderate way where they become social drinkers and not necessarily alcoholics?

A I don't know that there's not some people that hold that view. I've never heard it. I would disagree with it. You know, you don't ever – having been an alcoholic, you don't ever go back – we can cure pretty much the pathology and a lot of the social ills and the financial problem, we get that all straight and we can even get to the point, in my view, in my belief, that the person never wants a drink any more; but I don't believe that you ever overcome the susceptibility to, if you do have a drink, to the high risk of getting the full-blown addiction back again.

Q You're not suggesting that someone who has been through

[1952]

alcohol rehab cannot ever become a social drinker?

A I am suggesting that. I don't believe that's really so–

Q Are you suggesting that someone who's been through alcoholic rehab cannot stop and have one or two drinks?

A Excuse me.

Q That's what I'm talking about, social drinkers.

A That's not entirely true, what I said. When you limit it to people that have been through rehab in my view, there are people who have been through rehab who are not alcoholics. I believe that a person who is a full blown alcoholic cannot go back to being a social drinker.

Q I see. So you're making a distinction –

A Between rehab and alcoholism.

Q If you had known that Captain Hazelwood had been in rehabilitation and heard subsequent to his return as a captain that he had been drinking, what would you have done?

A Nothing.

Q Why do you say that?

A I would have no responsibility to do anything. I would base that on similar kinds of things that I had heard about other people, and I don't have any responsibility to do anything in that – in that area.

Q So did you mean by "I", you personally or did you mean your department or did you mean both?

A I mean in general that's not my job. It's not covered in my job description at all. When asked to evaluate someone, I do that, and otherwise we have no call in-people for – or responsibility stated to do anything.

[1953]

Q Okay, and whose job would that have been at the time?

A Whose responsibility would it have been? My – I'm not sure, but I would assume that, my assumption has always been it was his supervisor's job.

Q Do you recall any written procedure that defined the responsibility for either monitoring or reacting or responding in the event that someone back from rehabilitation began drinking again in the mid-'80s, while you were at Exxon, from 1985 on?

A The short answer is no. There was some policy that we had in Baton Rogue at the Exxon refinery that described a supervisor's responsibility if he perceived someone at work who seemed to be behaviorally impaired. Other than that very narrow instance, I don't recall.

Q Did you ever discuss Captain Hazelwood with Dr. Montgomery?

A Yes.

Q And could you tell me the nature of those discussions?

A Dr. Montgomery mentioned to me that – that Joe Hazelwood had been into a treatment facility.

Q Was there more than one conversation?

A I'm sure there was more than one. Surely two or three times the subject came up.

The only thing that I recall Dr. Montgomery's discussion or comments about was the fact that he didn't see in the medical chart a release, a fit for duty release. That was a concern

[1954]

and he was somewhat concerned about that because he – he recalled that, and by – not specifically, but by general process, he would have gotten or assured himself that there was a release for return to duty before Captain Hazelwood had returned to duty, and that's the gist and sum and substance of it.

Q Is there a form that Exxon medical used that you would – would be the equipment what you just referred to was fit for duty release or determination?

A Well, there are many forms, probably much more than Exxon, Exxon USA or Exxon Shipping would use. There are many forms and releases to duty come in many shapes and forms from the treating physician, usually on their own forms rather than Exxon's, all of which are usually acceptable; something to wit, saying, that they are released fit for duty or they're not released fit for duty, and if they're released with or without restrictions. That's what I recall.

Q Now, this is something that would be an Exxon-generated document or form?

A No. These would almost always come to the medical department from outside the medical department and from outside the company.

Q Is Exhibit 66142 such a form?

A I think it is.

Q Did this document – strike that.

[1955]

This document was in the medical file kept on Captain Hazelwood, correct?

A Yes.

Q This document has been referred to as an IDR. Does that term mean anything to you?

A Yes.

Q What does it stand for?

A Individual Disability Report.

Q If Dr. Montgomery had already consulted the medical file prior to this conversation with you, could you then conclude that he did not believe that Exhibit 66142 was a fitness for duty release form?

A Well, I believe his concern was not over whether this document was a release fit for duty, but whether he had – he had given something to Exxon Shipping Company or reviewing this document had been written something himself saying fit for duty.

Q Would it have been normal procedure in the medical department for an Exxon doctor to have done that; in other words, to have written something himself with respect to fitness for duty in the time frame we're talking about?

COLLOQUY: The question is –

Q In the time frame we're talking about.

A It carries all kind of answers to that. It would have been very normal for an Exxon doctor. Sometimes people return

[1956]

for – from lack of fitness for duty back to duty with no consultation at all with the medical department or any Exxon physician, although it – a document like this coming into the medical department would usually flow to the doctor that's the contact for that function; Dr. Montgomery in this case. It would be certainly normal for him to either communicate with shipping verbally, depending on the nature of the question from the shipping company, or to make some mark on the form itself if he had any question about the physician's – the treating physician's fitness for duty release.

If he had any question of that, it would be totally normal for him to clarify that question and make some note of it.

Q And in that context, to the best of your recollection, what was Dr. Montgomery's concern with respect to Captain Hazelwood?

A That he hadn't made a clearer note in saying, I have called the treating physician and I release this patient fit for duty.

Q Did he express any concern that – as to whether or not there had been a determination of release for fitness for duty?

A I don't believe that was his concern. It was just the – the documentation of that.

* * *

[1967]

DIRECT EXAMINATION OF MICHAEL EMEL
(read)

BY MR. COHEN:

Q Would you state and spell your name for the record?

A My name is Michael M. Emel, E-m-e-l.

Q And where is your home?

A 3626 211th Place, Northeast, Redmond, Washington, 98053.

Q Now, what's the first vessel you ever worked at?

A First vessel was the Galveston.

Q So you never worked for any other vessels for any other companies other than Exxon?

A Before I got hired with Exxon, I was a chief engineer on a private yacht.

Q In 1982, then, was the first time you went to work for Exxon, is that right, on the Galveston?

A Right. That would be on the discharge slip, would be the specific date.

Q Now, did you ever see anyone drinking on an Exxon vessel ever?

A Yes.

* * *

[1969]

Q Now, the last time we spoke here before the break, we were talking about drinking on board, and you said that you have on occasions had a drink. Now, did that ever happen when you were

[1970]

in Valdez?

A Yes.

Q On the vessels in Valdez?

A Yes.

Q Did you ever bring any alcohol on board the vessel from the Port of Valdez?

A Never.

Q You know of anyone whoever has?

A No.

Q So when you brought something aboard, it was in San Francisco, say?

A Yes.

Q Now, I think we established previously that you started sailing with Captain Hazelwood on the Valdez, let's just call it January of 1989. Do you recall an incident following that time that you went to see Captain Hazelwood about a pay voucher?

A Yes.

Q And where did you see him?

A In his office.

Q Was there anyone else, anybody else there?

A No.

Q What was the question about the pay voucher?

A I was asking to get a draw on a check to probably go to shore or something, an advancement.

[1971]

Q And do you remember the time of day?

A Probably it was in the evening – no, it very possibly could have been around noon or something. If I knew I was going to go to shore that afternoon or evening or something, I would probably try to get it taken care of before I left. So it would probably be around noon or something, afternoon maybe.

Q Now, do you recall during the course of that meeting concluding that Captain Hazelwood had been drinking?

A I can't conclude that.

Q I'm not asking you if you can conclude it now, I'm asking you if you at any time or at the time, at the time concluded that Captain Hazelwood had been drinking?

A I may have thought that he had been drinking.

Q You did think he had been drinking at the time, didn't you?

A Yes.

Q Mr. Emel, on what did you base that conclusion at that time?

A His mannerisms.

Q Could you be more specific, what mannerisms?

A His movement.

Q What kind of movement?

A It just seemed slow.

Q Did his ability to walk seem impaired?

Mr. Thomas: Well, I object to the extent it assumes, assumes the witness saw the captain walking.

[1972]

Mr. Sherman: You can answer the question?

A He walked a little different, not a lot of bounce in his steps, so to speak.

Q Was your conclusion based in part on his speech?

A No, just on the way he moved.

Q Now, without wanting to put words in your mouth, would it be fair to say that at the time you concluded that he just looked like he'd been drinking?

A Yes.

Q Has your conclusion changed since then?

A No.

Q So you still think, as we sit here today, back then he looked like he'd been drinking?

A Yeah.

Q Now, what is the Westar Terminal?

A That's a terminal down in San Francisco where the motor launch comes out and ferries you from the ship to the shore.

Q Is the launch operated by Westar?

A Yes.

Q It's not an Exxon operation, then, as far as you know?

A As far as I know, no.

Q Now, when entering the Westar Terminal at any time prior to getting in the launch, is there any security, are there any security measures in effect in terms of searches or looking for

[1973]

contraband?

A No.

Q To your knowledge were there any such security measures during the time that you sailed on the Valdez starting in January of 1989?

A No.

Q Were there any security checks or searches in place at the Valdez terminal that people had to pass through on returning to the vessel?

A Yes.

Q Do you know why there was such a system in Valdez, but not in San Francisco?

A No.

Q You know whether or not there is such a security system in place in San Francisco now?

A I have no idea.

Q In regard to the Valdez run on which you served, on those occasions in which you brought alcohol on board, where did you bring it on board?

A It would be San Francisco.

Q In all occasions?

A Yes, if I was in that port.

Q Sure. You don't recall bringing any alcohol anywhere else; in any other port, in other words?

A If the ship went to, say, maybe Long Beach or something like that, or possibly there.

[1974]

Q Would it be accurate to say that between the time you signed on the Valdez in January of 1989 and the time of the grounding, that you consumed roughly a gallon of alcohol?

A Yes.

Q Would you at any time share any of that alcohol with anybody?

A No.

Q And in the same time frame on how many separate occasions did you bring alcohol on board the vessel?

A Maybe twice.

Q Half a gallon at a time?

A Yes.

Q Now, just a couple more questions, Mr. Emel. The alcohol that you drank on board the Exxon Valdez, was that vodka?

A Yes.

Q Anything but vodka?

A No.

* * *

Q Do you ever recall anytime anyone ever getting fired for drinking that worked for Exxon?

A Yes.

Q Who?

A I can't recollect any names but I know that there were

[1975]

people that were fired.

Q Any vessels that you were on?

A Yes.

Q Can you think of the vessel?

A Exxon Princeton.

Q Roughly when was that?

A I would have to look at my discharge slips to see when I was on the vessel, but there was an individual on that ship that was fired, taken off in cuffs for drinking and marijuana.

Q Do you remember where this happened?

A He was taken off in New York, I believe. He was an oiler.

Q You say he was caught with marijuana and with alcohol?

A Yes.

Q Who took him off in cuffs?

A The authorities, the Coast Guard, I believe, Exxon – I don't know who. I wasn't –

Q Do you recall any other situation where someone was fired for drinking?

A I heard of occasions of people being fired for drinking.

Q What did you hear of?

A I heard that a man got fired because of drinking.

Q Just once or more than once?

A A couple of times, different people maybe in the same incident or other people, maybe three different occasions where I've heard that people were – that as public knowledge

[1976]

through the ESA and through Exxon.

* * *

[1977]

Q Let me back up a little bit, Mr. Emel. I want to refer again to the time you went to Captain Hazelwood's quarters in regard to the pay voucher question. After reaching the conclusion about which you've testified already, did you report that to any other person employed by or associated with Exxon?

A No.

Q Did you ever subsequent to that time have any discussions with Exxon management about that issue?

A No. One thing, when I observed the captain, I'm no expect

* * *

[1978]

DIRECT EXAMINATION OF WILLIAM MASCIARELLI (read)

BY MS. WAGNER:

* * *

[1979]

Q Now, from 1981 to the present, can you run through your employment?

A Exxon Shipping Company until – I have to get the right date. I guess October 10th of 1990.

Q Are you employed boy Exxon today?

A No, I'm not.

* * *

[1980] Q You sailed with Captain Hazelwood?

A I sailed with Captain Hazelwood.

Q Is that the only time you sailed with Hazelwood?

A No, I was with him for I think about three days in San Francisco. We have to look at the discharges, but –

Q What year?

A Just a month before the Valdez went aground, so January of 1989.

Q You say you were with him for three days. Was that in port?

A It was in port. I was the third mate on the Valdez for – I think about a month and then was transferred from the Valdez to the Exxon Baton Rogue and Greg Cousins came on board to relieve me on the Valdez, and it was Captain Hazelwood came on the ship after the Valdez had arrived in San Francisco and I was with him – it might have been only been two days. It might have been three days before I was transferred also in San Francisco to the Baton Rouge.

Q Do you remember what month that was?

A I can tell you the exact date if you want.

Q Mr. Gerry: January 20 to February 20?

A Well, the date I got off the Valdez was February 20th. Captain Hazelwood, I don't know when Captain Hazelwood joined. It might have been February 18th or 19th. So we had two days together.

[1981]

Q So it was in February?

A In San Francisco in February, yeah.

Q Did you have occasion to see has during that three-day period?

A I did. I did. I saw him every day.

Q More than one time a day?

A Yes.

Q Did you see him aboard the vessel or ashore or both?

A Only aboard the vessel.

Q Did you see him in his cabin?

A No, I didn't. Well, not that I remember. I remember specifically seeing him at dinner, on the bridge, in the officer's lounge. I don't know if he was in his cabin.

Q Was there any time during this period that you made a judgment that he was impaired, Hazelwood?

A Well, Captain Hazelwood was ashore for part of the time and had come back to the ship. It seemed to me that he had been drinking. I don't know about impaired; I never saw him his work, so –

Q Maybe it's, what –

A So I didn't have any standard to say was he impaired to walk down the corridor or to drive a car or to pilot a ship.

Q When you made the judgment, you said it seemed to you that he had been drinking. What factors were involved that you reached that conclusion?

[1982]

A Gee, I'm trying to picture him. He looked like somebody who had been drinking.

Q Did you ever, during this three-day period, see any alcohol or beer aboard the vessel?

A Well, I did. And that was the only – that – and that was the one time I had alcohol myself on the ship. Captain Hazelwood offered me a glass of wine and I took it and drank a glass of wine with him.

Q And what were the circumstance of this offering you a glass of wine, where did it take place?

A We were in the chart room. In the back of the bridge. I should say the ship was at anchor, there was nothing going on on the ship at that time.

Q You were at anchor outside San Francisco or in San Francisco Bay?

A In San Francisco Bay.

Q When you went in the chart room, were you in there by yourself with Hazelwood?

A Yes.

Q Did Hazelwood have a bottle of wine there in the chart room so that he could offer you a drink?

A I don't remember if he had two glasses of wine that he had brought up, say, to the bridge, or whether he had two empty glasses and a bottle. I don't remember.

Q Did you accept?

[1983]

A I did.

Q And did you have just the one drink with him?

A I did.

Q How long did that session take place roughly, a few minutes or –

A It could have been a half hour. We were just talking and –

Q Now, did Hazelwood have more than one glass of wine during that half-hour period?

A He didn't.

Q Did you, other than this wine during the three-day period see any beer or any alcohol aboard the vessel?

A I didn't.

Q When Hazelwood offered you this glass of wine, did he indicate to you what were the circumstances of why he was doing this, just to be social or for what?

A He didn't indicate, but Captain Hazelwood and I liked one another very much, and from my point of view it might have just been a friendly gesture.

Q Was there any indication to you when he offered this to you that he had been drinking before this?

A Not at all.

* * *

[1991]

Q Let me talk about fatigue a little bit. In your opinion, was fatigue among deck crew a problem on Exxon oil tankers?

A What do you mean by "deck crew"?

Q Let me first limit it to deck officers.

A Yes.

Q Was fatigue, in your opinion, a problem with regard to deck officers?

A Yes.

Q Just for clarity, when we talk about deck and crew – when we talk about deck crew and deck officers, the deck officers would be who, the first, second and third mates?

A Chief mate, second mate, third mate.

Q The deck crew would be constituted as who?

A The six A-B's.

Q In your opinion, did deck officers experience fatigue from overwork?

A In some circumstances yes. In other circumstances – well, always from overwork, yes.

Q When you say that you feel fatigue among deck officer crew [sic] was a problem, in what way was it a problem?

A Well, that led to lower – I don't know how to say it. Lessened people's ability to work safely, I guess is the thing to say.

[1992]

Q In your view was it primarily a safety issue?

A Yes.

Q You may have answered this: Was it your testimony that you don't recall the autopilot ever being utilized in Prince William Sound when you were on board?

A That's correct.

Q But based on your experience in transiting Prince William Sound, the Exxon vessels involved in those transits utilized the vessel traffic center on the VTS?

A I don't know what you mean by "utilized".

Q Did they rely on them to get information?

A The only information we had relied on them for was ice conditions.

Q Was there ever any time that an Exxon vessel relied on the vessel traffic center for information about where they were in the Sound?

A Never.

Q Let's factor in your observation yesterday that Kagan needed supervision and your observation that in the normal course of your changeover with Cousins, you would have told Cousins that, can you still imagine Cousins, had he done things properly, would not have picked up on the fact that Kagan failed to make a course change in six minutes?

A I'll tell you that I can imagine the circumstances. Kagan and Greg hadn't been together very long at that point, as far as I can tell. And let me say that I'm not simply trying to

[1993]

defend a fellow third mate; I can imagine the fact that the concern with the ice was so overwhelming that he would not have checked that rudder angle indicator.

Now, in my trips into and out of, and I did a lot of trips in the two months prior to the grounding on both the Valdez and the Baton Rouge, the captain was the guy who watched the ice and I got to do everything else, which included looking at that rudder angle indicator. The third mate's job is to do that when the captain is taking care of conning the ship or making sure the ship isn't running into anything.

When the captain or pilot is not on board and the third mate has to do everything else, it's very conceivable to me that that is one of the things that the third mate wouldn't follow-up on.

Q Are you saying Cousins had too much to do on board the bridge that night?

A Yes, yes.

Q One of the reasons, let's assume that he did not realize – let's assume first of all that the course command that he gave was not carried out by Kagan and let's assume he didn't pick up – pick that up for six minutes. What I asked him, I think, was is one of the reasons he didn't pick it up because he was too busy with other tasks?

A I believe that's the case.

Q And is the reason that he was too busy with other tasks

[1994]

because Captain Hazelwood was not on the bridge?

Do you remember the question now or do you want it read back again?

A Well, I think you're asking was the reason that I think the third mate was overworked the fact that the captain was not on the bridge. I can only say that, if I had been on the bridge in those circumstances, and I was five or six times in the two months prior, with that much ice, if my captain had left the bridge because he – in both cases with two captains, they had been looking at the radar while I did everything else. If the captain had not been on the bridge, I would have felt overwhelmed.

Q Under those circumstances as you understand them?

A Yes.

Q Based on your experience as a third mate, and based on the knowledge that you have of the facts and circumstances that took place that night, could fatigue have been a factor in Cousin's performance?

A I can imagine that it would have been, yes. Might have been.

* * *

[1995]

port when he was standing watch?

A No, I never did.

Q Did you ever drink ashore with Hazelwood?

A Never did.

Q Did you ever see him drinking ashore?

A No.

Q And the only time you drank with him was the one you have testified to, the wine?

A Yes.

Q Did you ever hear from the other officers or crew members any rumors or any statements concerning Hazelwood being impaired?

A Never.

Q Did you have any knowledge when you spent those three days with him that Hazelwood had been in a rehab program?

A No.

Q What is Exxon's policy, as you understand it, concerning drinking on board?

A That there is none.

Q Would you mind reading that again, I think the accent is on the last word?

A That there is none.

* * *

[1998]

DIRECT EXAMINATION OF HENDRIK VAN HEMMEN

BY MR. MONTAGUE:

* * *

Q Could you tell the jury a little bit about your employment?

A I work for Martin Ottaway and Van Hemmen. I'm an engineer and our firm deals with marine transportation problems.

Q Could you be more explicit as to what your firm does?

A Yes, we're a marine consulting firm. We work for underwriters and for attorneys, for ships owners and for investors, and we get engaged to analyze problems in marine transportation. They could be collisions or they could be groundings. They could be structural failures. They could be problems relating to the operation of ships.

* * *

[2016]

Q Mr. Van Hemmen, again, referring to the movement depicted on the simulation, in your opinion, were there any risks, were there any risks in maneuvering the vessel as it was shown on that simulation?

A Yes, sir.

Q And what kind of risks, in your opinion, were there?

A Well, at that stage the situation was stable prior to the

[2017]

maneuvering, and when the maneuvering started the maneuvering of the vessel basically caused it to grind on the reef and the grinding on the reef caused additional damage to the ship and therefore additional pollution, or it could have, in an extreme case, caused the ship to fracture and the fracturing could result in the ship breaking apart, capsizing or whatever takes place, and also the ship could actually come free, it could work its way free from the reef, and the ship could actually sink or capsize.

Q And is that a something that should – are those risks that should be considered at the time those maneuvers were taken?

A Yes, sir.

Q And were those possibilities of things that could really happen?

A They were all possibilities. Especially because the damage situation was not all that clear at that stage, so you start to take an action after that. You don't have that much information. You take an action basically shooting in the dark.

Q May I have Elmo? I'd like to show you, Mr. Van Hemmen, some testimony given in this court room by Captain Hazelwood. And I'd like you to – can you see that okay?

A Yes, sir.

Q Can you see, this is at page 633 of the trial transcript. Captain Hazelwood was asked the following questions and gives

the following answers. What would you have done if you wanted to get her off the reef. And the answer, if I wanted to attempt to get off, I could have pushed two buttons and gone sea speed full astern in about two minutes. You didn't do that. No.

Do you have any opinion about that statement by Captain Hazelwood?

A Yes, sir.

Q Could you tell us what your opinion is?

A Well, the two things that are not entirely realistic, first of all, the vessel at this stage, the stage that you were stopped was pointing towards a channel, she was not pointing towards a reef, she was pointing to its channel. And also at that stage Captain Hazelwood must have thought that he was hung up somewhere further out because he had damage so far out, all the way to the last cargo tank. To back her up he would go backwards and he would have worked his way backwards through the entire reef before he could get to the water, go to the reef turnaround, get back to deep water so it was quite a lengthy course to take.

The other thing that I find is not entirely realistic is that Captain Hazelwood states that he could have gone sea speed full astern in about two minutes. When the ship is aground, when a commercial ship or tanker like that is aground it is impossible for the propeller to come up to full revolutions.

[2019]

It's like taking your car, putting it in drive, putting foot on the brake and the other foot hit the throttle. If the you hit the throttle engine speed up but never to full speed, and that's the same thing with the tanker, you can't get to full speed. Full maneuver is about the max you can get without getting overload or overheating conditions, and you can push a little bit beyond that but to get full speed is it's just not possible.

Q So could you tell us in your opinion based on what you said, is the statement, I could have pushed two buttons and gone sea speed full astern in about two minutes, is that a correct or an incorrect statement?

A That's incorrect, technically incorrect.

Q Now, you have – based on the simulation and the movement of the vessel at 55 rpm and side to side, did that cause any stresses on the vessel?

A Yes, sir.

Q And could you explain what they are?

A They're – well, it's – if you just go ahead, just push ahead against the rock – say, this is a rock and the ship is around the rock, and you just push, you're just pushing, you can bring up as much propeller rpm as the ship can bring. It doesn't bother it too much. It's a very long ship, as you can see over there, and you see – take this reef, it's like a wrench and that causes the grinding motion, which can put a lot

[2020]

of stress on the vessel.

Q And what kind of stress on the frame of the vessel?

A On the structure of the vessel, stress on the steel. The ship's built out of steel, and the steel could break away and fracture and bend distort it.

Q Now, you heard – have you read the communications between Captain Hazelwood and the VTS after the grounding?

A Yes, sir.

Q And you're familiar with those communications where he referred to extracting the vessel from the rock?

A Yes, sir.

Q Okay. I want to ask you if the actions which Captain Hazelwood took, as depicted on that simulator, are they inconsistent with trying to get the vessel off the rock?

A They –

Q Do you understand that question?

A There's two sides to that question. Maybe if you could restate it, maybe I can give a clearer answer to it.

Q All right. If Captain Hazelwood – the movements that the ship took as shown on the simulation, is that inconsistent with telling – with trying to get the vessel off of Bligh Reef?

A No. If you look at what actually exists, that is the course of quarter to VTS transcript where Captain Hazelwood says, I'm trying to get it off. That type of maneuvering could be – somebody would make would try to get the vessel off, not

[2021]

realizing what the actual risk of doing that is.

Q Well, could you explain how that would get the vessel off the reef?

A Well, it was pointing in the direction of the channel, and

the moving back and forth that sawing back and forth is not an uncommon way of getting ships off obstructions.

* * *

[2045]

DIRECT EXAMINATION OF DANIEL JOHN PAUL, JR.

BY MR. O'NEILL:

Q Sir, we've never met before, my name is Brian O'Neill, and I represent fisherman and Natives who are the plaintiffs in this case against Exxon Corporation. You work for Exxon Shipping Company?

A I worked for the shipping company in that period, yes.

Q Do you work for Exxon now?

A Yes, I do.

Q What do you do now?

A I'm with Sea River Maritime now.

Q Sea River Maritime is what Exxon Shipping Company is now called?

A That's correct, yes, sir.

[2046]

Q And let's just sort of put you in a couple of jobs in context so we know what role you have to play in this case. Let's take 1985. What was your job in 1985?

A I was fleet services manager for Exxon Shipping.

Q And at some point in time did your job position change?

A Yes, it did.

Q And it changed to director of the human resources department?

A Human resources manager, yes.

Q What is a human resources manager?

A I was responsible for manning the ocean ships for benefits and compensation, training, labor relations and some administrative duties.

Q And that was from 1986 until when?

A Until 1990.

Q Did that include responsibility with regard to alcohol policy and those kind of things?

A Yes, it did.

Q For the shipping company?

A For the shipping company, yes.

Q Now, I put in front – I've put in front of you the tools of the trade, which are some exhibits and a deposition transcript, and that's the big stack over there is your deposition transcript, three volumes. So if you want to use any of the tools of the trade that you've got up there you just

[2047]

tell me and we'll go ahead and dig them out for you. Okay?

A All right.

Q The first thing I want to talk about are two exhibits that should be in that stack up there. One of them is plaintiffs' exhibit number 1024 and the next one is plaintiffs' exhibit number 154. And they both have to dc with the rating of masters and they look, so you can pull them out of the stack, like this. You got them?

A Yes, I have them.

Q And what is Exhibit 104?

A 104 is a 1987 rank list for ocean fleet officers.

Q And that includes masters or ship captains?

A Yes, it does.

Q And what is exhibit 154?

A It's a seriatim rating summary of Joseph Hazelwood.

Q And would it be fair to say that using these two documents one could put together, these two Exxon documents, one could put together where Captain Hazelwood ranked vis-a-vis other masters in the fleet from 1981 to 1988? Is that a fair statement?

A Yes, it is.

Q And we've attempted to put these two documents in a graphic form. So we have nowhere to put it on the chart. Idiot lines there.

THE COURT: See if you can make it work

BY MR. O'NEILL:

[2048]

Q And does this chart fairly reflect where his rankings were from '81 to '87?

A Not exactly, no.

Q What are we missing?

A I think the 1981 data on Exhibit 154 is 25 of 39.

Q Oh, so it should be this green bar should be down here a little bit farther?

A That's correct. And another problem is 1987. This exhibit says 24 of 29.

Q 1987. 24 of 29? So this should go down to here. Like that?

A Yes.

Q And then this is 24 of 29 so we ought to cut it off right about here?

A That would make it consistent with this exhibit, yes.

Q Okay. Would it be fair to say that he generally ranked in the bottom half?

A Yes, it would during that time period.

* * *

[2049]

Q Okay. At some point in time – would it be fair to say that if someone in management gets a tip that a master of a vessel is drinking aboard a company vessel, that that is something that management cannot afford to take lightly?

A That's a fair statement, yes.

Q And if a fleet manager gets a rumor or a tip that one of his masters is drinking, that it would be a prudent thing to do to investigate that rumor?

A That's correct.

Q That's just common sense and sound business practice?

A It's prudent, yes, uh-huh.

Q And would it be fair to say that you can think of no circumstances in your judgment that would excuse a fleet manager who has received some sort of rumor regarding one of his masters drinking, you can't think of a circumstance that would excuse him from conducting an investigation, can you?

[2050]

A I think that's what my deposition said, yes, that's correct.

Q But the matter of a ship master, because of his responsibility, using alcohol is a serious topic, isn't it?

A It certainly is, yes.

Q Now, at some point in time you became aware of the Graves' report, and I'm going to put it up here. I assume that when you became aware of it it wasn't in this heavy form. But at some point in time you became aware of the Graves' report?

A Yes, I did.

Q And about when was that?

A It was some time the late spring, early summer of 1985.

Q And you had learned that Captain Hazelwood had consumed alcohol prior to the date of the Graves' report?

A Yes.

Q And when you became aware of the Graves' report and the substance of the Graves' report, that was in about 1986, is

that about right?

MR. LYNCH: I think he just answered the summer of '85

BY MR. O'NEILL:

Q The summer of '85?

A Yes.

Q In the summer of '85 when you became aware of the Graves' report, the thought crossed your mind with regard to Captain

Hazelwood that he was able, Captain Hazelwood was able to allude monitoring, didn't it?

A I'm sorry, ask that again.

Q Let me try again. When you saw the Graves' report, you became aware of, or at that point in time knew that Captain Hazelwood specifically and – you had had prior dealings with Captain Hazelwood, was able to avoid monitoring for alcohol use?

A It appeared that that was the case, yes.

Q And that was the thought you had at that point in time?

A I don't recall today whether I had that thought then or not.

Q It's apparent, isn't it?

A It's not apparent, no.

Q At some point in time did you form a conclusion in your own mind some time after 1985, did you form a conclusion that Captain Hazelwood had lied to you about his drinking?

A No, I didn't.

Q You didn't?

A No.

Q Let's go to your deposition transcript and little go to page 614, lines one through five. And why don't you just read that to yourself and refresh your recollection go back to –

A I see the answer.

Q Okay. At some point in time you formed a conclusion in

[2052]

your own mind that Captain Hazelwood had been less than truthful with you in the past about his drinking, is that a fair statement?

A I said that in my deposition, I did.

Q Okay.

A Upon further reflection the time period was not clear.

Q So at the time of your deposition you told the examiner, my partner Mr. Nolting that you formed the conclusion that Captain Hazelwood had lied to you about drinking in the past, and today you have a different version?

A I have a different reflection of that because the time period that we're talking about here was not clear.

Q Would it be fair to say that when you read Mr. Graves' report that you knew that Captain Hazelwood had alluded your particular personal efforts to monitor him?

A It was not clear to me when he reported that he was drinking.

Q At your deposition?

A He might have been drinking after the time I was monitoring him, he may have been drinking before. It wasn't clear.

Q I'm going to ask one more question and I'm going to move on to a new subject. Would it be fair to say that at your deposition you testified that Captain

Hazelwood, in your view when you saw the Graves' report, you formed the conclusion that Captain Hazelwood had alluded your prior efforts to monitor

[2053]

him?

A Yes.

Q Thank you. And let's talk for a minute about what documents the company had at about this point in time. We know we have the Graves' report. You're aware of the existence of the Graves' report because you reviewed it in the summer of '85?

A I was in a meeting when it was discussed.

Q And we have what everybody refers to as the IDR, which is Exhibit 20 – this version of it is Exhibit 208 and the IDR is Exhibit 10. And you're aware of the existence of the IDR in the company files?

MR. LYNCH: This question is as of today?

MR. O'NEILL: Yes.

THE WITNESS: I'm sorry, repeat the question.

BY MR. O'NEILL:

Q You're aware of that existence back in 1985 at some point in the company files. You didn't know in '85, but now you know it was in the company files?

A That's correct, yes.

Q Third time is the charm.

A Got you.

Q And there's one other document I want to ask you about and I have it up there. And it's in the form of a document that's got a seal on the front of it, NTSB seal and it's Exhibit 745.

[2054]

A Yes, I see it.

Q And this is a document which we got from the National Transportation Safety Board, and the page, the first page after the certificate from the transportation safety board is a letter that you wrote to a Dr. Birky in August of 1989, enclosing a benefit record sickness report of Joseph Hazelwood, do you see that?

A Yes, I do.

Q And the next page is the benefit record sickness report. Do you see that?

A Yes.

Q Let me see if I can actually – let's switch back and see if I can pull this up.

I'm going to put it up on the T.V. screen and see if we can get a good look at you. Now where did this benefit record sickness report come from?

A I believe it came from our benefits administrator file.

Q And in the upper left hand corner there is an entry that says has Joseph Hazelwood, and it has got a diagnosis ALC treatment, do you see that?

A Yes.

Q And then right over here it has got an entry 4/16/85, hos through 4/29, then LOA for group, something else, marilax therapy, AA lectures, et cetera, do you see that?

A I see something like that, yeah, it's hard to read it.

[2055]

Q Do you know what LOA means?

A Leave of absence.

Q How about marilax, do you know what that is?

A I have no idea.

Q Oh, the marital, marital therapy, I'm sorry. What a dummy, Jesus. Okay, marital therapy. So would it be fair to say that this entry, 4/16/85, hospital, through 4/29, then leave of absence group, whatever the next word is, marital therapy, that was in the Exxon Shipping Company files in the benefits –

A That is my understanding.

Q Did you actually have somebody pull this file out of the benefits department so you can send it over to the national safety transportation board?

A Yes.

Q At the time we now have three documents that we've seen from the records of the company, we have the Graves' report, we have Exhibit 10, which is the IDR and we have this document that we just talked about. With regard to Captain Hazelwood and his treatment, are these the only three documents you know of that come out of the company files with regard to his treatment?

A That's all I'm aware of, yes.

Q And at some point in time you did some kind of a search so that you could respond to the National Transportation Safety Board?

[2056]

A Yes.

Q And would it be fair to say that in doing your search, you turned up no documents in the Exxon Shipping Company files, or for that case in any Exxon Corporation files that formally reflected a determination that he was fit for duty?

A I believe I was responding to a specific request here from Admiral – or from Mr. Birky.

Q Let me ask another question, then. Do you know of any documents that formally reflect a fitness for duty determination?

A I'm not – I don't recall any, no.

Q And do you know any documents that formally reflect any monitoring of Captain Hazelwood after 1985?

A The documents?

Q Yes, sir.

A I'm not aware of any.

Q And?

A Can I add to that statement?

Q Sure.

A Other than the general performance evaluations of any of our employees.

Q So we have the performance evaluations in the file, too?

A Yes.

Q And in 1986, the year after treatment, Captain Hazelwood's performance was such that he was ranked 35 out of 37 masters,

[2057]

isn't that correct? You want to check?

A In 1986?

Q Yes, sir.

A 35 of 37, that's correct.

Q So with regard to the issue of what we have in the files that concern Captain Hazelwood, drinking, alcoholism, treatment, that core set of facts, we've covered the universe of documents?

A We may have.

Q That you know of?

A The ones I'm aware of.

Q Thank you, sir.

A Could I add another –

Q Sure.

A – to my statement. Other than the underlying evaluations, of course, on Captain Hazelwood.

Q And the performance evaluations don't talk one way or the other about alcoholism, recovery, AA, treatment, return to fitness, fitness for duty, do they what?

MR. CHALOS: Your Honor, I move to strike any reference to alcoholism. There's been no records and there's been no testimony of that.

THE COURT: I'm not going to strike the reference. We've had testimony on that subject and the jury will have to decide what the issues are and what the answers are. I will

[2058]

decide what the issues are the jury will decide what the facts are.

THE WITNESS: Could you repeat the question, please

BY MR. O'NEILL:

Q Other than the document, the performance evaluations don't address this subject, do they?

A They address the employee's performance on the job, and part of his performance on the job is being able to perform the job in a fit manner.

Q Is there anything on any of the performance evaluations that says, I talked to the captain about his recovery, treatment, problems with alcohol, I followed up with them about any of those things, is there anything in any of those documents in that tone or tenor that you're aware of?

A Not that I'm aware of.

Q As the human resources manager of Exxon Shipping, and now what is –

A Sea River Maritime.

Q – you have a responsibility for issues dealing with the subject of alcoholism, don't you?

A I'm not currently the human resources manager.

Q When you were?

A When I was, yes, I had that responsibility.

Q Had you realized that people who have a problem with alcohol in the workplace don't always fit the stereotype of a

[2059]

skid row bumb or falling down drunk, that's a correct statement?

A I'm aware of that statement.

Q And indeed such sterotypes really don't help our solutions with those problems a heck of a lot, do they?

A No, they don't.

Q And your understanding of the disease of alcoholism is that you're always recovering and you must abstain from alcohol use?

A That's my understanding of alcoholism, yes.

Q Now would it be fair to say that Exxon medical department, in your view, was responsible for determining whether Captain Hazelwood successfully completed his alcoholism rehabilitation?

A Yes, we rely, when there's a question of – from the benefits group. If there's a question about the individual doctor's concern or, you know, diagnosis, then we refer that to the medical department and rely ultimately on their judgment.

Q And at no time after Captain Hazelwood left alcohol rehabilitation did you, as the human resources manager, ask him whether he completed any aftercare program?

A That's correct.

Q And as the human resources manager of Exxon Shipping Company and prior to the grounding, you're not aware of anyone from Exxon Shipping Company who spoke to the medical department about what type of aftercare Captain Hazelwood should have?

A I'm not aware of any, no.

[2060]

Q And at no time, in fact at no time prior to the grounding did you know whether Captain Hazelwood was in any kind of aftercare program at all?

A Yes.

Q But you had heard at some point in time a rumor about AA, that he might have attended AA?

A I might have.

Q So that was something you had in your mind prior to this grounding that this captain might be going to AA?

A I believe that's correct, yeah.

Q And would it be fair to say that you never discussed with Captain Hazelwood whether he was attending AA on a regular basis?

A No, I never discussed that with him.

Q In fact, you never discussed the subject of AA with Captain Hazelwood at all, did you?

A No, I didn't.

Q At some point in time after leaving alcohol rehabilitation Captain Hazelwood was assigned to the Exxon Yorktown, is that a correct statement?

A Yes.

Q Was it your understanding that the fleet manager that Captain Hazelwood worked for was responsible for monitoring his performance and abstinence?

A For his performance, and he monitors the abstinence of

[2061]

everybody that's working on board a ship while they're working on the ship.

Q While they were he working on the ship?

A Yes.

Q That's a qualification to the answer you gave in your deposition, isn't it?

A I don't recall exactly what I said in the deposition.

Q Would you go to page 164 of your deposition transcript. Go to page 163, I'm sorry, sir. Line 16 to line 20, and I'll read the question and answer, and if you could follow along and make sure that I get it right.

And the question was referring to Captain Hazelwood and the question was: Were you aware of his monitoring while he was on the job.

Answer: I was aware that the fleet manager that he worked for was responsible for monitoring his performance and abstinence. Do you see that?

A Yes, I do.

Q Did I read the question and answer fairly?

A You did.

Q I think I said the same thing. And a recovering alcoholic is supposed to be abstinent in your view?

A The question was aware of his monitoring while he was on the job, and that's the way I answered the question.

Q Would it be fair to say that you assume that the medical

[2062]

department evaluated Joe Hazelwood after his rehabilitation program?

A I assumed that, I think, yes.

Q And in fact you assumed that was the normal procedure, didn't you?

A Where it was requested by our people it was, yes.

Q Now you were the human resources manager from '86 to '87?

A Yes, during that period of time, from fall of '86.

Q And Dwight Koops was in what position during that period of time?

A '86 to '87?

Q Yes, sir.

A Dwight would have been the gulf coast fleet manager at that time.

Q And that's where Captain Hazelwood was?

A Yes, I believe – I believe he was in that for part of'87.

Q And at that point in time you were the director of human resources for Exxon Shipping Company?

A Human resources manager.

Q I keep on getting that wrong, don't I? Is that a promotion or a demotion?

A I have no idea.

Q And would it be fair to say that you don't recall ever discussing Captain Hazelwood's alcohol rehabilitation with Dwight Koops?

[2063]

A True.

Q And you never discussed monitoring Captain Hazelwood's drinking with Dwight Koops?

A That's correct.

Q Did you ever tell Dwight Koops about your concerns about the problems in monitoring Captain Hazelwood at all?

A Not that I recall.

Q Did the Exxon Shipping Company officers who reassigned Captain Hazelwood to the Exxon Valdez in 1987 consult with you about that reassignment?

A Not that I recall, no.

Q Do you recall if they consulted the medical department about that reassignment?

A I don't know.

Q Now, there was one instance in which you did get involved in monitoring Captain Hazelwood?

A Yes, uh-huh.

Q And that was at the 1988 fleet conference?

A Fleet officer conference, yes, I was asked to monitor him.

Q And that was by Mr. Iarossi, and he asked you and Harvey Borgen to monitor him just at the fleet conference?

A We were attending the fleet conference together, yes.

Q And did you tell Mr. Borgen that you had had reservations about your ability to successfully monitor Captain Hazelwood at or about this 1988 fleet conference time? Do you understand

[2064]

the question?

A I'm not sure that I do.

Q Are there too many words in that question?

A I'm not sure of the time frame you're talking about.

Q You and Borgen are going to monitor Hazelwood pursuant to this conference in 1988?

A Yes.

Q Did you tell Harvey, I tried to monitor this guy before, I had problems, it didn't work out, or words to that effect?

A No, I don't believe I did, huh-uh.

Q Now, how long was this fleet conference?

A About a week.

Q And other than this request from Iarossi and this one week fleet conference, that's the sum and substance of your knowledge with regard to monitoring Captain Hazelwood?

A I did on my own without mentioning it to anybody monitor him in the 1987 officer conference as well, which I attended, also held in Houston, about a week long conference, and because of the knowledge I had, I did observe him more carefully and was aware of his past problem.

Q And you weren't monitoring him for mild depression, were you, you were monitoring for alcohol use?

A That's correct, uh-huh.

Q And that was sort of done on your own?

A Yes.

[2065]

Q Nobody asked you to do it?

A No.

Q It was common sense because we had a potential problem here?

A I just felt that it would be prudent for me to do it.

Q Because a drinking ship captain is a dangerous thing, isn't that right?

A Can be.

Q Now, let me ask a little bit, as the human resources manager, you never told anyone that Captain Hazelwood – up to the time of the grounding, you never told Captain Hazelwood – you never told anyone that Captain Hazelwood had alluded your attempts to monitor his use of alcohol, did you?

A Well, I wasn't sure that he alluded my attempts.

Q You had concerns, didn't you?

A I had concerns.

Q And after Captain Hazelwood returned from alcohol rehabilitation you never asked him if he had resumed drinking, did you?

A No, just observed when I could.

Q You didn't go in and say, Joe how's your recovery doing, how's AA, how's aftercare, have you resumed drinking, you didn't do that, did you?

A No, I sure didn't.

Q And indeed, you're not aware of anyone from Exxon who asked

[2066]

Captain Hazelwood, after he got out of rehabilitation, whether he had resumed drinking?

A I'm not aware of anyone, no.

* * *

[2080]

Q Did you have to take into account the rehabilitation act in your staffing of Exxon Shipping Company ships?

A Yes, we did.

Q And how did that act affect treatment of people who had a history of alcohol treatment?

A Well, it required you not to discriminate against those people and to keep their problems confidential.

* * *

[2107]

Q I wonder if you would read the first paragraph for the record down to the sub part two there.

A The potential danger to employees and facilities resulting from the use of drugs or alcohol in the workplace has become a

[2108]

major concern of companies. Exxon Corporation, including Exxon Shipping Company, is one of the many employers that have programs to deal with this potential problem. Within the shipping company, this program has two basic concepts. One company sponsored medical support available on a confidential basis for individuals who request help in combating drug or alcohol dependency. And two, workplace guidelines which permit on the job – prohibit, excuse me, workplace guidelines which prohibit on the job possession or use of drugs or alcohol.

Q Maybe that's where your notice problem came up. You said permit and you meant prohibit. The prohibition that you had on the job, possession of alcohol and drugs, how far did that go back?

A Oh, it went back well before I ever joined the shipping company.

Q Was there any doubt about the fact that all the employees had been notified of that fact?

A No doubt at all.

Q Let me show you Exhibit 9113, ask you if you can identify that for the record?

A Yes, I can.

Q What is it?

A It's a list of posted offenses that are on each of the ships.

[2109]

MR. LYNCH: Offer 9113, Your Honor, that's defendants.

(Exhibit 9113 offered).

MR. O'NEILL: No objection.

THE COURT: Defendants 9113 is admitted

(Exhibit 9113 received)

BY MR. LYNCH:

Q And would you read item 14 of DX9113?

A Introduction, possession or use on the property of the company of intoxicating liquors or habit forming drugs.

Q Is it prohibited?

A It is an offense for which members of the unlicensed personnel may be discharged without further notice.

Q Did this prohibition also apply to officers and mates?

A Yes, it did.

Q That prohibition that Exxon had, was that something that was required by law, by the Coast Guard.

A No this was a company policy.

Q Was it something that was uniform in other U.S. flag competitors of Exxon Shipping Company?

A No, we were the exception.

Q When you say that, what do you mean?

A Most other companies allowed social drinking on board their ships.

* * *

[2111]

Q Now, those – that program included a provision which I'm pointing to, let me highlight it, no employee – woops, no wonder you can't see it there. Suffering from alcoholism or drug dependency will jeopardize his or her job security if help is requested or if an individual enrolls to rehabilitation

[2112]

program prior to being involved in an incident which violates company policy.

I'd like to ask you about that aspect of the program. First of all, from the standpoint of the safety credo, running the safest company in its industry?

A Uh-huh.

Q – was it your view that this provision contributed to the safe operation –

A Yes.

Q – of Exxon Shipping Company?

A Yes, it did.

Q And how did it do that?

A Well, it provided an employee help to solve a problem before it resulted in an incident on board the ship, safety incident.

Q By promising, or at least giving assurance that an individual could get his job back, did you recognize that there would be people coming back to Exxon ships who, if they took advantage of this provision, had been through rehabilitation for an alcohol problem?

A Yes, we did.

Q And did you consider that allowing those people back on the ship was nevertheless consistent with safety?

A Yes, we did.

Q How did you draw that conclusion?

[2113]

A Assuming they successfully completed the program they would come back as a better employee and not have the problem, have it put behind them or under control, and from that standpoint they would be a safer employee than they been – had they continued to drink or have the abuse problem on board the vessel.

Q Did you recognize however that there was some chance that there might be a relapse?

A Some chance, yes.

Q And how did you – what about the risk of relapse, how did you reconcile that with your safety credo?

A Well, the risk of relapse would be less after treatment than the risk of an accident caused by drinking if a person never went to seek help to begin with.

* * *

[2123]

Q And would, with Mr. O'Neill's permission, I'll lead into this. There were written guidelines prepared and given to supervisors?

A Yes.

Q And those guidelines related in part to the supervisors role in monitoring for alcohol?

A Yes.

Q And could you just give in a summary what the guidelines that you gave to your managers were with regard to what the supervisors role was?

A They were to look for unsatisfactory performance of the employees on the job as an indication of non-compliance.

Q Did the policy have a reason for focusing on job

performance as opposed to calling people and asking them about their personal habits at home?

A Yes. There was – some of the limitations we had imposed on us we mentioned earlier, but our interest was trying to provide a safe workplace and that involved contacting the employee at work.

Q There were those guidelines developed?

A In Exxon USA.

Q By whom?

A By the employee relations department.

Q And was that staff larger than your own staff?

A Yes.

[2124]

Q And they engaged in a study to develop what the appropriate guidelines would be to implement this policy?

A Yes.

Q Now, under this policy what was the responsibility of Exxon Shipping Company people in the case of an employee who took advantage of the opportunity to return to his job after alcohol rehabilitation, what was the company supposed to do in that case, carry out the policy?

A We were supposed to evaluate the employee's performance on the job.

Q And what about relapse, what about the risk that, you know, you'd have Mr. O'Neill talk to you about, you know, the person whose got an alcohol problem is not necessarily a falling down drunk. Was there any step taken to watch out for that risk of relapse?

A Well, we monitor the employees performance.

Q And in that monitoring did you just monitor that look at

that employee the same as any other employee?

A If we knew he had come back from rehab we would look more carefully for signs of drugs and alcohol abuse.

Q Were your people trained to do that?

A Yes, they were.

Q Where did they get that training?

A In 1984, in one of the fleet officer conferences that we had almost yearly, we did offer a drug awareness training

[2125]

program to better familiarize our officers of what to look for drug and alcohol abuse in the workplace, and we also had training in 1987 with the implementation of this policy.

* * *

[2133]

Q You talk about industrial due process and the legal framework of industrial due process. Industrial due process does not keep you from firing a drinking alcoholic in a safety sensitive position, does it?

A If he's not performing his job duties, it does not prohibit you from firing them.

Q And indeed in the '85/'86 time frame, you fired people for violating the alcohol policy, isn't that a correct statement?

A That's true.

Q And the Americans with Disabilities Act, on a variety of occasions, didn't keep you from firing him, did it?

A That's true.

Q The rehabilitation act – I'm sorry. The rehabilitation act doesn't keep you from firing them, does it?

A They were not handicapped.

Q You talked for a minute about the six on/six off rule. Do you recall that?

A Yes.

Q That is an important safety requirement, isn't it?

A It's a Coast Guard regulation that was implemented presumably for safety, yes.

Q It goes into the early part of the century, isn't that correct?

A I don't know how far back it goes.

Q And would it be fair to say that in Exxon Corporation, Exxon Shipping Company, in 1988, 1989, there was no way the company could monitor through recordkeeping the work hours of the deck mates?

A That's correct, yes. We didn't see a need to do that.

Q You talked a little bit about fatigue. And fatigue is a problem with regard to ocean going vessel, isn't it?

A It is a potential concern. I wouldn't call it a problem.

Q More than a potential concern, what was the theme of the 1988 fleet officer conference?

A Future manning was one of the themes. Safety was another. There were a number of themes to that conference.

Q How about fatigue at sea, was that a theme?

A I don't recall that.

Q Have you had a fleet officer conference where the theme

[2135]

was – a theme was fatigue at sea?

A We had, in 1988, we had a professional topic that dealt with fatigue. That was not a theme of the conference trying to educate our supervisors about how to identify fatigue and how to manage it.

Q You talked a little bit about the straight salary system and you talked a little bit about Captain Hazelwood and Captain Hazelwood's ratings. And in both of these the subject of management came up and that he was a poor manager. Under Mr. Iarossi's vision of the Exxon Shipping Company, Mr. Iarossi implemented a number of management initiatives. The purpose of which was to turn the captains from driving the vessels into the managers of the vessel's business units, isn't that a correct statement?

A I wouldn't characterize it that way, no.

Q Did he ever do that? Did you ever read his speech on that topic? Do you recall that speech?

A Surrendering Memory.

Q Do you recall that speech?

A I do.

Q That's one of the things he talked about in that speech, isn't it?

A It is not turning them from – he was turning – he was adding to their professional responsibility.

Q He was adding to their professional responsibilities so

[2136]

that they would assume responsibility for the management of the ship essentially as a business entity?

A Right, but not to the degradation of their professional responsibilities.

Q It was a way to enhance their professional esteem so they were in essence a professional manager and a seagoing captain?

A They were a supervisor of the unit.

JOINT APPENDIX

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No. 07-219

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IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX VOLUME TWO
[Pages 691 - 1367]

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EXCERPTS FROM THE TRANSCRIPTS OF PROCEEDINGS
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Q Did Mr. Iarossi, in Surrounding the Memories, describe them as a manager of this business unit? You were there –

A I think he may have.

Q He did, didn't he? You were there for that speech?

A He may have. I don't recall his exact words.

Q Now, you talked a little bit about your monitoring of Captain Hazelwood on your own. We have two instances. We have the '88 fleet conference, but when Mr. Lynch was talking to you, you talked a little bit about the incident where you watched him. Do you recall that?

A I also said I monitored him at the '87 conference.

Q His drinking was of such concern to you that you went out of your way to monitor him, isn't that a correct statement? A His drinking was of no more a concern to me than any other rumor of a master that I would hear, but I did monitor him which I thought was prudent, right.

Q And with regard to your concerns about the ability to monitor him, you never past them on to any other members of the

[2137]

management team, did you?

A Not that I recall.

Q Now, in response to Mr. Lynch's question, your answer was something that puzzles me. You said, I had no training with regard to recovering alcoholics or alcoholism. Do you recall saying that?

A Yes.

Q You were the director of human resources for Exxon Shipping Company and that subject matter was within your responsibilities, wasn't it?

A That's right.

Q I want to talk for a minute about the safety credo, the plaque.

A Uh-huh.

Q The first item in the safety credo is accidents and injuries are preventable. Do you see that?

A Sure do.

Q Accidents and injuries are preventable, and one of the ways that we prevent accidents and injuries is through the careful selection and evaluation of seagoing masters, is that a correct statement?

A One of many ways, yes.

Q That's a very, very important subject, isn't it?

A Certainly is.

* * *

[2139]

DIRECT EXAMINATION OF MARY WILLIAMSON
(Read)

BY MS. WAGNER:

Q Could you please state your name for the record.

A Mary Robin Williamson.

Q Where do you presently reside, Ms. Williamson?

A Houston, Texas.

Q By whom are you presently employed?

A Exxon Shipping Company.

Q In what capacity?

A Catering buyer.

Q By whom were you employed in 1980?

A Exxon Shipping Company.

Q In what capacity?

A 1980, I believe I was on the utility, mess utility list.

Q How long have you been employed by Exxon Shipping?

A Since 1978.

Q What job positions did you hold with Exxon Shipping from 1978 until 1990?

A I held a job as mess man, mess utility person, ship's cook, fleet chef, those are the job titles.

Q In any of these assignments, Miss Williamson, were you on board a vessel?

A Yes.

[2140]

Q Were you on board a vessel at any time which was captained by Joseph Hazelwood?

A I didn't sail on the vessel, but I was aboard on temporary vessel assignment.

Q Can you please explain that, please, when that was and what vessel?

A The vessel was on the west coast, and it was one of the big ones. I'll say the Valdez. It may have been the Long Beach, but I think the Valdez. I'm not real sure. But Captain Stalzer was the other captain, so it was the Valdez. I relieved in the west coast office for the port steward.

Q You relieved?

A Yes. Temporary shore assignment, temporary special assignment is what we call it.

Q At any time that you were fleet chef, or on temporary special assignment as port steward, did you receive any reports of intoxication by any captains on board any Exxon vessel, shipping vessel.

A No, ma'am, the one incident that I perceived as alcohol being involved was on the launch in San Francisco.

Q And could you explain that, please, in terms of when?

A You want a date? Somewhere there is a date on this.

Q Even just a year.

A A year, okay. It had to be – it was March, I think, March or April, March of '89, and I was on board the Exxon

[2141]

Galveston. And I took a launch ashore, it was at night, and I had not heard any comments about the

Exxon Valdez crew or Captain Hazelwood up to that time.

I came back on what is called a midnight launch. It gets back to the ship about midnight. I think it leaves at about 11:30. At that point I met Captain Hazelwood at the Weststar launch.

Q What happened?

A He came up and he spoke to me and they – a conversation ensued. I – we were inside the building. We later went outside. I stepped back toward the door so it was fairly – by then there was a group of people, but it's my perception that I smelled alcohol on his breath.

Q On whose breath?

A Captain Hazelwood's. I don't know for sure, but that's only my perception. And we had a conversation and we stepped outside and we got on the launch. And that conversation continued briefly, not long, because he was out on the open deck area and I went in the cabin.

Q Of the launch?

A Yes, ma'am.

Q And that was your only contact with Captain Hazelwood at that time?

A That was my only contact with Captain Hazelwood. Inside a building, by the door of a building, and the conversation was

[2142]

finished up on the deck of a launch.

Q Now, is Weststar launch the same as Weststar terminals?

A I know it as Weststar Marine Services and Weststar launch is the same thing. It is at Pier 46 in San Francisco. So is that what you're talking about?

Q And at this time did you advise Captain Hazelwood that you thought that he was intoxicated?

A I didn't say to Joe Hazelwood, I think you're drunk, no, ma'am. I said something to the effect – he wanted he to relay a message to the captain of the Galveston, and I said, well, Captain, I don't think I can do that. I think maybe in the morning if you feel better, you can relay that message.

Q What message did he want you to relay to the captain of the Galveston?

A It wasn't entirely clear, and I wasn't entirely letting him

finish his statements because he seemed to be upset with Captain Reeder, and that was the master of the Galveston at that time and wanted me to tell Captain Reeder, that he was upset with him, and I didn't think that was my place to do that.

Q Now, at this time that you smelled alcohol on the breath of Captain Hazelwood in March or April of 19 –

A I think it was March. I got off the ship in April. It was March.

Q Did you feel that you had a duty to report Captain

[2143]

Hazelwood to other authorities in Exxon?

A It was my impression that I smelled alcohol. It was my impression that I thought he had been drinking. I got back to the Galveston that night, and I'm aware of Exxon Shipping Company policy. I gave it a lot of thought that night. I didn't talk to anyone else on the vessel about it. I was deciding what to do in the – and the next morning there was some A-B's talking about something that had happened during the night which I slept through when the ship let go from the Valdez. And I was wondering what I should do or if I should do anything. And I still didn't go to anybody. But we were at anchor doing some repairs and a gentleman by the name of Steve Day, who worked in the west coast office, whom I know, came on board and – well, and I didn't want anybody violating company policy. I couldn't prove the man had been drinking, but I thought something should be said. So I took Steve Day aside, alone in the officer's room on the Exxon Galveston in the afternoon. I'm not sure of the date. I think it was the second day of repairs. I said, when you get some time I need to talk to you confidentiality about something. And I went in and said, it is my impression, I was ashore the other night and this is what I think, and I think that Joe Hazelwood was drinking. Now, I don't know any more about that and I didn't pull anybody to see if he had been drinking, but it's my impression. And Steve if you think anything should be done

[2144]

about this would you take it back and talk to somebody. And I didn't tell him who to go talk to, but I felt – whether anybody agrees with me, I felt like I did what I had to do and I trusted Steve Day to address or at least see if the issue was checked out.

Q Was the issue checked out?

A I did not talk to Steve Day after that. I assumed it was.

Q And you said nothing to anyone that night?

A No, ma'am, I did not.

Q Do you know anyone else who saw Captain Hazelwood the night he left the launch in March 1989 from San Francisco and boarded the vessel?

A There were crew members and some licensed from the Exxon Valdez on that launch that went back on the ship with him and there was another crew member from the Exxon Galveston on board that launch.

Q Did you discuss your beliefs regarding Captain Hazelwood's possible state of drunkenness with any of the Exxon Valdez members?

A No, I didn't.

Q Did you board the Exxon Valdez that night?

A No, ma'am.

Q Along with Captain Hazelwood?

A No, ma'am. It went to the Exxon Galveston, the launch went to the Galveston prior to going to the Exxon Valdez. I went

[2145]

out.

Q As a port steward, would you have expected someone on board a vessel to report someone else on board the vessel as a crew member being drunk?

A I would think some people would and I would think some people wouldn't.

Q Why wouldn't some people do that and why would some people do it?

A This is my opinion.

Q I know, I'm asking for it, please.

A Okay. Some people would do it because company policy you should follow. And some would do it because they probably thought there was another way and – you don't want to turn somebody in. And if they were drinking and not drunk, and there was no harm done, even though it was a violation of company policy, it's not – I didn't say anything that first night because I'm not a hundred percent convinced Joe Hazelwood was drunk. I thought he was drinking. Then I had to debate company policy is a serious thing and to go to somebody and say, hey, by the way I think your captain over there was drinking. I had to think long and hard about that. And I think there are other people that probably have to think long and hard, whether it is a captain or somebody else, but in the end we try to do the right thing in most cases, and what I did I feel like I was in the wrong place at the wrong time and I

[2146]

tried to do the right thing. And maybe I didn't do it in a timely fashion, but I think I'm just like most other people out there. Sometimes you may take too long but you don't deliberately violate company policy. If I had seen the man stumbling, falling down drunk, yes, ma'am, I would have made a fuss over it. But that's not what I saw.

Q And you said Captain Reeder was the master of the Exxon Galveston at this time?

A Yes, ma'am.

Q Were you made aware at any time as to whether or not Captain Hazelwood and Captain Reeder had a verbal altercation on the radio at about this time?

A The morning after I came back on the launch ride that night, that next morning at breakfast, I heard people talking about when the Galveston and the Valdez had let go. And this is talk, because the chef didn't have to get up for those things, so I wasn't up for that, that there had been profanity used on the radio.

Q Well, when you became aware of this cursing between Captain Reeder who is the master of the vessel you were on –

A Yes, ma'am.

Q – and Captain Hazelwood, did you in any way feel any obligation to tell captain Reeder of your observations or perceptions the night before?

A I won't say the thought didn't cross my mind. We were

[2147]

underway. Captain Reeder was on the bridge. Captain Reeder was busy and I still hadn't made up my mind what to do about it. So I didn't tell Captain Reeder maybe I should have, hindsight, is always better than foresight, but, no, I did not tell Captain Reeder. Q If you can – and I appreciate the difficulty in doing so – internally, what was going through your mind when you judged whether you shouldn't or you should tell Captain Reeder about your perception with regard to Captain Hazelwood?

A It's perception. I can't tell you the man was falling down drunk. He got on the launch just fine. And if there was an incident with profanity or cursing over the radio, then that is between Captain Reeder and Captain Hazelwood, and that's up to them to settle. I don't know if I was right or wrong in doing what I did. I'm telling you what I did. If I had thought the man was totally incompetently drunk I would have handled it different. I thought he had been drinking. And I had a hard time deciding what to do about it and, yes, ma'am, I was fully aware of the company's policies.

Q Well, the company policy doesn't make a distinction between drinking and falling down drunk, do they?

A No, ma'am.

Q It prohibits drinking, am I correct?

A You're right.

Q Well, what was the company policy? Did it allow crew

[2148]

members to have one drink as you understood it?

A As I understood it, you could not come back to a ship inebriated. You could not have alcohol aboard a vessel. You could not drink aboard a vessel. If you went ashore and had dinner and ad a beer or a glass of wine and you didn't have to go on watch for several hours, then you could do that. That was my interpretation of it.

Q Yes. At the point of the launch in March of 1989 was there any person representing Exxon Shipping who, if they perceived a crew member might be drunk, could administer a test to determine whether or not that crew member was drunk or how drunk they were?

A That night that I went to the Weststar launch, there was a Weststar lunch driver and there were people going back to ships. And I don't know about any breathalyzer test, but nobody said anything about any breathalyzer test and only Exxon people that were there were people that were, A, going to the Valdez; B, going to the Galveston. I didn't see anybody else who worked for Exxon Shipping.

Q Were you aware of any company policy in effect at that time which would have stationed some Exxon Shipping representative at the site of a launch to determine whether or not returning crew members were drunk and/or how drunk they may have been?

A I don't know of one. There might have been, but I don't know of one.

[2149]

Q Was there any Exxon Shipping representative on board a vessel whose function was to determine whether or not returning crew members were drunk or how drunk they were?

A I assumed it was the mate on watch, or if you were on – you know, if somebody saw you they would tell the mate or the captain or a chef if you were an oiler or an engineer.

Q And that's all you were aware of, that's the only procedure you were aware of?

A That's the only procedure I was aware of. There might have been more, but you're asking me what I knew.

Q Miss Williamson, let me ask it directly, then. At the time you were on the launch with Captain Hazelwood in March of 1989 and you perceived he had been drinking, did you also perceive that his drinking may have been in violation of company policy?

A I know you want a clear-cut answer, but I didn't think about it that way.

Q Why not?

A I don't know how to explain this. I didn't perceive Joe Hazelwood was a danger to his vessel or anybody else. And I didn't discuss with him if he had been drinking. I didn't see him take a drink. Now, in the back of my mind, yeah, I knew what company policy was, and how precise, or how right I was or how wrong I was, and I gave it a lot of thought. And maybe if I hadn't of heard there had been an incident with profanity on the radio, maybe I would have never said a word to anybody. I

[2150]

don't know that. That played a part in it, and then I still didn't say it to the captain. Then I waited for someone to come show up from the office that I trusted that I thought would just take this and pass it on, and that's an assumption

on my part that he passed it on.

Q You said that the incidence of profanity somehow connected in your mind to –

A Our captains don't normally use profanity on the radios.

Q In your mind, did you associate the use of profanity by Captain Hazelwood with regard to your perceptions the night before?

A Something was wrong. I didn't know if he had been drinking or not. But something – captains don't use profane – I'm not saying a captain never used a dirty word on the radio. I'm saying our captains don't pick up radios and use – and curse other people out, another captain or a line handler or whatever. They don't do that. That is not normal.

Q I'm just trying to find out honestly what you were thinking at the time, and if I can ask maybe directly, then, when you heard of the incident of Captain Hazelwood using profanity, in your mind did that raise another question as to whether or not he might be drunk?

A It raised a question of, this is odd, and I wonder if I know something that impacts any of this. And I wonder what I should do about it. It raised –

[2151]

Q Mr. Thomas interjects, I believe she's finished.

It raised it internally?

A It raised it internally for me. I didn't assume – I mean, you can get angry, I don't say profanity is not used on Exxon Shipping ships, and I don't say that everybody didn't use it time and again. I'm saying on the radio that's just not routine. That's not normal. That doesn't mean somebody is drunk, that means somebody is annoyed or upset. If I had really been concerned, I guess I would have gone to

Captain Reeder, and I didn't do that. I just kept thinking about it, and that was strictly– I don't know how to explain to you what I felt or how I thought, and maybe you don't understand it, but I didn't assume Joseph Hazelwood was drunk. I assumed something was wrong with him concerning – and I assumed that – well, I knew what my perception was and maybe I had better say something. And the best thing maybe to do would be to say something to somebody in the office if I could get off the ship and go to a telephone. I didn't get off the ship. We were at anchor. And then Steve Day showed up, and I thought, well, Steve Day's here, and I'll just tell him.

MS. WAGNER: There's about two more pages left, finish it up?

THE COURT: Finish it up.

Q I'm just trying to understand –

A In effect, I passed the problem on, whether I was right or

[2152]

not. And it was only my perception of the problem.

Q What was the problem you understood you were passing on?

A That I thought he had been drinking. I didn't know if this – I didn't know how this played into profanity on the radio or anything else, but, you know, here, Steve. I don't know what it mens or if it means anything, and I did it confidentially, and I did it to him alone and I said if you would take it out back and see if anybody in the office wants to check it out. He told me he would take care of it. He didn't get real specific, but he said he'd take the information and I assumed he did.

Q Can you tell me to the best that you can recall what you said to Mr. Day and what Mr. Day said to you?

A I told Steve Day that I had been ashore, that I had come back. It was the Weststar, it was the launch, I had a conversation with Joe Hazelwood. It was my impression that Joe Hazelwood was drinking. And I didn't see him falling down drunk or anything and I didn't – you know I don't know what this mean, but I had heard of an incident of profanity on the radio, and I didn't know if Steve knew about and that if he wanted to know about that he could go ask some crew members or go ask a captain. I wasn't a witness to that. And that I would be more comfortable if he would just pass it on to somebody in the office and check it out or have somebody check it out. I don't think I asked Steve to check it out.

[2153]

Q Check what out?

A To check to see if the profanity or anything else, if Joe Hazelwood had been drinking or if it was all linked together or what was going on. I mean, they could have – they could call the ship up, they could do something. So he told me he would take that back to the west coast office, and I don't – I don't specifically remember him telling me who he would tell. I just remember he said he would do it, and I – I believed he would do it. So I didn't – I didn't run after him to see if he really did it, I just assumed he would take it back to whoever he thought was appropriate in the west coast office. It would be checked out.

Q At the time you observed Captain Hazelwood on this launch outside San Francisco, did you fear any retaliation from Exxon Shipping if you – or Captain Hazelwood if you actually officially reported the incident?

A Official retaliation, no, ma'am.

Q Well, even unofficial retaliation?

A If I had been wrong and reported him, I thought they would, there would – thought there would probably be some unofficial and not from top down, from the people you sail with. Being ostracized, but that's human nature and I could be wrong about that. Everybody wants to get along with who they sail with.

* * *

[2155]

Q At the time in March 1989 that you were on board the launch in San Francisco with Captain Hazelwood, did you perceive that Captain Hazelwood had had more than just a beer or glass of wine at dinner? I'm asking you only your perception.

A My perception was I smelled alcohol on this man's breath. He could have had a beer five minutes before he showed up for the launch. He didn't slur his words, he didn't stumble, he wasn't as nice as he had always been on the phone with me, but I didn't take that directed at me, that's what I perceived. I didn't perceive this fumbling person going back to the ship.

* * *

[2166]

DIRECT EXAMINATION OF STEVE DAY (Video)

BY VIDEO EXAMINER:

Q Mr. Day, for the record, would you state your full name, please?

A Steven Morgan Day.

Q And where do you currently reside, sir?

A At 2920 Sombrosa Street in Carlsbad, California.

Q By whom are you currently employed?

A Exxon Shipping Company.

Q What's your current position with Exxon Shipping Company?

A I'm a first assistant engineer.

Q When you were initially hired in November of '84 by Exxon Shipping Company, what position did you hold?

A Second assistant engineer.

* * *

[2170]

Q After the management conference, when was the next time you would have had occasion to see or hear of Captain Hazelwood?

A May of '88.

Q Okay. In May of 1988, you came across Captain Hazelwood's name again or you heard about him again?

A I worked with him.

Q Where was this?

[2171]

A In West State Shipyard in Portland, Oregon.

Q You were the repair superintendent at that time?

A I was an assistant to Jack King.

Q And at that time, was Captain Hazelwood the master of the Exxon Valdez?

A Yes.

Q You say you worked with him. What exactly did you do with Captain Hazelwood, or how did your duties coincide with Captain Hazelwood's?

A Well, it was – it was in both of our interests to get the vessel back into service, you know.

Q Let me – the Exxon Valdez was in dry-dock?

A Yes, undergoing repair.

Q Do you recall specifically how long the Exxon Valdez dry-docking lasted in May of 1988?

A I believe it was about eight weeks.

Q Was there any reason it was longer than the general?

A Because there was this guarantee dry-docking, as I mentioned, the scope of work was larger, a lot of guarantee related items were repaired or altered.

Q Could you tell us what kind of contact you had with Captain Hazelwood during this time?

A Primarily working the – my responsibility was to monitor the repairs and then work with him, coordinate with him to be sure that he was satisfied that repairs were complete and then

[2172]

get the vessel back into service, you know.

Q Did you see Captain Hazelwood on a daily basis?

A Yes, I would – I would say that's how I remember it.

Q Did you socialize with Captain Hazelwood at all during this time?

A No.

Q During the time of the Exxon Valdez dry-docking, did anything happen concerning Captain Hazelwood which you subsequently reported to a superior of yours?

A Yes.

Q Okay. Could you tell us what occurred?

A I overheard on the walkie-talkie radio someone call the ship superintendent for the vessel, yard person, indicating that "we're out of Henry's up here." It was my impression that the voice calling was Captain Hazelwood.

Q You heard Captain Hazelwood's voice before?

A Yes.

Q Okay. You said that you heard this voice which you believed to be Captain Hazelwood saying "we're out of Henry's up here"?

A Yes.

Q What does that phrase mean to you?

A It sounded to me like he was referring to Henry Weinhart's beer.

Q You identified the position before, I think, but to whom

[2173]

was Captain Hazelwood speaking at this time?

A The ship superintendent.

Q And who was that?

A Person named Bill Timmons.

Q Do you recall what Mr. Timmons' response was?

A I believe it was something to the effect, Roger – Roger, captain, I'll see what I can do about that. Something like that.

Q How was it that you happened to overhear this conversation?

A I was in the shipyard office – the port engineer's office, and it was my habit to leave the radio on in case the shipyard needed me or people on the ship needed to ask me something.

Q Did this exchange cause you any concern?

A Yes.

Q And why did it cause you concern?

A I was concerned that others might draw the conclusions I had drawn.

Q You had drawn some conclusions from this exchange?

A That Henry's meant Henry Weinhart's. I was concerned the way it sounded over the radio.

Q Why did that concern you the way it sounded?

A Well, we try to keep the radio conversation to work-related business and it didn't sound work-related to me.

Q Did it concern you that an Exxon Shipping Company captain was ordering beer over the radio?

A I would have to say I was concerned that that might be the case.

Q Did you do anything to follow up on your concerns?

A Yes, I spoke to Herb Leyendecker.

Q Who is Herb Leyendecker?

A At that time, he was the repair manager, I believe was his title. He was my boss, essentially, as repair superintendent overseeing the repairs of the vessel.

Q What did you tell Herb Leyendecker?

A From my recollection, I told him essentially what we've just – what I've just told you.

Q Where was Herb Leyendecker?

A He was in the office with me.

Q So he overheard the conversation as well?

A It's very possible that he did.

Q Did he indicate to you that he'd over heard the conversation?

A My recollection is that I didn't have to do much explaining, so he was in an office that was just a few feet away and probably could have heard the same radio that I heard, or even had one on in that adjacent office.

Q Was there anybody else in the office besides you and Mr. Leyendecker?

A Not that I recall, no.

Q Can you tell us what it was you discussed with

[2175]

Mr. Leyendecker?

A As I stated earlier, you know, we like to keep the radio for the business of the repair. And that there might be a possibility that what we heard was ordering beer.

Q What did Herb Leyendecker say in response to your concerns?

A My recollection is that he said that he would speak to Captain Hazelwood about what I had heard or we had heard. And he didn't really want me to get involved. I think being a fleet – fleet person.

Q I didn't understand what you meant, being a fleet person.

A This – the job that I was doing in Portland and the entire two years I was ashore, still essentially a first assistant engineer who was working temporarily as a repair superintendent or new construction inspector, but eventually as we've seen in my bio, I do have to go back to sea and work with the rest of the fleet as a peer or as a junior officer to some of these people. It was his desire to keep me out of any potential conflicts or discussions of that nature.

Q Did he tell you that that was his desire?

A Yes, that's my recollection that –

Q He said don't get – don't get involved, you're going to be sailing with these people, I'll handle it?

A That's my recollection.

Q Okay. As a result of the concerns that you told us about,

[2176]

any action that you took in regards to this incident, after you spoke with Herb Leyendecker, using that understanding of follow up, did you do anything to follow up on your concerns?

A Well, I spoke to Herb about – as I said, and I believe he did speak with Captain Hazelwood at some point. I can't recall whether it was that day or the following day.

Q Okay. Let me ask you, did you speak with Mr. Leyendecker about his conversation with Captain Hazelwood?

A Yes.

Q What did he tell you about that conversation?

A From what I recall, he indicated he – he asked Captain Hazelwood if there was drinking going on on the ship, and Captain Hazelwood said there wasn't. This is from what I remember of him debriefing me afterwards. He asked Captain Hazelwood if he was drinking again, and from what I recall, his reply was, no.

And then I believe Herb indicated that if there was any drinking going on on the ship, that he wanted it stopped. And if there was any booze on the ship, he wanted it off, you know, kind of – kind of a warning or a – some guidance that if this was some kind of indication of a problem, that he expected the captain to take care of it.

Q Anything else you can recall about what Herb Leyendecker told you in regards to his conversation with Captain Hazelwood?

[2177]

A No, that's – that's all I can –

Q You said that Herb Leyendecker asked Captain Hazelwood if he was drinking again?

A That's – that's my recollection, yes.

Q Did you have an understanding as to why Herb Leyendecker would ask him if he was drinking again?

A My understanding was that, you know, possibly at some time in the past Captain Hazelwood had an alcohol problem or been a heavy drinker and as – you know, as I stated earlier, the only time I had met him, he was not drinking.

Q Prior to this incident, had someone told you or had you learned from some source that Captain Hazelwood had had an alcohol problem or was a heavy drinker?

A Nothing specific.

Q Mr. Day, did you want to clarify that answer?

A Yes. I would say the impression that I had regarding, you know, what I said previously, possibly being a heavy drinker, probably came from Herb, you know, in, you know, discussing the incident or in his decision to speak to Captain Hazelwood. That's my recollection, that that's where I kind of became aware that, you know, there might be something in his past.

Q Was this an indication that you'd received from Herb prior to this incident?

A No, I think kind of during. Yeah. Prior, I would have to state, you know, say the same as I did just a few minutes ago,

[2178]

there was nothing specific to indicate that.

Q Okay.

A You know, the only other thing I can add is, you know, I did attend this conference and with a group of sea-going people, and did notice that he wasn't drinking. So maybe here's a guy who had realized it was in his best interest not to. You know, that's probably the only other place I could have drawn that conclusion.

Q Do you recall thinking that at the time that maybe, here's

a guy who doesn't want to drink?

A Yes. He and Andy, both, you know. They'd made a choice of some – you know.

Q Do you know whether Herb Leyendecker spoke with anyone else regarding this incident?

A No, I do not.

Q Do you want to clarify?

A Well, there's a time frame involved.

Q Okay. And I had limited my question to –

A Right. So it's wide open and in that time frame, you know, no. But –

Q It's your understanding that sometime later Herb

Leyendecker spoke with someone else about this incident?

A Yes.

Q Do you recall when that was that Herb would have had that conversation?

[2179]

A I don't know exactly when he had the conversation. I do know when he told me that he had had the conversation.

Q Okay. And when was that?

A After the grounding.

Q Okay. But when he told you about the conversation, he didn't indicate when it was he had had – had discussed this incident with anyone?

A Not specifically, no.

Q Did he indicate to you that this subsequent conversation he had had was – occurred prior to the grounding?

A Yes, that was my – that was my impression.

Q Did he tell you who he spoke with?

A Yes.

Q Who did he speak with?

A Harvey Borgen.

Q Did he tell you what he told Harvey Borgen?

A No, not specifically, just gave him a description of – of essentially what I've testified here.

Q Okay. And did he tell you what Harvey Borgen's response was?

A No, he didn't.

Q Now, you've told us that you spoke with Herb Leyendecker about this incident. Have you spoken with anyone else about this incident, excluding the lawyers – well, excluding your lawyer and Exxon Shipping Company counsel, have you spoken with

[2180]

anyone else about this incident?

A Yes.

Q And who have you spoken to?

A Paul Myers.

Q Let's go back to the conversation you can recall with Paul Myers –

A Yes.

Q – regarding this incident. When did that conversation

occur?

A My best recollection is that when I – when I returned to Benecia after the vessel sailed from Portland, I remember discussing this incident with him. It's also very possible prior to the ship sailing from Portland in speaking with Paul regarding preparations to complete the repairs and go to sea

that I mentioned it as well.

Q Okay. You told us the ship was dry-docked in Portland for approximately eight weeks?

A Yes.

Q So in the May or June 1988 period, you think it's possible you spoke to Paul Myers regarding this incident?

A Yes.

Q And then you say when you went back to Benecia you had a conversation with Paul Myers?

A Yes.

Q And when would that have been?

[2181]

A Approximately May 23rd.

Q So we can be a little more specific, you think you may have had a conversation with Paul Myers between May 20th and May 22nd while you were still in Portland, and you recall a conversation on May 23rd, 1988, when you returned to Benecia with Paul Myers.

A The telephone conversation that I don't really recall, you know, that vividly probably occurred sometime between May 11th and 20th. That would be the proper time frame for that.

Q What was Paul Myers' position with Exxon Shipping Company in May of 1988?

A He was ship group coordinator.

Q He was not your immediate boss?

A No. Well, not normally. In his capacity as ship group coordinator for the Exxon Valdez, I as repair superintendent was obligated to keep him informed, and so solely for the purposes of that 20 days or so that I was involved in the Valdez repair, he was a supervisor on the operation site.

Q Do you recall what you told Mr. Myers regarding this incident during the telephone conversation that you believe occurred sometime between May 11 and May 20, 1988?

A What I recall is essentially informing him what I've told you today, what occurred, Herb was involved, Herb followed up on the vessel, spoke to the captain.

Q Did you tell Paul Myers that you heard Captain Hazelwood

[2182]

ordering beer over the radio?

A I can't recall my specific words. Probably the best is to say I relayed to him what I've told you today.

Q Do you recall what Paul Myers' response was to the information that you were telling him?

A No, I don't.

Q Did Paul Myers indicate to you that he would take any action based upon what you told him?

A No, he didn't.

Q Was there something that specifically concerned you about that incident that led you to discuss this with Paul Myers?

A It was Paul's policy to request feedback on all of the

people on the vessel from the repair superintendent, so I felt this was part of giving him that feedback, you know, regarding events or people and their performance.

Q You mentioned before that Herb had told you to stay out of this because you're not – may have to sail with these people. Was that a concern that you had when you were discussing this with Paul Myers on the telephone conversation?

A Yes.

Q Did you discuss that with Paul Myers?

A I would say yes.

Q What did you tell him in that regard?

A I would say discussion – I mean – my recollection is that Paul understood the position I was in, and that – I kind of –

[2183]

I got the impression – or my feeling after talking was that he agreed with what Herb had done, to keep me out of it and take the issue himself.

Q In May of 1988, were you aware of any instances where Exxon Shipping Company employees suffered consequences, even informally, from their fellow employees or from the company for reporting violations of company policy, alcohol or otherwise?

A In that – at that time, no.

Q Subsequent to that time, have you become aware of such?

A Nothing specific. Our promotion system within the shipping company, including the sea-going employees is based upon performance only, and that performance is evaluated by your senior officers on the vessel, so it's easy to understand how crossing a certain group or – or sea officer could come back to haunt you or prevent you from being promoted or getting, you know, salary increases or whatever. It's something everyone's pretty conscious of.

Q Whether or not you discussed it with Paul Myers, was that a concern – was that a concern that you held, that your reporting this incident could cause certain negative ramifications to you in future evaluations?

A Yes.

Q I may have asked you this already, and I apologize. Did Paul Myers indicate to you whether he was going to take any action as a result of your report during the telephone

[2184]

conversation?

A Not that I recall.

Q You said you had another conversation with Paul Myers on May 23rd or 24th when you returned to Benecia?

A Yes.

Q Was that a conversation that you initiated?

A I can't recall whether he did or I did.

Q What was the subject of that conversation? Was it this incident?

A No, actually, most of it was updating him on the – how the repair finished up, kind of nuts and bolts of how the repair was completed. This was just part of that general conversation.

Q Now, you say you recall this in-person conversation better than you do the telephonic conversation you'd had with Mr. Myers. What do you recall about your conversation with Paul Myers on May 23 or 24, 1988, as it relates to this incident?

A What I recall is pretty much just restating the circumstances and Herb's involvement and his debriefing to me. That's pretty much it.

Q I understand. Other than this incident, did you report anything else to Paul Myers during this conversation regarding Captain Hazelwood's performance during the dry-docking of the Exxon Valdez?

[2185]

A I reported his performance generally was quite – we had quite a good relationship, very cooperative, seemed to work well together to get the repair completed.

Q Did you have any heightened concerns about this incident because it was Captain Hazelwood involved as opposed to John Doe involved?

A I would say no. You know, the problem I had was using the radio for some purpose such as that where it could be heard by all the shipyard employees, as well as the ship's crew.

Q Did you have any further conversation with Paul Myers regarding this incident?

A What time frame?

Q Well, since the May 23-24, 1988 conversation?

A Yes.

Q When did that conversation occur?

A It was in 1989, approximately two months after the grounding.

Q Where did that conversation occur?

A In my office, in the west coast fleet office in Benecia.

Q Who initiated that conversation?

A Mr. Myers.

Q Was your report of this incident the subject of that conversation?

A Not – not really.

Q What was the subject?

[2186]

A It was more the incident itself, not my report of it.

Q What was said at that time with regards to the incident by Mr. Myers?

A He indicated that he had passed on that information that I had told him to Harvey Borgen.

Q During this conversation, what else did he say?

A He said that there had been another incident in which – that he did not remember.

Q Now you have confused me. He told you that there was another incident? What type of incident?

A We're going to get to it, I'm sure. It's in all the other depos.

Q That's the Mary Williamson incident?

A Yes. He mentioned there was an incident reported, apparently reported to him that he did not remember. He didn't remember that occurring.

Q He didn't recall having received a report of that; is that correct?

A That's correct.

Q Anything else that Paul Myers said during this conversation that you can recall?

A No, it was very short.

Q Whether Mr. Myers told you or otherwise, are you aware whether Mr. Myers took any steps other than reporting to Mr. Borgen in response to your report of this incident?

[2187]

A No, I'm not aware of any steps.

Q And do you have any knowledge as to what Mr. Borgen did, if anything, in response to Paul Myers' report of this incident to him?

A No, I'm not.

Q Are you aware of any other Exxon Shipping Company employee having knowledge of this incident, other than those that you've told us about today?

A Just – just Herb and myself.

Q And Harvey Borgen and Paul Myers?

A Yes.

Q Okay. Your discussion with Herb Leyendecker –

Leyendecker, excuse me, did you discuss whether there had been beer on board the vessel?

A Yes.

Q And what was discussed in that regard?

A Herb asked if I had seen any beer on the vessel. My reply was that I had seen beer bottles, empty beer bottles on board the vessel.

Q Where were these empty beer bottles that you had seen on board the vessel?

A In the dumpster or garbage can in the computer control room, which was kind of public areas.

Q What kind of beer bottles had you seen?

A Henry Weinhart's.

[2188]

Q When had you seen those beer bottles?

A My recollection is that it was – it was sometime between the time I arrived there, May 2nd or 3rd, whenever that was, and the time of the radio call, sometime in that first week, ten days.

Q Okay. Had you seen the beer bottles on more than one

occasion?

A I can't say I specifically recall. I saw them in two different locations that I mentioned, which had to be a little bit apart, you know, it was – saw them in the dumpster, saw them in the chart controller room, so I don't know specifically if it was, you know, successive days or every day or once.

Q Do you recall how many beer bottles you saw?

A Best recollection is possibly four to six total in both locations. That's the best I can think or remember.

UNIDENTIFIED SPEAKER: I'm sorry. Four to six in each of the locations?

THE WITNESS: No, total. Maybe two in one, four in the other, or two and two.

BY VIDEO EXAMINER:

Q Did you see any other alcohol containers aboard the vessel?

A No.

Q When you discussed this incident with Paul Myers, did you tell Paul Myers that you had seen beer bottles aboard the

[2189]

vessel?

A My recollection is that I would have – I would have told him that, or I did tell him that during that discussion.

Q Was Captain Hazelwood on board the Exxon Valdez on a regular basis during the time it was in dry-dock and you were there?

A Yes.

Q When was the next time that you would have come in contact with him or his name would have come up?

A March of '89.

Q Where were you at that time?

A On the Exxon Galveston.

Q Who was the captain of the Exxon Galveston at that time?

A Captain Craig Reeder.

Q And what type of vessel was the Exxon Galveston?

A It's a small 25,000 dead weight ton lightering vessel. Stayed in San Francisco Bay.

Q Stayed in San Francisco Bay for the purpose of lightering other vessels?

A Yes.

Q What were your duties at that time?

A I was still repair superintendent working out of the west coast fleet office.

Q Could you tell us about the circumstances surrounding your either contact or Captain Hazelwood coming out in March of

[2190]

1989?

A I didn't meet Captain Hazelwood at that time. I was involved in a conversation about him.

Q When did this conversation occur?

A I'm going to say it was approximately March 13th or 14th, 1989.

Q What time of day; do you recall?

A Oh, about 11:00 in the morning, 11 a.m.

Q Were you a direct participant in the conversation, or did you overhear a conversation?

A I was a direct participant.

Q Who was the conversation with?

A Mary Williamson.

Q This is a conversation you initiated, or had Mary Williamson come to you?

A Mary had come to me.

Q What did she say to you?

A She said she had something she needed to talk to me about.

Q Okay. And what was your response?

A We were both very busy at the time. I said, okay, when I get a chance I'll stop by, or we'll get together and she could pass on this information.

Q Did you make time during that initial contact to speak with Mary Williamson?

A Actually, my recollection is the initial contact was – I'm

[2191]

going to say it was the – a Monday or the first day of my involvement with the Galveston on that repair, and I – I didn't really get a chance to speak with her that day. I had been on a ship all night, a different ship, and just came out in the morning and then went home. It was the following day, so it was about, say, a 24-hour time period from the initial – well, when she said she had something she wanted to tell me and when we actually got together.

Q And just so I'm clear, at that initial contact she didn't mention Captain Hazelwood's name?

A No.

Q What was the next occasion when Captain Hazelwood's name came up or you had contact with her?

A After speaking with Mary?

Q Well, let me ask you, have you told us everything you can recall in regards to your conversation with Mary Williamson, that initial contact?

A Oh, yes, yes. Initial contact was just, Steve, I need to tell you something when you get a chance. Okay. She went her way, I went mine. We had lots to do.

Q You didn't speak with her again?

A Until about 24 hours later the following day at lunch.

Q What was the next occasion after that initial contact that

you had with Mary Williamson where Captain Hazelwood was discussed?

[2192]

A I believe it would have been the 11:00 conversation that we had. That's my recollection. I don't remember it coming up at all in the interim.

Q Could you tell us the circumstances around your subsequent conversation with Mary Williamson?

A I finally had the time to – to break away, went up to the – she was the fleet chef on the Galveston, the cook, and she pulled me aside into a private area, one of the lounges adjacent to the galley and told me, you know, what she had to say.

Q What did she have to say?

A As best I can recall, she had been on a launch from Westar going out to the Galveston. At the time she was on that launch, the Galveston was alongside the Exxon Valdez and the Valdez was discharging cargo to the Galveston. And she said she had met Captain Hazelwood on that launch and had a conversation with him on the launch on the way back to the ship. She said that in her opinion, that he might have been drinking, and that he was being kind of loud and directing most of his comments toward her, and so she, you know, continued the conversation with him out on the deck of the launch to try and minimize the number of people who would overhear what was being spoken about. And she thought this might be a problem, you know, that maybe someone should be made aware of the circumstances that she had described.

[2193]

Q Did – you said that Mary Williamson indicated that she believed Captain Hazelwood may have been drinking?

A Yes.

Q Was she any more specific than that? Did she give you any indication as to what it was, what was said, or appearance or demeanor that led her to believe that Captain Hazelwood may have been drinking?

A I'm trying to be sure I distinguish between what I've read in designated documents and, you know, from what I was told at the time. Takes a little while to sift it through. Certainly I think the loudness was – I think my impression was that was an indication of something, being very vocal, and I believe that she also indicated that she smelled alcohol. And I believe the substance of the conversation was regarding Captain Reeder, who was Mary's captain on the Galveston, that's the main reason she tried to, you know, move away from the rest of the group on the launch. It wasn't very favorable. That's – that's all I can remember right now.

Q Do you recall any – did Mary Williamson give you any of the specifics of what Captain Hazelwood was saying?

A I – I don't recall very many specifics, just Captain Reeder's name and Dan Paul as two people who were objects of his anger or displeasure, or whatever he was vocalizing, just the individual stuff more than any description as to what the complaint was. I just seem to remember the – the names.

[2194]

Q Did you report what Mary Williamson had told you to anyone?

A Yes.

Q And who did you report it to?

A Paul Myers.

Q When did you make that report?

A It would have been the following day, one day after my conversation with Mary.

Q What did you tell Paul Myers?

A From what I recall, I – I initiated the conversation, went into Paul's office in Benecia, shut the door and related to him essentially what I've – what I've told you here, what Mary observed and thought he should know about it.

Q Do you recall what, if anything, Paul Myers said in response to your report?

A He didn't – didn't say very much, my recollection, anyway. I vaguely remember some, you know, questions of when, what day, and, you know, but that's about – that's about all. It was very short, actually.

Q At the time that you were making this report to Paul Myers, did you have the same concerns that you had discussed previously about reporting activity of a senior officer and how that may impact upon your subsequent evaluations?

A Yes.

Q Do you know whether Paul Myers did anything in response to

[2195]

your report?

A No, I don't know.

Q At the time that you had had the conversation with Mary Williamson on March 13 or 14, was the Exxon Valdez still in port or had it departed?

A We were still in port.

Q At the time that you had the conversation with Paul Myers, was the Exxon Valdez still in port or had it departed?

A They were still in port.

Q When you had the conversation with Mary Williamson, had you been informed of any verbal altercation that Captain Reeder and Captain Hazelwood had had?

A At the time that I spoke with Mary?

Q Right.

A It's kind of tough to sort out, you know, because as you know, there's a lot of testimony about that.

Q Right.

A My best recollection is that there was some indication that some kind of altercation had taken place over the radio. It kind of all runs together, you know, it's – there's the grounding, it was all within a week's time. Very busy time. I would say in answer to the question, yes, I think somewhere, either from Mary in our conversation by inference or somebody telling me on the launch or the launch driver telling me on the way to or from the ship, you know, somehow I got some kind of

[2196]

feel that there was some kind of friction there between these two people.

Q You said that Mary Williamson had reported to you that Captain Hazelwood had said less than kind things about Captain Reeder and Dan Paul?

A I believe so, yes.

Q What led you to report the information that Mary Williamson had told you to Paul Myers?

A Well, Paul was his supervisor.

Q Paul was not your immediate supervisor, though; is that right?

A No.

Q Who was your immediate supervisor at that time?

A Depended which vessels I was responsible for. At that time. I believe for most of the time I was in that office, it was Stuart McRobbie and Bill Deppe, maybe three shifts with one, two with the other, it kind of shifted around. That's why I reported it to Paul.

Q Did you report it to Paul Myers because you had made the previous reports to Paul Myers as well about Captain Hazelwood?

A Not really. He was – he was Captain Hazelwood's supervisor at the time of the shipyard repair, also, so I would – I would say that the reason for telling Mr. Myers is he was Mister – Captain Hazelwood's supervisor in both cases.

[2197]

Q When you made the report to Paul Myers, did he indicate to you that he would do anything with the report?

A Not that I recall, no.

Q At this time, on March 13th or 14th of 1989, were you concerned that Captain Hazelwood had a drinking problem?

A I would say that my feelings were that, you know, something was going on with this individual, that his supervisor ought to be made aware of, if I can do that, and as I said, I chose to do that. I don't know that I'm qualified to hear a secondhand report and determine if someone has a drinking problem or not. So it's kind of hard to come out and say that.

Q Do you believe that you did all that you could to inform Paul Myers, Captain Hazelwood's supervisor of the concerns that you have stated that you had about Captain Hazelwood?

A Yes.

Q And those concerns were that something was going on with this individual?

A Yes.

Q Was that something, in your mind, a potential alcohol problem?

A Could have been – could have been a lot of things. Could have been, you know, family problems. Could have been a number of things that were bothering this guy. But I just felt that what I was hearing from others he should be made aware of as his supervisor, so if he needed to speak with him or

[2198]

investigate, he could.

Q After your conversation with Paul Myers, when was the next time that Captain Hazelwood's name came up or that you had contact with him?

A March 24th, the grounding, was the next time really I heard his name.

Q Was there any problem with the Exxon Valdez when it was in port in San Francisco, any mechanical problem?

A We were having some problems with the turbo chargers on the main engines.

Q Okay. And what was that problem?

A I believe it was surging.

Q What was your first thought when you heard the Exxon Valdez had gone aground?

A Thought it was a mistake.

Q Why did you think it was a mistake?

A I just didn't feel that with, you know, one of the newest and most modern ships, well-maintained ship, that our company would have a problem like that. You know, with the care that we took in our operation, that we would be the ones to hit Bligh Reef. Frankly, I thought it would be somebody else, you know, a fly-by-night operation.

Q When you heard that the vessel had been grounded, did it

cross your mind that Captain Hazelwood might have been drinking?

[2199]

A No. Initially – to answer your question, initially, no.

Q Okay.

A Could have been a mechanical problem, you know.

Q You say initially, no. At some subsequent point in time, did it cross your mind?

A Heard an awful lot of media reports that immediately brought that to the forefront, you know. News we got in the office.

Q So that morning –

A Yes.

Q – when you got to the office?

A Yeah.

Q And that thought was as a result of the media reports you heard?

A I believe so, yes.

Q When those media reports started coming across, did you discuss with anybody, either the Mary Williamson report to you or the ordering of the beer in Portland shipyard?

A That day?

Q We can begin with that day.

A Any time – yeah. Not that I can specifically recall on that day, you know, we were kind of busy with getting drawings of the ship, getting people prepared to go up there.

Q Okay. Subsequent to that day, did you discuss either of the incidents, the Mary Williamson report or the ordering beer

[2200]

in the Portland shipyard as it related to the media speculation that alcohol had been involved in the grounding of the Exxon Valdez?

A Every neighbor on my street that wanted to know the real story. There was an awful lot of hallway talk, as you can imagine, about every – all different theories on what happened. Then there were the media reports that may or may not have been correct, you know.

I do remember, you know, talking to – it's kind of hazy, but I do remember talking to Stuart McRobbie about it. He was running the office after the grounding. I also may have mentioned, you know, these incidents to Tom Shearer who worked in our office.

Q Anyone else you can recall?

A Those are the – the only people that I really have any recollection of. Like I said, there was an awful lot of hallway talk and I heard about, you know, everything you can imagine.

Q You said that you had a conversation with Stuart McRobbie but it was kind of fuzzy. Do you recall anything about your conversation with Stuart McRobbie?

A Not – not too much. Essentially, as I said, he was running the office and he was, I'm sure, being asked for information by the company if there was any information out there. So what I recall is just, you know, meeting with him

[2201]

briefly and relating to him what we've talked about here today.

Q Do you recall any comments he made?

A No, I believe he was just a messenger. He was a conduit to pass information on to someone else.

Q How about your conversation with Tom Shearer, do you recall any specifics of that?

A Say it was pretty – pretty much the same as the conversation with Stuart, maybe a little less formal. Tom was just more of a peer than an individual in the office. I would say the same facts.

Q Did you express to either of these two individuals or to anyone other than your lawyers any concern you had that you had made reports to Paul Myers about Captain Hazelwood's activities, and yet to your understanding nothing was done in regards to those reports?

A Well, first I'd like to say, you know, something very well may have been done with the information that I passed along. I just was not aware of it. I also, you know, after the grounding, I think there – you've spoken to most of the – most of the people involved. I think everyone had some feelings that, gee, what could I have done to have prevented this thing? And

I was no different than anybody else in that regard. And in hindsight, I think I tried to do what – what I could, you know, by informing Mr. Myers of what I told him.

[2202]

Q Paul Myers, would he be considered Exxon Shipping Company management?

UNIDENTIFIED SPEAKER: By whom?

VIDEO EXAMINER: By this witness.

THE WITNESS: Yes.

BY VIDEO EXAMINER:

Q Do you believe that Paul Myers should have taken some measures to investigate the reports you gave him?

A Yeah. As I said, I think he very well could have that I was not aware of. I think by virtue of the fact that I reported the information to him, that I felt it was important enough to be looked into.

Q What did you – was there a message you were trying to get across to Mr. Myers that perhaps was not expressed in what you were telling him?

A Sometimes, Mr. Myers – I don't know if you've met him – tends to have a very flat affect. And when you speak to him, you can't determine whether it bounced off or sunk in sometimes, you know. Whether he's preoccupied with something else, he just – as Mr. Klinckhardt asked, what was his response, and there really wasn't much of a response, and that's why I said, you know, in thinking about it and trying to answer truthfully, can I really be sure that he heard me or was he thinking so much about something else that was going on that day that, you know, he maybe didn't.

[2203]

Q So then perhaps –

A I was speaking that, you know, I'm fairly certain he heard the spoken words, the words that I enunciated, but they may not have registered or sunk in. He may have been – as an example, when – when I reported the Mary Williamson/Westar incident, he was at that time very involved with trying to get the turbo chargers repaired satisfactorily on the ship so that the ship could sail. We'd been delayed a couple days already and he – so it's very possible that's one – I think that's kind of the conversation that, you know, sparked me to make that statement to you, is that I know on that particular day he was very busy and I was very busy as well. And maybe in the – all the other things that were going on in his mind at that time, trying to get the ship out of port, that didn't register.

Q Why was he concerned about getting those turbo chargers operational?

A So that the ship could sail and pick up its next cargo.

Q Was it costing you money for the vessel to be at the yard?

A The ship was in service in – at the time of the Westar incident in March of '89, so every day that it sat in San Francisco without heading towards Valdez was a day off hire for the vessel, which costs a lot of money.

Q You testified earlier that in your – one of your discussions with Mr. Leyendecker – Leyendecker?

A Leyendecker.

[2204]

Q Leyendecker, that there might be repercussions to your career if you reported a concern about alcohol abuse of an officer such as Captain Hazelwood; do you recall that testimony?

A Yes.

Q Notwithstanding that concern, you reported what you learned on several occasions to Mr. Myers; correct?

A Yes.

Q Why did you do that, notwithstanding the fact that you knew there might be repercussions on your career?

A I felt it was information that – that Paul should have, you know, as his supervisor. And I also felt that Paul would be discreet enough not to reveal his sources, you know, having known him for a while.

* * *

[2207]

Q Now, did Exxon Shipping Company management ever do anything to encourage reporting violations of the alcohol policy?

A Not that I'm aware of.

Q You believe it's realistic to expect a junior officer, someone like yourself, to report violations of the alcohol policy to superior officers? Are you aware of anyone else, Mr. Day, other than you, any junior officer ever reporting violations of a senior officer?

A No, not that I'm aware of.

Q Now, you testified earlier today that you had no knowledge that Hazelwood was monitored regarding his use of alcohol. Do you remember that testimony?

A Yes.

Q Okay.

A Up until the time of the grounding and everything became public and there was a lot of public –

Q Well, are you aware of Captain Hazelwood being treated differently in any way by Exxon Shipping Company management?

A Up to the time of the grounding?

Q Yes.

A Not that I could discern.

Q The contention that Captain Hazelwood was the most closely monitored man in the fleet, do you have any information or any evidence that would support that contention?

[2208]

A The only thing I think I could add on that is that

Mr. Myers, who is the SGC for the Exxon Valdez, was very diligent in visiting the vessel. He was – of the SGCs that I saw work in that office, spent much more time on the ships talking to the people. What he was doing there, I really couldn't, you know, couldn't say.

Q How long was Hazelwood in Portland during April and May of 1988?

A I really – I'm not aware of when he joined the vessel. I know when I arrived on the second or third day of May, he was there as captain.

Q Okay. And how long did he remain before you went back?

A He sailed with the vessel. In the first voyage, I believe.

Q So how long a period of time would that have been that he was there and you were there before he sailed?

A Probably 20 days, 18 days, somewhere in there.

Q And during that 18 to 20 days, you had daily contact with Hazelwood; did you?

A Yes, for the most part.

Q Okay. And you're saying that no one ever told you to monitor or check on his drinking during that period of time; is that true?

A That's correct.

Q Did Harvey Borgen ever come to the Portland shipyard during

[2209]

that 18 to 20 day period of time?

A No, not in the period I was there, no.

Q Did Paul Myers?

A No.

Q My question is, you had – in March of '88, it was your belief that Hazelwood had stopped drinking; is that right?

A Yes.

Q And after either the incident in May of '88 or Mary Williamson's report a week before the grounding, did you consider the fact that Hazelwood had relapsed and he'd started drinking again?

A I thought that might be a possibility, yes.

Q That's why you reported it to Exxon Shipping Company management; true?

A The way I put it earlier, was that I reported the information to Paul Myers because I felt as – as his supervisor, he should be aware of – of this information. I believe that's the way I put it. Certainly as his supervisor, hopefully he had a lot more information about this individual than I did. I didn't know Joe Hazelwood very well and he could draw those conclusions as to what that information – what, you know, what that meant to him or to his – in his job as his supervisor more than myself. As I said, I felt that could have been a possibility.

Q Okay. And it was on each occasion when you went to Paul

[2210]

Myers, it was your hope or your belief that Mr. Myers was going to act on your report and do something; true?

A Yes, he – you know, I passed the information to him so that he could take that information into account in supervising this individual, however he chose to do it.

Q Mr. Myers, Paul Myers, in March of 1989 when you made that report to him, the Exxon Valdez was still sitting there in San Francisco Bay; wasn't it?

A That's correct.

Q It hadn't taken off?

A That's correct.

Q How many days did it continue to sit there before it took off?

A I believe I told him on Wednesday afternoon, ship sailed Saturday.

Q So it sat there for, what, three or four days?

A At least two full days, yeah.

Q Okay. And had Mr. Myers chosen to remove Hazelwood as master, he had at least two or three days to do that; didn't he?

A Yes.

* * *

[2216]

DIRECT EXAMINATION OF RONALD SCOTT LUNT

BY MR. JAMIN:

* * *

[2217]

Q All right. Now, was there a period that you worked for an outfit called Alamar?

A Yes, there was.

Q And is Alamar shorthand for something else?

A It's short for Alaska Maritime Agencies.

Q And what was the period, sir, that you worked at Alamar?

A It was – I can't remember the exact month, but from '86 till – till the end of April, about, of '89.

Q And what was Alamar's general purpose?

A General purpose was to assist the ships and the captains who came into port that were hired by their companies.

[2218]

Q All right. And were these the ships and captains that were in the Valdez crude trade?

A Yes.

Q And the vessels would come up with ballast and leave Valdez with crude?

A Correct.

Q Now, within Alamar, was there a particular person who was the boss?

A Yes. Bob Arts was the manager of the officers.

Q How many employees were there?

A Six total.

Q And what was your – what was your job title, if you had one?

A I was titled an operations agent.

Q How many operations agents were there?

A There were four of us.

Q So if Mr. Arts is the boss and there's four agents, what were the other two people?

A Secretaries.

Q All right. Now, as an agent, what kind of workday would you have? What kind of workweek would you have?

A Basically depended on which type of ships we had coming in. Normal day would be a couple three ships in port. If there weren't any requests from the captains, or generally it was just maybe somebody to the doctor or securing stores for

[2219]

the steward's department or basically like that would be a basic day.

Q All right. So would it be fair to say you were a support person for the vessels as they came in?

A That would be a good description.

Q All right. Would you meet ships when they docked, sir?

A Yes.

Q Was that part of the job?

A Yes. Every time one of our ships came in, we'd meet them as soon as they got gangway on board.

Q All right. Were you there shortly prior to their departure as well?

A Yes. We'd come on board and get any last minute mail that had to come off and collect copies of oil reports from the gaugers.

Q I think we've talked a little bit about ullage reports, but that's how much room is left in the vessel after it's filled up with oil?

A Well, how much is left and how much crude oil is actually in each particular tank.

Q All right. Now, was – was Exxon one of Alamar's clients?

A Exxon was the largest principal Alamar had.

Q So you would deal with the various Exxon vessels as they came into port?

A Correct.

[2220]

Q During the course of your work at Alamar, did you come to meet Joe Hazelwood?

A Yes.

Q All right. And can you estimate for us how many times you might have interacted with Mr. Hazelwood during that period that you were at Alamar?

A I'd estimate 15 times maybe.

Q All right. Now, this may seem a little strange, but how do you know you were interacting with Joe Hazelwood? How do you know it was Joe?

A He was the captain of the ship. That was who I dealt with when I went on board, or he was the first person I'd go see.

Q All right. So as I asked you some questions about Joe Hazelwood, you're sure it was Joe when you're talking about?

A Yes.

Q All right. Now, did you have an opportunity, sir, to go to Mr. Hazelwood's cabin at all?

A When you say exactly his cabin, his office was outside of his cabin and that's where we would conduct business.

Q So you had an opportunity to go to the office part of his suite, then?

A Yes.

Q All right. And what brought you there, sir?

A Oh, Exxon shipped all their mail to our office for the crew members and whatnot, and we'd always take that on board. And

[2221]

then I'd sit down with the captain and discuss any requirements he had of myself or our office when the ship was in port.

Q So you actually got to know him a bit?

A Yes.

Q Let me talk just a bit about your responsibilities, if any, at Alamar for crew people. Would you – and this is with respect to the Valdez, your time in Valdez and talking about crew members from the vessels.

Would you on occasion take crew members to bars?

A Yes.

Q And on occasion, would you pick crew members back up from bars?

A Yes.

Q And did you ever see crew members from Exxon vessels return to ships noticeably drunk?

A Yes.

Q And how could you tell, sir?

A Just – it was about a 15, 20 minute ride from town to Alyeska, and just being loud, boisterous, having fun or whatever, I mean, just a different attitude than when I brought them to town.

Q All right. And were those crew members that you found

noticeably drunk or determined were noticeably drunk, were they able to get through the security gate at Alyeska?

A Yes.

[2222]

Q And were they able to walk back to the vessels?

A Yes.

Q Now, are you familiar with how one had to go from shore over some sort of apparatus to get to the vessel?

A Yes.

Q All right. Was there a name for that, sir?

A Oh, there's four berths there, and each one had a walkway

down to the ship. And then there was a gangway once you got to the end of the – end of the berth onto the ship.

Q So gangway is the right word, then?

A Yes.

Q All right. And were these men that you had seen as noticeably drunk able to make it over the gangway?

A Yes.

Q Did you ever see anyone actually pass out once they had gone through security?

A Yeah, one – one time, but it was not a – an Exxon employee.

Q Not an Exxon employee, but that person had been able to get through security?

A Yes.

Q Let's just talk about some of your contacts with Captain Hazelwood. What sorts of contacts would you have with the captain? What kinds of things would you do?

A Oh, I'd go on board, like I said, and deliver the mail and

[2223]

usually – or most of the time, if it was still business hours in town, he'd ask for a ride to town. And a couple of the crew members would come and I'd drop them off downtown and, more times than not, we'd set up a range of time for me to pick them back up, take them back to the ship after a few hours.

Q All right. Were there particular locations to which they were dropped off when you would bring them downtown?

A Yeah. I'd say most of the time it was either in the parking lot of the Pipeline Club or the parking lot of the grocery store directly across the street from there.

Q All right. And were you also involved in picking up when vessels would leave?

A Yes.

Q All right. And from where, if there was a normal place, from where would you pick him up, sir?

A Best I can recall, it was either at the Pipeline Club or there's another business in town called The

Pizza Club where sometimes they'd pick up pizzas for the crew members and take them back.

Q All right. And on such occasions when you were picking Captain Hazelwood up to return him to the vessel, did you ever go actually into the bar to pick him up?

A Yes.

Q And can you explain how that would happen?

A Well, like I stated earlier, we'd just arrange a time for

[2224]

me to pick him up, and I'd just pull up, go in and see if he was ready to go.

Q All right. And were there times when he would tell you that he wanted you to pick him up at a certain time at a bar?

A Yeah.

Q All right. Now, did you ever actually see Joe Hazelwood drinking alcoholic beverages in Valdez?

A Yes.

Q And can you explain the circumstances as to how you would see that?

A Well, I'd just locate him inside the bar and walk up to him, whether he's sitting at a table or at the bar, and ask him if he was ready to go.

Q All right. Now, how do you know that it was alcohol that he was drinking, sir?

A Well, I don't know for a fact, but just – like I say, I've lived there for 12 years and frequented the Pipeline Club, seen what's called like a rocks glass in front of him, and I just assumed that that's what was in the glass.

Q How many times do you think that you saw Joe Hazelwood drinking in these circumstances where you'd pick him up before he went back to the vessel?

A Four or five, maybe.

Q And can you estimate how many times that you picked up Mr. Hazelwood from the Pipeline Club to bring him back to the

[2225]

vessel during this period?

A I thought that was what you just asked; four or five times, I mean.

Q Okay. Now, would you also get other materials to bring back to the vessel at Mr. Hazelwood's request?

A Yes.

Q What sorts of things were they?

A Oh, what sticks out most in my mind is during the summer months, we would get fresh seafood that was available in town and take that back on board.

Q And were there other stores you'd bring back as well?

A Occasionally they'd run out of bacon or something like that.

Q Now, during the period prior to the shipwreck, do you know whether it was possible to bring alcoholic beverages through the Alyeska security gate?

A Yes, it was possible.

Q And how do you know that, sir?

A I've seen it happen.

Q What were the circumstances?

A Guys I'd take back, they had arrived, would have a bottle on them and they would just put it inside a – inside coat pocket or put it in a boot or something and just hide it from the security people.

Q Now, other than the crews of the vessels – and I want to

[2226]

focus exclusively on Exxon right now, Exxon vessels, other than the crews of the vessels, by which I mean, the masters and the mates and the seamen, the engineers, the radio people, the crew, did you ever see other Exxon people from shore side management in Valdez?

A There was only one occasion that I can remember where a couple of people came up that were interested in the steward's department. They stayed in town for two or three days and boarded several ships to check out their facilities in the kitchen.

Q All right. Besides them, did you see any other Exxon management in Valdez?

A No.

Q All right. Were you ever aware that there was any program to monitor or keep an eye on Joseph Hazelwood while he was in Valdez?

A Not to my knowledge, there wasn't.

Q All right. Now, did you have contacts other than in person with Exxon people on a regular basis?

A Pardon?

Q Did you have contacts other than personal contacts where you would actually interact with someone, and other than crew, with shore side management?

A Strictly through telephone conversations, yes.

Q And what was the nature of those telephone conversations?

[2227]

A Generally, it was due to a sick crew member who was unfit for duty or if there was an emergency to get somebody off the ship or somebody that was meeting the ship in Valdez.

Q And how often would you – would you have these contacts, or perhaps how many contacts did you have over the time that you were in Valdez?

A Several hundred times maybe I'd talk to somebody in Benecia.

Q In Benecia, sir?

A Yeah.

Q And did you understand that was near San Francisco and it was the west coast office?

A Right, west coast fleet office.

Q During those conversations, did anyone ever ask you to keep an eye on Joseph Hazelwood and/or his drinking?

A Never.

Q Did Hazelwood have a reputation among Alamar people for being a sailor who liked to drink?

A Most of them.

MR. CHALOS: Your Honor, I object. Hearsay.

MR. JAMIN: I think, Your Honor, it's relevant as to whether or not it would have been possible to monitor Joseph Hazelwood and, if Exxon was interested, what they would have found out if they explored it for drinking in Valdez.

THE COURT: I'll allow the testimony as to

[2228]

reputation.

MR. JAMIN: Sir, let me repeat the question as I recognize that may be a little bit disquieting.

BY MR. JAMIN:

Q Did Joseph Hazelwood have a reputation among Alamar people as a sailor who liked to drink?

A Yes.

* * *

[2240]

DIRECT EXAMINATION OF GARRETT O'CONNOR, M.D. (Live)

BY MR. MONTAGUE:

* * *

[2241]

Q So is it correct that you're both a medical doctor and a psychiatrist?

A That's correct.

Q What is your current practice?

A Well, my current practice – I perhaps should add that prior to getting to my current practice, there's about 25 years intervening in which I was, first of all, on the faculty of John Hopkins University from 1964 through 1972, as an instructor and professor of psychiatry in the department of psychiatry and in the school of public health.

During that time, I directed the psychiatric emergency service at John Hopkins, and also between 1969 and '72, the John Hopkins Drug Abuse Center in Baltimore. I was also the chief of the Acute Treatment Clinic and taught community psychiatry in Baltimore.

I then moved to Los Angeles in 1972 where I joined the faculty of UCLA. And I taught psychiatry on the faculty of

[2242]

UCLA from 1972 until 1976. And for a period of one year there, was the medical director of the UCLA VA Drug Abuse Center at the hospital in Los Angeles.

Q Are you still affiliated with UCLA?

A Yes, I am. Not full-time anymore since 1976, but I am an associate clinical professor at UCLA where I teach courses regularly to medical students and residents on alcoholism and drug abuse.

Q Does that bring us now up to your current practice?

A I think so.

Q Okay. And could you tell the jury what you do today?

A Yes. I am in the private practice of psychiatry and addiction medicine, and in that role I see – I am referred and I evaluate patients for possible alcoholism, drug abuse or other forms of chemical dependence. And I evaluate them, make a diagnosis, if a diagnosis is to be made, and then make recommendations for treatment.

Q And do you have anything to do with these patients after treatment?

A Well, I do. Sometimes I participate in their continuing evaluation and extended care over a two or three year period as they are recovering from – they continue to recover from their alcoholism or their other forms of chemical dependence.

Q And sometimes are you consulted to evaluate persons who have been through – who have already been through alcoholic

[2243]

treatment?

A Yes. The patients come to me at different times. Sometimes they come before they're gone to treatment. They may be referred by a company; by the FAA, for example. I do a lot of work with pilots, and so the FAA or the airlines will refer me patients about whom they have a question, employees about whom they have a question, refer them to me to evaluate their status to see if there is a diagnosis of chemical dependence and, if so, what to do about it.

So then I will make a diagnosis, make a recommendation, perhaps for inpatient treatment, for outpatient treatment, plus a program of on going care.

Then in the case of – most of the patients I see, I should say, are people in safety sensitive positions. Pilots are the – not the bulk of my practice, but 50 percent of my practice. I also see air traffic controllers. I also see physicians, including surgeons and thoracic surgeons. I also see attorneys, and an occasional judge.

* * *

[2249]

Q Let's get down to basics, Doctor. What is alcoholism?

A Oh, well, there are many definitions for alcoholism, and I will try to make it clear to you what some of the most recent ones are. Alcoholism, first of all, is a disease. It's a biological disease, a psychological disease and a social disease. And that means that it is a disease which affects your body, your mind, your emotions and your relationships, wherever they – at home, or work or wherever they may be.

Now, because there are so many definitions of alcoholism, everybody in a sense has their own way of thinking about it. Our society, the American Society of Addiction Medicine, and this is the definition I'm going to give you because I think it's a very good one, spent two years assembling all of the information on definitions, and we came up with – I was a board member of the society at the time. We came up with a 1990, a definition which that was later published in the Journal of American Medical Association, very prestigious journal.

* * *

[2258]

Q Once an alcoholic, does drinking have any effect on your cognitive functions or your thinking powers?

A Yes.

Q And does one have to be drunk for that adverse reaction to take place?

A Cognitive functions, I think – thanks for bringing that up, because I had – I didn't mention it in my list of symptoms.

Cognitive functions are when the alcohol affects your brain, and the ones we would be most concerned with would be poor judgment, effects on judgment, effects on memory, faulty memory, blackouts, for example, that alcoholics get from drinking too much. And there are many studies that show that these cognitive effects are not just associated with drinking or being drunk or using intoxication, but because of the chronic effect of alcohol on the brain, they persist even at times when the alcoholic is sober.

And when we're evaluating – I'm evaluating pilots or doctors or police officers or others after treatment, one of the things that I do is evaluate their cognitive functions. They may have been sober for two or three months by this time, but they still may have cognitive deficits from the chronic effects of drinking which have to be evaluated.

* * *

[2265]

Q Are there studies made, or is it known in your profession basically what the relapse rate is, or the parameters of the relapse rate for an alcoholic?

A Well, Mr. Montague, that question really can't be answered very simply, but I could answer it briefly in the following way: That untreated, relapse rates for alcoholics tend to be very high, up to 60 or 70 percent if you don't treat people. However – and, of course, it depends on age and amount of drinking and type of alcoholism and whether or not a person has a social support group, whether they're jobless, whether they – all of those things come into play in assessing relapse rates, but in general, they're very high. However, with proper treatment they can be reduced substantially.

* * *

[2269]

Q Let's get them. Do you have sufficient information to form an opinion as to whether Captain Hazelwood suffered from the disease of alcoholism as of 1985?

A I do.

Q And have you formed such an opinion?

A I have.

Q And can you tell us what that opinion is?

A Yes. In my belief, Captain Hazelwood suffered from the disease of alcoholism since 1985.

Q Could you tell the jury the basis for that opinion?

A Yes. The basis of my opinion is largely based on the materials that we just reviewed, and perhaps the best way to talk about it is to divide it up into three time periods, really. The signs and – that were apparent prior to Captain Hazelwood's entry into South Oaks Hospital, and then hospitalization itself, and the period after his hospitalization and then, finally, the period towards the end of his employment with Exxon prior to the oil spill.

Prior to the hospitalization, what – what did he have? Well, he himself complained that he and his wife had been

[2270]

talking about getting some help for eight months prior to his going into the hospital. He also complained of moodiness and a mid life crisis. There was an investigation going on into Captain Hazelwood's drinking by Exxon in the early part of 1985. Captain Pierce called him, said there's an undercurrent of some kind going on here and maybe you better do something about it.

The Graves report, which indicated that Captain Hazelwood – of course, Exxon didn't know about that until a little later, but looking back on it, Captain Hazelwood had come back drunk to the ship on – I think intoxicated on several occasions and had also been drinking on board. So they were the main things, I think, prior to – in addition to, of course, the principal thing. Of course, Captain Hazelwood's own account of, as he said, abusive drinking for four years, once a week with his wife at home, heavy drinking, we would say, four to five doubles before dinner, wine with dinner, two to three doubles after that. Which would make him, as he said in his testimony and his deposition testimony, giddy or jokey or a little clumsy. So there was that, and this obviously, as he indicated, did not help his relationship with his wife. And led to subsequent treatment.

Q If I may divert for a minute. Did you notice any change in Captain Hazelwood's testimony with respect to the time of what he said in his deposition and what he said here in court?

[2271]

MR. SANDERS: Objection, Your Honor, as to relevance.

MR. MONTAGUE: Well, Your Honor, the witness just said that he relied in forming his opinion on his deposition testimony.

THE COURT: Mr. Sanders, anything else?

MR. SANDERS: Your Honor, I question the relevance of a comparison.

THE COURT: Well, I'll allow the witness to testify as to the comparison, and you may cross-examine as to whether there's any basis for it, if it isn't brought out.

You may testify.

MR. MONTAGUE: Thank you, Your Honor.

THE WITNESS: Well, yes, there were – I think a couple or three different versions of Captain Hazelwood's account of his drinking with his wife. In his first – in his deposition testimony, he said in response to the questions that it was once a week for three to four years. Then I think in two different parts of his trial testimony, he said on one occasion that it was sometimes weekly and sometimes kind of every three weeks. Now, a different pattern given. And then on another occasion, he said that the time interval between his heavy drinking at home was, I think, several months. Several weeks or several months. Any way, there was again a third version of the same account.

BY MR. MONTAGUE:

[2272]

Q Is that – I'm sorry.

A Yes, go ahead.

Q Does that have a significance to you, the fact that that story would change from his deposition in January of this year and at the trial?

A Yes, it does. It makes it difficult to rely upon Captain Hazelwood for accounts of his drinking, for me, in trying to think about the significance of Captain Hazelwood's drinking, what it means, the vitality of it, the centrality of it in this case when you get a person giving three different versions under oath in a two or three month period. It makes it difficult to rely upon whatever he says about his drinking, especially is he – also basic to that opinion is his own admission in his deposition testimony that he lied about his drinking several times, and there was other information which perhaps we'll generate here that he lied about his drinking on other occasions throughout this time.

MR. SANDERS: May it please the Court, I renew my objection, move to strike the comparison of testimony.

THE COURT: I'll allow the testimony to stand.

MR. MONTAGUE: Thank you, Your Honor.

BY MR. MONTAGUE:

Q Let's get back from my diversion. You were giving the basis for your opinion as to why you had concluded that Captain Hazelwood was suffering from alcoholism or was an alcoholic as

[2273]

of 1985, and I believe you had finished his – the events – or had you finished the pre-events before he entered South Oaks Hospital?

A Yes. Oh, one more I forgot about, that he didn't tell his doctor about any of this. Why is that significant?

MR. SANDERS: Your Honor, may we have a side bar?

(At side bar off the Record)

THE COURT: Ladies and gentlemen, you will please ignore and disregard totally the last question and answer that was given.

Dr. O'Connor, at this stage of your testimony we need to tighten things up a little bit and do it more in a specific question and a specific answer. When you're giving the broad background material, I've allowed you to give narrative, broad answers, but we're into the case specific part of your testimony now, and we need to tighten it up some.

THE WITNESS: Yes, Your Honor.

BY MR. MONTAGUE:

Q Dr. O'Connor, in reaching your opinion on whether Captain Hazelwood, that he was an alcoholic and suffered from alcoholism in 1985, did you consider the fact that he attended a 28 day inpatient alcohol rehabilitation program?

A Yes, I did.

Q And what is the significance of that?

A Well, it was in an alcoholism rehabilitation center, and he was admitted to that for treatment.

Q Okay. Did you consider the information that was on the IDR, which is Plaintiff's Exhibit 10?

A Yes, I did.

Q And the statements on that made by Dr. Vallury?

A I'm sorry. The statements made on it by Dr. Vallury, yes.

MR. MONTAGUE: That's not facing too good. Thank you. Can you see that?

THE WITNESS: Yes, I can.

BY MR. MONTAGUE:

Q And what is it on that report which supports your opinion or from which you formed your opinion or contributed to your opinion that Captain Hazelwood was an alcoholic in 1985?

A Well, the – do you want me to –

Q By the way –

A This IDR or this abbreviation of that.

Q You look at Exhibit 10, if you want and if you could put Exhibit 10 on the – I guess we can't get – PX10?

MR. SANDERS: Don't we have a blow-up of that somewhere?

MR. MONTAGUE: Can everybody see the screen?

BY MR. MONTAGUE:

Q You want to tell us what we're going to refer to and I'll try to make it more legible for everybody.

A Yes. I was going to refer at some point to the code

[2275]

numbers at the top of the diagnosis section.

Q Is that what you're referring to?

A Yes. Where it says 300.40 and 305.42. They are typed.

Q What is it about those that you relied upon in reaching your –

A Well, one of them is the code number for dysthymic disorder, and the other is the code number for alcohol abuse episodic.

Q Yes. And what is the significance of that to you?

A Well, alcohol abuse episodic is a diagnosis which indicates a form of alcoholism. Furthermore, the handwritten information below, individual psychotherapy, group therapy, marital therapy, AA and lectures, seminars and workshops pertaining to alcoholism is a classical description of the treatment in an inpatient 28 day program for alcoholism following what is called a Minnesota model, which was the traditional form of treatment for alcoholism at that time. And indeed today, as well. So that the – what is described for treatment is the treatment for alcoholism.

And then further down, Dr. Vallury, looks like his writing, has said that Mr. Hazelwood will complete our 28 day program, that's the – the only thing – alcoholism is the only thing for which a 28 day program exists. It is recommended, given the nature of his job, that after discharge, Mr. Hazelwood will be given a leave of absence to get involved in AA and aftercare.

Again, that is an absolutely classical prescription for extended care and aftercare for somebody with a diagnosis of alcoholism. We note in item five there that workshops pertaining to alcoholism is what's used. And going back to the diagnosis part there, it's typed, and that's probably Captain Hazelwood. It indicates at the top, was admitted on the 1st of April, and this form is the 16th of April, just 16 days, so this diagnosis is no doubt provisional. And it's typed here.

MR. SANDERS: Objection. Objection to the speculation.

THE COURT: Sustain the objection.

The jury will disregard the comment about the nature of the diagnosis.

BY MR. MONTAGUE:

Q Doctor, in your opinion, would any trained practicing professional in your area know that Captain Hazelwood was treated for alcoholism by looking at that document?

A Yes, in my opinion, would know.

Q Is there a treatment for dysthymia – dysthymia, which is

it? Dysthymia, dysthymia, which is it?

A Dysthymia, I think is how it's pronounced. Yes, there is a treatment for dysthymia and that is individual psychotherapy for 18 months to two years with what's called cognitively based behavioral psychotherapy, which helps a person recognize the signs and symptoms of their depression and helps them do something about it to engage in behaviors that will prevent it.

Q And from that exhibit, the IDR, can you determine whether Dr. Vallury prescribed that type of treatment for dysthymia?

A There is no evidence to – no, there is no prescription for that type of treatment.

Q Are there any other bases for your conclusion that in 1985 Captain Hazelwood suffered from alcoholism?

A Well, Dr. Vallury's deposition, we heard in the Court here, where he indicated that the – with respect that he – he advocated, any cases of alcoholism, he said, that abstinence should be the recommended treatment, as he has indicated here by recommending AA and aftercare.

He also said that the – in this instance, the treatment for dysthymia and alcoholism would be the same. He recommended, as did the hospital recommend, a – as Captain Hazelwood said in his testimony, too, there was a general recommendation not to drink and he had committed himself not to drink for a while.

Q Okay. So your opinion is that in 1985, Captain Hazelwood was an alcoholic?

A That is my opinion.

Q Do you have any doubt about that conclusion?

MR. SANDERS: Objection, Your Honor.

THE COURT: Sustain the objection.

[2278]

MR. MONTAGUE: Okay.

BY MR. MONTAGUE:

Q Do you have – in the materials you've reviewed and what you've heard in this court, have you found that you have sufficient information to form an opinion of Joe, Captain Joe Hazelwood's status in recovery from alcoholism after his inpatient treatment and up to the time of the grounding of the Exxon Valdez in March of 1989?

A Yes, I do.

Q And have you formed such an opinion?

A I have.

Q And what is that opinion?

A It is my opinion that Captain Hazelwood never really got into a state of recovery and, therefore, that he did not achieve a state of stable recovery following his discharge from South Oaks between that and the time of the oil spill.

Q Okay. And could you tell us – well, let me ask you some specifics, so maybe we can shorten things.

The fact that Captain Hazelwood left his aftercare program after two months, did that have any significance?

A Yes, it does.

Q And what is that significance?

A Well, he was prescribed to attend extended and aftercare sessions, and he told us that he had dropped out of those in late June or early July, about six weeks after his

[2279]

prescription, and he didn't tell anybody about that. Except dropping out of treatment, dropping out of recommended treatment without telling anybody is often a sign of the beginning of the end of an alcoholic who will sometimes return to drinking because they have cut themselves off from professional contact and support.

Q Does the fact that after finishing treatment he had no further contact with an alcohol abuse professional have a significance?

A To my – to my knowledge, that's the case.

Q And why? Why does that have a significance?

A Well, again, the treatment had been prescribed by Dr. Vallury, and one of the symptoms of a return or an eventual return to drinking or poor recovery status is the alcoholic's belief that they can do it on their own and that they have a better way of going about recovery than professionals or other people who know what they're doing.

Q What about Captain Hazelwood's attendance at AA meetings and his description of participation at those meetings?

A When Captain Hazelwood began, he says he attended AA meetings for – 90 meetings in 90 days, but his description of his attendance in AA I have found very difficult to understand. For example, he has said that he has never shared in an AA meeting in four years. He has said that despite the fact that he does not now or then ever thought of himself as an

[2280]

alcoholic, he has been attending closed meetings of AA, and closed meetings of AA are for alcoholics only. He says that he has had three temporary sponsors. The concept of a temporary sponsor that I'm familiar with is one that you meet in a hospital who helps you get established in AA, and then you get a permanent sponsor. I've never heard of somebody having three temporary sponsors for three years, even though sponsors may move, you get another one, but they're permanent response source. And then finally, the only requirement for membership in AA is a desire to stop drinking. Doesn't mean everybody who joins AA stops drinking, but they have a desire to stop drinking, and when they go back to drinking, they generally talk about it in AA with their sponsor, but as he didn't share ever in AA, he apparently didn't talk about it in AA.

So persons who continue to drink in AA and particularly who come to closed meetings and don't display any desire to stop drinking in AA are not generally well accepted because everybody in AA has a desire to stop drinking and wants to stay sober so people who don't demonstrate that, in my experience, are frequently not terribly welcome. So that's why his description of his membership in AA is puzzling to me.

Q Does his description of his participation in AA meetings comport with your experience in attending over 3,000 meetings?

A No, it does not.

Q And you mentioned his resumed drinking. Did that have a basis for your opinion that he did not achieve recovery?

A I'm sorry, could you say that again?

Q Yes, his resumed drinking.

A Yes, his resumed drinking. He – he did resume drinking after a statement that he would remain abstinent and it was about a year later that he did so. And the way he did so is very typical of how any alcoholics go back to drinking, just sitting there at dinner, suddenly it seems like a good idea to have a drink. No – nothing major going on in his life, just had a drink and, to me, that means that the denial process had begun to set in again and the vigilance that he may have been taught at the treatment center about returning to drinking, the consequences of drinking, the knowledge that he had about what would happen if he violated policy because of his meetings with Captain Tompkins and others, all of that information was not there, as he just took up the first drink. It just happened like that.

And from there on out, his resumption of drinking over the next two and a half years, between then and the oil spill, it seems to me, we can detect a pattern or a progression of just having one drink, which is a lapse or a slip, but then over time, relapse – just like recovery, relapse is a process, not an event, it goes on over time. And he continued to drink, it was wine and beer and Bloody Mary's on planes and drinking with colleagues. And then by September 1988, he had a period of

[2282]

heavy drinking in which he drank a lot of – I think ten drinks and then drove a car afterwards, which might suggest again a return – or the development of what I talked about, tolerance, be able to drive a car after drinking ten drinks in a short period of time.

Then the pattern continued. He began to violate alcohol policy even knowing that that would result in termination of his job, and at Portland where Mr. Carr talked about having a drink on board with Captain Hazelwood. We heard about the walkie-talkie episode this morning for Mr. Day. We also then heard about the Captain Reeder episode, Ms. Williamson's report, all of these things were contributing to my conviction that Captain Hazelwood had by that time returned to an abnormal pattern of drinking, under the circumstances, given his treatment and given what was known. In addition, he was leading a double life. Heavy drinking after work for a while, but he concealed that from his wife who herself was in Al-Anon and who had been in marital therapy with him in the hospital, which most of these things were to be talked about which you do in marital therapy, he didn't drink at home for all this period of time, and yet he was drinking on the road, on board, with colleagues and so on.

And then finally, on March 23rd, 1989, there was his drinking in Valdez prior to the oil spill with the violation of the Coast Guard rule.

[2283]

Q Okay. Now, have you formed an opinion, Doctor, as to whether Captain Hazelwood's alcoholism was the cause of his leaving the bridge on the Exxon Valdez on March 23, 1989, while the vessel was outside of the traffic lanes, diverting ice and heading towards Bligh Reef?

A I have.

MR. SANDERS: Objection, Your Honor, I think this is a little far outside the expertise that he's stated here in this courtroom.

THE COURT: Mr. Montague, it strikes me that it goes beyond.

MR. MONTAGUE: Let me ask it a different way, if I might.

THE COURT: All right.

BY MR. MONTAGUE:

Q Doctor, have you formed an opinion as to whether Captain Hazelwood's alcoholism impaired his judgment on the night of March 23, 1989?

MR. SANDERS: It's closer, Your Honor, but –

THE COURT: I'm going to let him try it.

BY MR. MONTAGUE:

Q Have you formed an opinion, first?

A About whether alcoholism impaired –

Q No, impaired his judgment?

A I have.

[2284]

Q And what is your opinion?

A I believe it did.

Q And can you tell us in succinct terms how you reached that opinion?

A Well, it – obviously, basic to that opinion is the fact that I think that Captain Hazelwood had returned to an abnormal pattern of drinking by that time, and that he was actively alcoholic and in full relapse of his drinking, for all the reasons that I've given. On the afternoon – and was exercising poor judgment both with respect to his drinking and with respect to his activities.

On the afternoon of March 23rd, he drank an unknown amount of alcohol in Valdez in the company of his chief radio operator and his chief engineer and led them in a violation of the Coast Guard rule. It seems to me that for –

MR. SANDERS: Now we're far afield, now. It's not his field of expertise as to whether there's a violation of the four-hour rule and those kind of things, and I think he's answered the question.

MR. MONTAGUE: He's stating his basis.

THE COURT: He's stating his basis.

Ladies and gentlemen, you are the deciders of the facts in this case, and you all have a dispute in the evidence that you're going to have to deal with as to whether or not the Coast Guard rules were violated. That's a decision you're

[2285]

going to have to make at some point.

This witness is going to offer some testimony about that, but whether or not – he isn't the one who's going to decide whether those rules were violated. You're the ones that are going to do that.

Go ahead, Mr. Montague.

THE WITNESS: Perhaps I could say by drinking within four hours of going back on the ship. And then coming back on the ship, Captain Hazelwood is – his behavior in leaving the bridge that night was so uncharacteristic, he is known as a –

MR. SANDERS: Objection again. Now, he's testifying over in the area of seamanship.

MR. MONTAGUE: Okay. Okay.

BY MR. MONTAGUE:

Q Apart from – we've heard all kinds of testimony about what happened on the ship that night, and I'm asking you, Doctor, if you can, as on the basis of his behavior leading up to that night, not what happened once he got on the bridge, but his behavior leading up to the night he boarded the vessel, if that's sufficient for you to form an opinion as to whether his judgment was impaired that evening?

A Yes.

Q Okay. Can you do that and can you tell us?

A I can try, yes.

Q Thank you.

[2286]

A Well, I would be repeating myself to say that I think his judgment was impaired by the way that I have heard the accounts of – the various accounts of his drinking that afternoon. And so that in itself, under the circumstances of his backgrounds, treatment, development of his disease, progression of it would indicate to me that his judgment that afternoon was indeed impaired.

Q Now, the fact that he was able to walk up the gangplank when he boarded the ship, does that have an effect on your judgment?

A No.

Q And the fact that persons on the vessel will testify that they saw him and he looked perfectly fine, does that have an effect on your opinion?

A No.

Q Captain – Dr. O'Connor, have you formed an opinion as to whether Exxon's – Exxon contributed in Captain Hazelwood's failure in recovery?

MR. SANDERS: I object to that question. Contributed?

THE COURT: Try the question another way. There may be a way that you could get at this from a medical standpoint, but that's where your focus needs to be.

MR. MONTAGUE: That's correct.

BY MR. MONTAGUE:

[2287]

Q Dr. O'Connor, have you reviewed Exxon's reactions to Captain Hazelwood from 1985 up to March 23, 1989?

A Yes, I have.

Q And do you have an opinion as to how those actions affected Captain Hazelwood in his alcoholism?

A Yes, I do.

Q Could you tell us that, briefly?

A It goes back initially to the return to work of Captain Hazelwood in August of 1985 when the criteria for return to work was successful completion of treatment for his alcoholism. And Captain

Hazelwood has himself has said that he dropped out of treatment after six weeks and therefore, in my opinion –

MR. SANDERS: Object to this as the

mischaracterization of the testimony. Again, I – maybe the jury should –

THE COURT: The jury will have to decide what the facts are, but I'm going to allow the Doctor to testify as to his opinion, but if his recitation of the facts does not comport with yours, you will have to ignore the opinion.

You may go ahead.

THE WITNESS: Yes, sir. That he had dropped out of treatment at the end of June or the beginning of July, and that he had indicated to Captain Mark Pierce that his medical treatment had been curtailed over the summer. And that

[2288]

indicates to me that he had not, in fact, successfully completed –

MR. SANDERS: Objection, Your Honor. That's not only a mischaracterization of the evidence, it's a making up of evidence.

Can we approach the bench, Your Honor?

THE COURT: No. I'm going to allow him to testify. But I say again, if his recollection or recitation of the facts does not comport with yours, you will ignore his opinion on this subject.

Why don't you ask another question, Mr. Montague, and help focus this.

MR. MONTAGUE: Okay.

BY MR. MONTAGUE:

Q Specifically, let me ask you this question. Based on your experience, if Captain Hazelwood had been properly evaluated before being assigned to the Yorktown in 1985, could Exxon have discovered the signs of his failure in recovery?

A I believe so.

Q And do you have an opinion as to whether there were sufficient signs available to Exxon to detect Captain Hazelwood's failure to recovery when Exxon reassigned the captain to the Exxon Valdez in 1987?

A I believe there were.

Q And had Exxon looked properly, could they have found those

[2289]

signs?

A I believe they could.

Q By the way, is it accepted professional conduct, in your field, to require an evaluation of someone who has gone through alcohol treatment on the basis of rumor?

A Yes.

Q Particularly with when that person is in a safety sensitive position?

A That's correct.

Q Is that normal, in your experience?

A Yes, it is normal. Aggressive investigation of rumors about drinking ought to, under circumstances of a person after evaluation, trigger a medical evaluation of their recovery status at the time.

Q Okay. Now, one last question. Based upon all of your testimony today and what you've heard in this courtroom, and based on the signs that were available to Exxon, do you have an opinion as to whether Exxon should have allowed Captain Hazelwood to be the master on the Exxon Valdez as it left San Francisco in March of 1989?

A I do.

Q And what is your opinion?

A I believe that Exxon should not have permitted him to leave San Francisco as master of the Exxon Valdez on that date.

* * *

[2300]

you. Didn't you in fact say at your deposition on the 22nd of April 1994, that Captain Hazelwood did not, in my opinion, meet the criteria under alcohol dependency DSM-III at that time, referring to 1985?

A Yes, I did, as you showed me.

Q Now, I think it's obvious, but I want to make sure. DSM-III-R was not in existence in 1985 when Captain Hazelwood sought treatment, was diagnosed and treated by Dr. Vallury?

A That's correct.

Q All right. And then you also mentioned another definition or basis for your definition of alcoholism, and that was one that your society worked two years on; right?

A That's correct.

Q And that wasn't published until 1992; was it?

A I think it was earlier than that, but certainly in the '90s, yes.

Q Wasn't it published by the Journal of American Medicine in 1992?

A No, it was published originally by the American Society of Addiction Medicine in 1990, and it was commented upon and

[2301]

republished in the Journal of the American Medical Association in 1992.

Q In any event, whether it was five or seven years, it was long after 1985; correct?

A It was 1990, yeah.

Q And certainly after the grounding?

A Yes.

* * *

[2307]

Q And 305.02 is alcohol abuse episodic?

A That's correct.

Q Which is different under DSM-III than alcohol dependence or alcoholism; is it not?

A Under DSM-III, yes, it is.

Q That's what Dr. Vallury was using; isn't it?

A That's true.

Q Quite obviously?

A That's true.

Q Couldn't have used DSM-III yet because it wasn't there yet?

A That's correct.

Q Couldn't use your societies definition because it wasn't there yet?

A That's correct.

* * *

[2317]

DIRECT EXAMINATION OF BENJAMIN GRAVES
(Video)

BY VIDEO EXAMINER:

Q Mr. Graves, for the record, would you state your full name, please?

A Benjamin Carter Graves, Jr.

[2318]

Q Sir, where do you currently reside?

A I reside in Kingwood, Texas.

Q Could you tell us by whom you're currently employed?

A Exxon Company U.S.A.

Q And in 1984 you were transferred to Exxon Shipping Company here in Houston?

A Yes.

Q Did you request that transfer?

A No. It was –

Q Was that considered a promotion, demotion, any change in status at all?

A It wasn't a demotion. It was either a lateral move or a promotion. I don't remember.

Q And what was the title you were to assume in 1984 with Exxon Shipping Company?

A Administrative manager.

Q What were your duties as administrative manager with Exxon Shipping Company in 1984 through 1986?

A I was basically the human resource organization for Exxon Shipping Company.

* * *

[2326]

Q After Exxon Shipping Company had learned through Captain Hazelwood's own admission that he had drank while aboard the vessels and that he had gone through alcohol rehabilitation, was it a concern at any time after that that Captain Hazelwood may be drinking, whether it's on board the vessel or at home?

A Oh, I'm sure that some of Captain Hazelwood's supervisors were interested and concerned about that.

Q Okay.

A I certainly would have assumed that they were, any way.

Q Did you have any conversations with Frank Iarossi regarding that topic?

A Only to the extent that Frank asked me to be sure that John Tompkins counseled with Hazelwood before he was reassigned to a vessel. That his assignment, travel plans routed him through

Houston so that he in fact could talk with John before being assigned to the vessel, and John was to counsel with Captain Hazelwood about maintaining his non-drinking status and to be a solid employee and manager of the ship.

Q You say non-drinking status. Does that mean non-drinking status both on board the vessel and off the vessel?

A I presume from an alcoholic standpoint, once you are, you can't pick up a drink thereafter. I don't know. That's just

[2327]

what I hear. But John was to advise him that any infractions that the company became aware of would subject Captain Hazelwood and subject him to discipline up to and including termination.

Q Did your conversations with Frank Iarossi regarding this topic include conversations that once you're an alcoholic, you can't pick up another drink –

A No.

Q – that abstinence was important?

A No.

Q Did you ever have any conversations like that with Mr. Iarossi?

A No.

Q Did you take any steps to attempt to determine the extent of Captain Hazelwood's alcoholism?

A No, that would have been the medical department, if they – I mean, wouldn't be something I would be able to evaluate.

Q Do you know whether they attempted to evaluate that?

A I have no idea what conversations took place between our medical department and his facility.

Q Did you speak with anyone in an attempt to discover generally what's involved with alcohol rehabilitation?

A No. Again, I don't consider myself an expert in that. It's like whether I know whether the ship is being navigated properly or not. It mean, it's a doctor's prerogative, as far

[2328]

as I'm concerned.

Q Did you speak with anyone in an attempt to determine information regarding how from a human resources perspective a company should deal with an alcoholic?

A Not that I can recall.

Q Did you speak with either Frank Iarossi or Paul Revere regarding how the company should deal with Captain Hazelwood having gone through alcohol rehabilitation and reporting back to work?

A I don't recall speaking specifically to them about it. I mean, it's – alcoholism as a – as the company viewed it is a treatable illness, is kind of a job performance issue as much as anything else, and you know, how a person's illness affects their ability to do their job is part of the on-going supervisory responsibilities that any supervisor in the company would have, stay close, you know, close to observe the employee as possibly and determine what their performance levels are.

Q Did you discuss with either Mr. Iarossi or Mr. Revere that it would be necessary to closely observe Captain Hazelwood as much as possible and evaluate his performance?

A I didn't, but I think that was clearly Frank's intent of having John Tompkins talk to Hazelwood before he went back aboard the vessel to let him know that his performance was going to be watched and the company wished him well and expected him to have a full and total rehabilitation.

[2329]

Q Do you know what background, if any, John Tompkins has in regard to problems associated with alcoholism?

A No, I don't.

Q Do you know whether John Tompkins sought the advice of anyone to determine generally the problems associated with alcoholism or how a company generally should deal with an alcoholic employee?

A I don't know. You'd have to ask Mr. Tompkins that.

Q Was there any discussion that you were a party to with either Mr. Iarossi or Mr. Revere where it was discussed whether Captain Hazelwood should have a shore side assignment at least initially?

A No.

Q Is it your testimony that you believe a shore side assignment would have been punitive in nature?

A No, I do not believe it would have been punitive in nature.

Q Do you believe a shore side assignment would have violated the alcohol policy?

A No.

Q It's just a subject that never came up, as far as you know?

A As far as I know.

Q After your May 19, 1985 conversation with Joe Hazelwood, did you have any further conversations with him regarding either his rehabilitation or his use of alcohol on vessels?

A Not that I recall. I guess it's possible, but the only

[2330]

significant conversation I remember with Joe was the interview that I did with him on May 19th.

Q From the summer of 1985 until you left Exxon Shipping Company, did you have any involvement whatsoever regarding follow-up on Captain Hazelwood and his alcohol rehabilitation?

A Did I? No.

Q And did you ever ask Captain Hazelwood any questions about his home life?

A No.

Q And do you have any knowledge of either Mr. Tompkins or Mr. Sheehy or anyone who was watching Captain Hazelwood asking him questions about his home life?

A No.

Q Do you have any knowledge of anyone ever, from the time Captain Hazelwood returned from his leave of absence up to the time of the grounding, of anyone asking Captain Hazelwood whether he had resumed drinking?

A I have no knowledge of that.

Q Did Captain Hazelwood tell you that he had come back to the ship drunk on several occasions?

A Yes.

Q Did you ask him on how many occasions he was referring to, whether it was five times, ten times, 20 times?

A No, I did not.

Q And did you ask him when these occasions had occurred?

[2331]

A I don't recall asking him specifically, no.

Q And did he tell you specifically when these occasions had occurred?

A Not that I recall.

Q And did you – was it your understanding that attendance at AA meetings was – by a recovering alcoholic was an important element in the rehabilitation program?

A Our presumption is that that would be a reasonable thing for any substance abuse person to be involved in, some continuing support activity.

Q Between mid May and August, did anyone monitor whether he was going to AA meetings three times a week?

A I don't know.

Q As he had indicated?

A I don't know that they did or did not.

Q Did you suggest to anyone that that might be a good idea?

A I personally did not, no.

Q Was that matter discussed by anyone, to your knowledge?

A Not to my knowledge.

Q Now, did you understand that that outside doctor would be making a decision as to whether or not Captain Hazelwood was fit to return to duty as a master of an Exxon vessel?

A Well, my memory's a little fuzzy on the disability situations, but I think the outside doctor may be able to take a position that the person is fit for duty, but generally

[2332]

speaking, someone in our medical department may have the authority to approve, overrule or say yes or no to that.

Q All right. Now, no one at Exxon Shipping, to your knowledge, had any contact with the – the outside doctor who was treating Captain Hazelwood; is that correct?

A Not to my knowledge.

Q To your knowledge, however, someone in the medical staff of Exxon U.S.A. did have contact with this outside physician; is that correct?

A That was my understanding, yes.

Q And was it your understanding that that intermediate from – that person from the Exxon U.S.A. medical staff was Dr. Montgomery or someone else?

A As I recall, I was unclear as to whether that person was Dr. Montgomery or someone on the medical staff. Dr. Montgomery was the person I talked to.

Q And Dr. Montgomery is the person who said to you that in my judgment Captain Hazelwood is fit to return to duty?

A I guess he told me that he had completed his program in the hospital, he was continuing to go to the AA sessions and had done what he should do relative to the rehabilitation effort. Q Did Dr. Montgomery indicate to you that anyone from Exxon U.S.A.'s medical staff had interviewed Captain Hazelwood since he had undertaken this rehab course?

A No, he did not.

[2333]

Q Were you ever laboring under the impression that anyone from Exxon U.S.A.'s medical staff had any contact with Captain Hazelwood concerning his medical treatment after he entered the rehab clinic?

A No.

Q Do you know if any system was set up at that juncture to advise others what to do in the event Captain Hazelwood relapsed into drinking?

A No, I'm not sure what system was or was not in place.

Q What system was implemented to closely monitor Captain Hazelwood while he – while he was out at sea?

A I do not know.

Q Was any system of closely monitoring Captain Hazelwood at sea ever discussed with you?

A Not with me.

Q Did you ever hear of any discussion that anyone had with regard to establishing a monitoring system for Captain Hazelwood while he was at sea?

A No.

Q How about shore side, was any monitoring system discussed concerning Captain Hazelwood's behavior and performance while he was not at sea?

A Not with me. It may have been discussed in the operations group, but not – I don't recall anything about it.

A I was a ship group coordinator.

* * *

[2334]

DIRECT EXAMINATION OF WILLIAM DEPPE
(Video)

BY VIDEO EXAMINER:

Q Captain Deppe, what is your first recollection of hearing about the Exxon Valdez on March 24th, 1989?

A I got a phone call from Paul Myers early that morning telling me that the vessel had gone aground near Bligh Reef.

Q And who's Paul Myers?

A Paul Myers is a ship group coordinator and in the west coast fleet office.

Q What happened after that?

A I helped arrange for flights up to Alaska for Harvey Borgen, Paul Myers and myself. We – we – I packed a bag and shortly after that drove to Oakland Airport and met them at Oakland and we flew up to Alaska.

Q Okay. And was it Harvey or Dave Borgen?

A Harvey.

Q Harvey Borgen. And what was his position at the time?

A He was the west coast fleet manager.

Q And what position did you have at that time with Exxon?

A I was a ship group coordinator.

* * *

[2338]

Q In doing the reviews that you referred to as a port captain, it was part of your job to keep an eye on the captains and the masters to make sure they didn't drink on board or have alcohol on board ship?

A Well, it – that was – that would be part of the job, yes.

Q And would part of your job be to monitor any captains or masters who might be suspected of having a drinking problem?

A Part of the job is to monitor all the masters and chief engineers to – if anyone is having a problem with anything to do something about it.

Q In any time, did anyone or anything make you aware that Captain Hazelwood might have a drinking problem?

A I knew that Captain Hazelwood had been through a rehabilitation program.

Q Did you know what the rehabilitation program was for?

A Yeah, it seemed to be pretty common knowledge in the fleet that Captain Hazelwood had been through a rehabilitation program for alcohol.

Q What was the basis for your knowledge that Captain Hazelwood had been through an alcohol rehabilitation program?

[2339]

A I don't know how I found out. I just knew.

Q That would be back – do you remember the time that was?

A It was – it was before I got in the office as port

captain.

Q Now, during the time that you were either port captain or shipping group coordinator, were you given any instructions regarding the monitoring of Captain Hazelwood?

A Not that I can recall.

Q I don't mean this in an argumentative way, but when you say not that I can recall, you've had a long time to think of this. Can you – does any situation at all occur to you where somebody in Exxon Shipping or Exxon or Exxon U.S.A. asked you or asked anyone else about whom you have knowledge to keep an eye on Captain Hazelwood in regard to his – regard to his drinking?

A I knew that he had been through rehabilitation. How I found out about it, I'm not sure. If a conversation took place in the office with anyone about it, I – it didn't stand out in my mind because I knew already, but I – I was aware of

Hazelwood's problem, and I would have been aware of him drinking if I was in a situation with him and he was drinking. I would have – that would have been something that would have stood out in my mind.

Q At the time that the alcohol policy was issued, which you described earlier, was there any discussion on monitoring any

[2340]

employees or officers who were thought to have an alcoholic problem?

A No.

Q In the various meetings that you attended in 19 – in 1987 up to the time of the grounding, do you recall any discussions about monitoring persons that were thought or known to have alcoholic problems?

A No.

Q Did any of your superiors ever ask you to keep – to monitor or keep your eye on Captain Hazelwood in regard to any drinking problems?

A Not that I can recall.

Q During the same period of time, have you – did anyone ever bring to your attention any complaint regarding Captain Hazelwood?

A From 1987 –

Q To the time of –

A – to the time of the spill?

Q Yeah.

A In a disciplinary nature?

Q Any nature.

A Well, there was some complaints about some of his management style, but those were – those were in ranking type situations. But as far as any disciplinary type things, there was nothing brought to my attention during that period.

[2341]

Q If you know, during the same period of time, '87 through the spill, was anyone, Exxon, Exxon Shipping, or Exxon U.S.A., given an assignment to keep an eye on Captain Hazelwood relating to drinking problems?

A No, I wasn't aware of anyone.

Q Now, you have – you have taken vessels through the Valdez Narrows; is that correct?

A Yes.

Q Have you ever taken vessels through the Valdez Narrows when you weren't on deck at the time?

UNIDENTIFIED SPEAKER: On deck?

THE WITNESS: On the bridge.

BY VIDEO EXAMINER:

Q On the bridge, I'm sorry.

A No.

Q Did you consider it to be your obligation or your duty to be on the bridge during the time that you – during the times

that you trans – that you've taken a ship through Valdez Narrows?

A Yes.

Q The question was, when you were – you were in a supervisory capacity, did – would not you expect any reasonably prudent captain to be on the bridge during such a transit?

A I would expect most captains would be on the bridge during

[2342]

those transits, yes.

Q Since – I'm going to read a question and answer and ask you if this is still your opinion. I'm looking at the hearings, page 1096. Question is, could you tell me what Exxon does to ensure that six hours of rest are given to ship's personnel, to the deck watch officer prior to getting underway.

Answer, we don't have any program to give six hours of rest to any dock – deck hand or officer before we get underway. On the ships that I've been on, we make sure that – or I've been made sure that once we have taken departure, if no one has had rest, then I'll stay up on the bridge and I'll stand the watch until someone who has had enough rest to come and take the watch and meet the law.

Still believe that's a correct answer?

A Yes.

Q You still stand by that answer; right?

A Yes. I'll elaborate a little bit on that.

Q Sure.

A The master and the individual officer is responsible to make sure that he's getting that rest, also.

* * *

[2344]

Q Now, you testified earlier that it was common knowledge in the fleet that Hazelwood had been through alcohol rehabilitation; do you recall that?

A Yes.

Q When you made that statement, when do you believe it was common knowledge?

A In 1986 and 1987.

Q So it was well-known within the fleet, at least by the time of the meeting in 1988 that you were present at where he was ranked?

A Yes.

Q Was the subject of Hazelwood's having been through alcohol rehabilitation mentioned in any way in the 1988 ranking meeting?

A I don't think so.

* * *

[2347]

DIRECT EXAMINATION OF GREGORY COUSINS
(Video)

[2348]

BY VIDEO EXAMINER:

Q Please state your full name and home address?

A Gregory Thomas Cousins, reside at 13966 Fletcher's Mill Drive, Tampa, Florida.

Q And you were with Exxon from 1980 up through 1990; is that correct?

A Correct.

Q When you were sailing as a third mate which you've testified to on the four vessels with Exxon, did you go do Valdez?

A Yes.

Q Now, on the – these vessels, the North Slope and the New Orleans and the Exxon Valdez, what was the total number of trips you made to the Port of Valdez, approximately? I think you previously have testified about a dozen, would that be about right?

A That would be, yes, fair, I think.

Q About how many of the trips that you made to Valdez were you a watch stander in Prince William Sound? Of say of the approximate dozen?

A How many transits did I make on the bridge?

Q Yeah, that you were actually watch standing going in or coming out?

A Well, I would say a portion of all of the times, but at least – at least half.

[2349]

Q How many trips did you make with – on the Exxon Valdez prior to the – not counting the grounding trip, in or out? Did you make a trip prior to that trip?

A Yes.

Q How many trips did you make prior to that trip; do you recall?

A I believe there were three or four total.

Q How many trips prior to that trip, the grounding trip we'll call it, the grounding trip, in and out did you make with Captain Hazelwood?

A One or two.

Q Now, in your experience, in going into Valdez and coming out again, the same parameters I gave you before, and we're always talking about Hinchinbrook to Valdez and from Valdez to Hinchinbrook, what type steering was used on the vessels you served on?

A Hand steering.

Q Did you ever, in any of your trips while you were a watch officer, see the steering put in any type of auto mode in those waters?

A Well, the – one time.

Q When was that?

A That was the evening of – or the morning of the grounding.

Q Now, you had no pilotage endorsement on your license or you

[2350]

have none today?

A No.

Q For Prince William Sound?

A No.

Q Are you familiar with the requirements for a pilotage endorsement on a license in Prince William Sound?

A No.

Q What I'm trying to do is really save time, Mr. Cousins. Instead of asking you take me through your day, you have the eight to twelve that morning; is that correct?

A Yes.

Q This is on the 23rd of March?

A Right.

Q In essence, what I'm concerned with is when you're working, when you're not working. So you're on duty from 0800 to 1200 is that a correct statement?

A Correct.

Q What did you do, your recollection, between 12 and 1300; do you remember, on March 23rd?

A Well, I had lunch, then I did the salinity test and I returned to – I went to my room.

Q How long did you take for lunch; do you recall, about a half hour?

A No. Well, 10, 15 minutes.

Q All right.

[2351]

A Actually, the – the twelve is the watch. I'm relieved actually at 10 minutes before.

Q You also relieve 10 minutes before eight; do you not?

A Correct.

Q So you stand a full four hour watch?

A Yes.

Q So you do this salinity test after lunch?

A Yes.

Q And does that take you up to about 1300, would that be about right?

A Just a little bit – around 1300. Actually a little bit before 1:00.

Q What is a salinity test?

A Measuring water density.

Q And is that the density of the sea water around the vessel?

A Yes, sir.

Q And what's the purpose of that?

A That is used by the chief mate to calculate what – what drafts we'll be able to load to.

Q How do you get sea water to take the test?

A On the Valdez, we – we would go down into the engine room and take water from a small spigot that was fitted into one of the sea suctions.

Q So is that part of your normal – your normal operation of

[2352]

the vessel?

A What, taking a salinity?

Q Yes.

A Yes, when you're loading, um-hum.

Q It's needed information in order to put a proper load aboard the vessel?

A Yes.

Q This paperwork you did in your office?

A Yes.

Q In your room?

A Yes.

Q That paperwork was paperwork which you connected with the vessel; right? You weren't writing love notes to your wife or anything?

A Well actually, it may have been, but there was some paperwork that was connected with the vessel's safety.

Q All right, and you were the safety officer aboard?

A Yes.

Q Do you have a good estimate of how much time you spent with that paperwork?

A It wasn't long. I'd usually – well, sit down, work on it 10 or 15 minutes and set it aside and do something else.

Q So it may have been 10 or 15 minutes?

A Yes.

Q So let's pick it up from 1315 – okay – 1315 on, you slept until about when? You can look at the testimony and notes?

A Whenever they called me for supper relief. A few minutes before 1700.

Q All right, and you then did what?

A Relieved the chief mate for supper.

Q When you relieved the chief mate, where did you go?

A Cargo control.

Q And then you had to observe gauges or whatever?

A Yes, monitor the load.

Q Okay, do you agree that 1730 was about the time the chief mate relieved you in the cargo control room?

A Approximately. Jim – Jim was like the rest of us, pretty

quick eater, but generally.

Q That's about right?

A Well the normal, normal, the normal supper hour lasts 20 minutes.

Q All right. And then what did you do?

A I went back do bed, as far as I – I can remember. I returned to –

Q According to Delozier's – I'll let you look at the document – 1745, he says cargo control room. Does that refresh your –

A You're referring to his report?

Q His notes, yes. You see 1745 he has cargo control room?

Does that refresh your recollection?

[2354]

A Probably, yes. I remember sticking my head in the control room and spoke to Jim Kunkel, chief mate, briefly about the topping off and that's when he told me that I would be assisting him.

Q And you stay in the cargo control room?

A No, I went to my room.

Q Before you give me an answer, let me ask you, can you try and place times on these different events that you're giving us?

A I will attempt to. Can I – I'll begin with I relieved the chief officer at approximately 1700.

Q Okay.

A He had supper. I remained in the cargo control room monitoring the load while he ate. After he returned, I had my meal. I returned briefly to the cargo control room and I guess this Delozier has almost a log entry type thing here of 1745. I don't know where he got that. Maybe it's in the testimony, but I don't recall, but I don't think that it is.

I spoke briefly with the chief officer and that's when he told me that he will use me to assist him in the topping off.

I left, I did not remain if the cargo control room from that brief conversation on, because the topping off didn't begin until sometime later.

Q What time?

A Much later. Almost – well, I don't know.

[2355]

Q Finished cargo was 1924; does that help you?

A Correct. So Mr. Delozier has a 1900, chief mate called cargo control room for topping off. So at 1900, this – the chief mate called me in my room.

Q Let me just go on and then I'll get back to that. Your testimony is for a brief time you had this conversation with the chief mate and then you went to your room?

A Yes.

Q And what did you do in your room?

A I don't recall. I normally don't sleep that time of day. I may have read a book, sat down in the recliner and digested my meal.

Q Up to this point of 1900, when you start working again, does that – approximately 1900, did you agree with that?

A Right.

Q Chief mate called you for cargo for topping off?

A Yes.

Q Was this period that we've been going over up till 1900, was this sort of typical for a turn around period in Valdez?

A Yes. Yes, I would say that.

Q Now from 1900, which we took you up to, up to the time of grounding, you were doing work up on the bridge and/or on watch; is that correct?

A From 1900 on, yes.

Q When the vessel got underway and you ultimately returned from your docking station to the bridge?

A Yes.

Q When you returned to the bridge, who was on the bridge?

A The pilot, I believe the captain, I relieved the chief mate, Jim Kunkel, and I don't right offhand recall who the helmsman was.

Q Well, without reading your testimony, Radtke, you testified in the Hazelwood trial, does that refresh your recollection?

A Yes.

Q You relieved Kunkel and he went below?

A Yes.

Q And you are now the watch officer?

A Yes.

Q Now, after you returned to the bridge, did Captain Hazelwood leave the bridge?

A At – yes, at some time later, he did.

Q When he left the bridge, was it prior to the Narrows?

A Yes.

Q And when he left the bridge, did he say anything to you about he was going to leave the bridge or why he was going to leave the bridge?

A Yes, he – he told me he was leaving the bridge and he told me why, but I don't remember why.

Q All right. Now, my question to you today, thinking back on it, are you saying he did give you a reason?

[2357]

A The reason – the reason was he – was that he needed to discuss something that was bothering the chief engineer.

Q That's why he told you he was leaving the bridge?

A Yes.

Q Did the captain tell – tell you or did you hear him announce when he was going to return?

A I don't recall.

Q Prior to the Narrows, ultimately isn't it correct that you were asked by the pilot to call the captain because the pilot was going to leave the vessel?

A I called the captain on my own before we entered the Narrows. I said he was almost finished doing what he needed to do, that he'd be up directly, and later, sometime later after we had transited the Narrows, and I can't say exactly when, I think the pilot mentioned, said you ought to have the captain up here for debarking the pilot.

Q So it's correct that the pilot ultimately asked you to have the captain come to the bridge; isn't that correct?

A Yes.

Q So you're saying you had a conversation with Captain Hazelwood in the interim?

A Yes.

Q And that conversation, tell me again, what did you say and what did the captain say?

A I informed the captain that we were approaching the Narrows

[2358]

and he asked if there was any problems, any traffic and of course there wasn't and he said that he'll be up as soon as he finishes doing whatever he was doing, and I don't recall what he said, as far as what he was doing.

Q In any event, as you recollect it back, as you're sitting here right now, the period of time Captain Hazelwood was off the bridge, would you agree, was not a short time?

A I would say it was longer than – than I was used to.

Q In your experience on these other vessels in Valdez, did you ever experience when you had that same watch, let's say coming through the Narrows, as you're going out –

A Um-hum.

Q – did you ever experience a captain walking off the bridge and staying off the bridge through the Narrows?

A I can't recall, no.

Q You say you can't recall, you mean no, you do not?

A I can't recall having been on the bridge with – without a master present through the Narrows.

Q Now, when you called Captain Hazelwood to come back to the bridge, you remember what you said to him?

A Yes.

Q After the pilot, the pilot said to get the captain, you telephoned Captain Hazelwood?

A Yes.

Q And what did you say to him, the pilot wants you back or –

[2359]

A I told him that we're getting close to the pilot station, that we need him on the bridge, and he said, I'm on my way.

Q Okay. From the time you – of that telephone call, about what was the interval of time between that call and Captain Hazelwood arriving on the bridge?

A I don't recall.

Q Now, you took Cousins – you took LeCain's watch that evening, the mid watch, at least the beginning of it?

A Yeah.

Q After you stood your watch?

A I was standing part of his watch, yes.

Q Why did you do that?

A Because he didn't get called when you normally call the – the relieving watch.

Q Maybe you didn't understand my question. Did LeCain ask you to take his watch for him because he was tired?

A No.

Q Why did you take LeCain's watch?

A Because when I returned to the bridge, he wasn't there. So I had no choice. I can't just leave the bridge without being relieved.

Q When you returned to the bridge, you mean after dropping the pilot off?

A Correct, yes, sir.

Q But isn't it normal for you to send someone down to wake

[2360]

the watch officer?

A No, the – the watch is called from the bridge.

Q Well, who calls it from the bridge?

A Normally I would.

Q You didn't, though, did you, that evening?

A Well, I didn't have a telephone with me out on deck. I was out on deck during the time that – the relieving watch would be called. The A-Bs called their relief. No one called my relief.

Q All right, but then you got back do the bridge; did you not?

A Yes.

Q And you could have called LeCain when you returned to the bridge; could you not?

A I could have, yes.

Q But you didn't?

A I did not.

Q Why didn't you?

A Because I was busy.

* * *

[2367]

A As far as turning the con over to me, we had – we had discussed what – what he had intended, asked me if I was comfortable with that. I told him what I thought and what I saw and how much room we had between the reef and the ice. The ice had – I don't want to characterize it as being surprised, but I had not seen the ice on radar up until the time that I returned to the bridge from dropping the pilot off. So we had some discussion about that. He asked me again if I was comfortable with that, our attempt to get around the ice, and that he wanted to leave the bridge for just a few minutes, did I feel comfortable, and I said yes.

* * *

[2377]

Q Now, when the captain was going to leave to go below, he just before leaving put it on load program up, which you've told us about?

A Right.

Q So in other words, Captain Hazelwood left the bridge, and correct me if I'm wrong, two minutes before your vessel was going to be abeam of the position that you're testifying to that he told you to make the turn in?

A Yes.

Q Is that correct?

A Yes.

Q 120 seconds?

[2378]

A Right.

Q What was the urgency, as you understood it, in what Captain Hazelwood told you why he left the bridge at this time two minutes before the turn that you've testified he told you to make at Busby Island light?

A I don't know that I ever understood the urgency, but I understood that he needed to gather figures to pass on to Alyeska or whatever the name of our agent is up there.

Q Did he use the word messages to you when he said I got to send some messages or do you recall the term he used?

A I don't recall specifically if he used that term.

Q And you just testified, just a minute ago, you said you weren't sure if you ever understood the urgency of it. What did you mean by that? Is it that you questioned the urgency?

A In comparison to what we were doing. Who cares about cargo figures? I mean, that's my opinion, but evidently he felt comfortable. I indicated to him that it's not a particularly – should not have been a particularly tricky maneuver.

Q On that evening when you were thinking of your mind set right then, did you question the necessity of Captain Hazelwood leaving the bridge for the reason that he gave to you in the circumstances the vessel was in which you've testified to outside the traffic separation scheme?

A I didn't really have time to – I didn't really have – I

[2379]

was a bit busy with navigating the vessel to concern myself with whether it was unusual or not. It was just that's the captain, that's what he's doing.

Q Now, your prior testimony that you just gave, as you reflect on it now, you find it to have been unusual, is that what you're saying?

A Yes. I'm sure he does, too.

Q I show you 32504. This is a photograph taken at night in the wheelhouse of the Exxon Valdez. Do you recognize the photograph as being somewhat representative of what you had on the evening of March 23, 24?

A Somewhat. The lights are a little bit too bright, but.

Q You like them dimmer than that?

A Yes, it was quite a dark evening.

Q Okay. And this photograph shows this overhead rudder angle indicator is illuminated?

A Yes.

Q So you can readily see that, can you not?

A Yes.

Q You already testified that Captain Hazelwood knew, because you discussed it with him, that you were outside the traffic separation scheme when he was turning the con over to you?

A Yes.

Q He further knew the vessel was on a course of 180?

A Yes.

[2380]

Q He also knew that the vessel's course of 180 was heading if continued down toward the Bligh Reef area?

A Yes.

Q He also knew that there was ice in the channel which you previously discussed and have marked on the chart?

A Yes.

Q Across the traffic separation scheme?

A Yes.

Q He knew that you were a Navy third mate, had come up from a seaman up to a third mate about when you had made your third mate?

A Yes.

Q Got your third mate license?

A Yes.

Q He further knew that when he was turning the con over to

you, that it was Second Mate LeCain's watch?

A Yes, he did.

Q He further knew that the steering was on auto gyro because he had put it in auto gyro?

A Yes.

Q And by the way, did Captain Hazelwood, before he left the bridge, tell you it was auto gyro?

A I only knew when the watch was changing out, Mr. Carr (ph) informed me that it had been put on.

Q Did you find it unusual that Captain Hazelwood had ordered

* * *

[2381]

A I – I believe that's when I took the fix or shortly thereafter, I was headed out to the port bridge wing, took a visual bearing of Busby light.

Q Okay. And what did you use for the time that you were doing this? Did you use your wristwatch?

A Yes.

Q And had you previously synchronized your wristwatch with the bridge watch?

A Yes.

Q You do that as a matter of routine when you come on watch?

[2382]

A Yes. And also the gear test requires that.

Q The first thing you did was take a bearing with an azimuth?

A Yes.

Q I'm going to ask you, prior to that, and in your sailing experience, have you ever utilized any other method to determine when a navigational aid was abeam when you needed to do it rapidly?

A Yes.

Q What method did you use?

A I've used radar for that purpose. I've also just in conjunction with the radar, placed an azimuth circle set up on – with the vanes set so I could actually take a rough sight of it from inside the wheelhouse.

Q Why did you, in this situation, take the time to take an azimuth bearing to make it precise as opposed to doing it in a rougher manner like I described?

A I can't give you a satisfactory answer for that. It puzzles me, also.

Q Now, after you took the azimuth bearing, you then walked into the wheelhouse from the port wing?

A Yes.

Q And what did you do next?

A I read the range, radar range off of Busby Island, the point – the point.

Q And then what did you do after you got that distance?

[2383]

A I plotted the fix.

Q So you walked back into the chart room and while you were in this position, we mentioned yesterday that you couldn't see anything up ahead?

A Correct.

Q Okay. Now, you have plotted the fix, and tell me from the time you walked out on the port wing of the bridge to take the azimuth bearing that time, at that time, was 55 the time you started this process?

A Yes.

Q Can you tell us, when did you receive a first report from the lookout?

A I had just finished plotting position at the 2355 fix as the lookout came into the chart room and reported Bligh Reef light. She gave the color and characteristics of the light.

Q Did she tell you where the light was in bearing with reference to your heading?

A Yes.

Q What did she say?

A I believe she said it was a point on the port bow – a point on the starboard bow, excuse me.

Q And the point, in nautical terms for those that don't know, is how many degrees?

A 11 and a quarter degrees.

Q Now, when she made that report to you, did you reach a

[2384]

conclusion as to what light she was reporting?

A I – I knew what light it was. I'd seen it before she had, actually.

Q Okay. And did she make a subsequent report to you?

A She – yes. Some moments later, and I can't say how much later, she corrected her initial report and the characteristic of the light.

Q Do you remember what the correction was or –

A I think she'd reported it as six or seven second light, and then she corrected hers to a five second light.

Q To what it actually was on the chart?

A Yeah, yeah.

Q Where were you when she made that second report? Had you come out of the chart room or were you still in the chart room?

A I was in the wheelhouse.

Q You plotted the position, she had made the first report while you were in the chart room?

A Yes.

Q You walked out of the chart room, now what did you do next?

A That's when I approached the radar. It was giving the command – I was giving the command when she made her second report, as I recall.

Q Giving what command?

A The rudder order, the ten degree right rudder.

[2385]

Q I see. Okay. So you gave that order, then you went – you went to the telephone?

A I went to a bulkhead.

Q Got the light?

A Right, flashlight, went to the telephone. It's on the bulkhead separating the chart room and the wheelhouse, and called the captain's office.

Q Were you in the wheelhouse when you were making that call or were you in the chart room?

A I was in the wheelhouse.

Q And then I think we talked about before you turned around to make the telephone call to Captain Hazelwood and you didn't watch the – you didn't watch the helmsman?

A I turned to take a flashlight from a holder that was on an opposite bulkhead, and I called Captain Hazelwood as he had instructed me to do.

* * *

[2392]

Q Did you at any time after the grounding smell crude oil

[2393]

vapors?

A Yes. They were very strong.

Q And what was the interval of time between the grounding and your smelling this?

A Almost immediately.

Q And in your mind, did you make a judgment that there was danger of a fire?

A Yes, that possibility crossed my mind.

Q Now, were you on the bridge when Captain Hazelwood started maneuvering the vessel's engines?

A Yes.

Q After the grounding?

A Yes.

Q And on the bell logger, it indicates that the first engine maneuver was at time 0935 and 57 seconds when the vessel's engine was put dead slow ahead. Do you see that number towards the top of the second column? It's about six entries down. It's this one right here.

A The dead –

Q The dead slow ahead; you see that?

A Slow ahead that's at 0935.57

Q Yes.

A Yes.

Q And to bring that to local time, that's 0935 and 57 seconds; is that correct?

[2394]

A Yes.

Q Did Captain Hazelwood, did you hear him say anything that indicated to you what he was trying to do while he put his engines ahead?

A I heard part of a radio transmission. And I assume it was with vessel traffic, that he thought perhaps there was a chance to extricate the vessel from the reef.

Q When you say extricate, you mean free the vessel from your strand?

A Yes, correct.

Q I'm going to read you transmissions here that he gave and then ask you your interpretation. It was your understanding he was trying to get underway?

A I really didn't know what he was trying to do.

Q But you did mention that you had heard part –

A I mean, the – the definition of extricate is to pull something out; right?

Q Yeah. I want you to turn over to page nine on this same exhibit.

A Um-hum. The transmissions?

Q Yes. And I want you to look at the transmission that was of 0107.29 when he's talking to the captain of the port?

A Yes.

Q Were you on the bridge when Captain Hazelwood had this

[2395]

transmission with the captain of the port?

A Yes.

Q And do you see where he is twice in that transmission, he says, we are working our way off the reef, and then a little below that he says again, we're trying to just get her off the reef. Do you see that?

A Yes.

Q What does that indicate to you he was trying to do?

A Could be meaning he was trying to get her off the reef.

Q Were you on the bridge when Captain Hazelwood ultimately stopped the engine after this commencement of the maneuvers at about 0036 and the maneuvers –

A Yes.

Q You were on the bridge?

A Yes.

Q The maneuvers continued, did they not, from 0036 to time 1040 and 50 seconds where there's a stop, and we're indicating the left-hand column on that page, can you look at that about midway below the center. Do you see that?

A Yes.

Q And is that correct, then, that the maneuvers continued for about an hour and four or five minutes?

A Yes.

Q And is it also correct if you look down a little bit in that column that on three occasions there's entries of full ahead on the engine?

A I see full ahead, yes.

Q Did you hear Captain Hazelwood during this hour and four or five minutes giving orders to the helmsman?

A Yes.

Q And what orders did you hear that were given?

A I don't recall.

Q During any of your studies, did they ever teach you about proper maneuvers when your vessel goes aground if you're going to attempt to free your vessel from a strand?

A Yes.

Q And what were you taught?

A Stay aground.

Q And what – were you ever taught anything that if you were going to risk trying to free yourself from a strand, did you ever receive any instruction as to what steps you should take to try and do that?

A I can't recall having read anything recommending pulling a grounded vessel in the condition that we were in from a ground, but any – any text that I've read on those matters suggest extreme caution and number of safety precautions.

Q And in connection with use of the engines, if you go

forward – if you go aground in the forward part of your vessel forward of your engine room aft, would it be more prudent to back your engines rather than try and go ahead to free your vessel from a stern strand?

[2397]

A If someone was trying to pull the ship off the reef?

Q Yes.

A I remember – regardless of whether he thought that was a good thing to do or not, you would back the engines.

Q And by going forward on the engines in the situation you were in, if the vessel were able to have been freed from the strand, might you not endanger tearing your engine room apart?

A Yes.

* * *

[2399]

Q Did you have in mind the time he turned the con over to you and told you to make the turn at Busby Island what

[2400]

course you would steer to bring it back into the lanes?

A Yes. I had already formulated my approach to this – our passage between the reef and the ice back into the lanes.

Q What course did you in your mind – you didn't mark it on the chart?

A No.

Q And what course did you have in your mind that you would steer to go from abeam of Busby Island, between the ice and the reef?

A It was not so much a course. It was a series of headings.

Q And did you have those plotted out in your mind?

A In my mind, yes.

Q What were they?

A I cannot recall. My intent was, because of the extent of the ice and how it appeared on radar, that the reason for me not using more rudder angle, more rudder initially was that I wanted a somewhat more gradual rate of change, heading change, so I didn't end up in the midst of the ice.

Q Okay. Now, where the ice was did not encroach on the red sector of Busby Island; did it?

A No.

Q So that there was room between the red sector and the front edge of the ice for the vessel to go through?

A Yes, there was plenty of room.

* * *

[2402]

Q Now, you mentioned, I believe, Mr. Cousins, it was Tuesday. You said looking back there a number of things you would have done differently, and I think it was in response to a question about making sure that Kagan in fact followed your order to turn. Could you describe for me sitting here in hindsight what things you would have done differently on the evening of the 23rd and early on the 24th?

A I would never have bothered to go out and take a visual bearing from a repeater. I would not have left the three centimeter radar. I would not even have bothered to go back into the chart room. I already knew where I was. I would not have left the helmsman unattended as I did. I would have taken a visual bearing but I wouldn't have – would not have walked out to the repeater and sighted it. It was not necessary.

Q Why did you do it that evening?

A I can't answer that.

Q You said you would have stayed at the radar?

A I would have maintained the radar watch and right there where I can watch the helmsman, the rudder angle indicator. I can watch – I had fairly decent visibility, as far as viewing the lights, the navigation lanes, Bligh Reef light, I could see that. I saw that before the lookout did.

There was just no reason for me to do what I did that

[2403]

evening, as far as plotting the fix, going out and sighting it, turning my back on the helmsman, calling the captain. If he wasn't there, who cares. I mean, obviously he had something else to do. I should not have allowed myself to become inattentive to more serious –

* * *

[2407]

Q Okay. Let's go to the next thing. You testified that Captain Hazelwood, after getting underway, at some period of time before the Narrows left the bridge?

A Yes.

Q And you further testified that in your experience, your experience in Valdez, you have never seen a captain who had not been on the bridge through the Narrows; do you recall that?

A Correct.

Q You further testified that you have never seen load program up used before when there was ice in the traffic separation scheme; do you recall that?

A Correct.

Q You further testified that the con was turned over to you by Captain Hazelwood at a time in which the vessel was outside the traffic separation scheme in which the vessel's heading was in the general area of Bligh Reef, that the vessel's steering was in auto gyro, the vessel's engine was in load program up and that you had no pilotage?

[2408]

A Correct.

Q In violation of your vessel organization manual, the requirement for two officers to be on the bridge?

A Assuming the Watch Condition C?

Q Yes.

A Yes.

Q With which you said in your judgment existed?

A In my judgment, yes.

Q You further testified that the captain went below to his cabin and remained there until about the time of the grounding, which was a period of – we had about 15 minutes, I believe, from 2353 to 0008 or thereabouts?

A Correct.

Q Now, do you have an explanation, knowing Captain Hazelwood and knowing what you knew of him before the grounding and reflecting back on this, what caused this captain – you believed him to be a competent captain; did you not, I gather?

A Yes.

Q What caused this competent captain in a sequence of acts over a period of few hours to be performing acts which you have given – the record speaks for itself – a description of? Do you have any answer to that?

A I have no idea.

Q Did you ever see Captain Hazelwood drinking ashore?

A One time, yes.

* * *

[2415]

Q When you sailed as an A-B, did you have occasion to go up to Prince William Sound?

A Yes.

Q How many occasions?

A I think the estimate was perhaps 26 voyages or so, like that.

[2516]

Q During the course of your service as an A-B in Prince William Sound, did you have occasion to steer up there?

A Yes.

Q Did you stand the lookout watch during those –

A Yes.

Q – those trips as well?

A Yes.

Q You had a chance to observe the topography of the area?

A Yes.

Q You knew where Bligh Reef was?

A Yes.

Q You knew where the Bligh Reef buoy was?

A Yes.

Q You knew where Busby Island was?

A Yes.

Q You knew where Naked Island was?

A Yes.

Q How about Rocky Point?

A Yes.

Q Potato Point?

A Yes.

Q The Narrows?

A Yes.

Q Little Rock?

A Yes.

[2517]

Q Now, can you recall who the captains were that you sailed with into Valdez while you were an officer?

A Yes.

Q Tell me who they were.

A Captain Grove, Captain Wallace, Captain Hazelwood, Captain Stalzer, Captain Hoye, Captain Witty.

Q Now, when you sailed as an officer, where did you pick up and drop off the pilot?

A Rocky Point.

Q Was that on every single trip that you were involved with dropping off and picking up the pilot?

Let me rephrase that. That was a bad question.

When you were involved in the picking up or dropping off of the pilot, did you always pick him up at Rocky Point and drop him off at Rocky Point?

A Yes.

Q When you – when you acted as a lookout when you were an A-B, in Prince William Sound, did you report the various navigation aids that you spotted?

A Yes.

* * *

[2424]

Q Okay. Let me put the letter in front of you. I put before you the letter dated September 19th, 1986 from Alaska Maritime Agencies to whom it may concern?

A Yes.

Q Had you read this letter prior to March 23rd, 1989?

A Yes.

Q Were you aware, prior to that date, that there were

[2425]

proposals made by the Coast Guard to change the pilotage regulations in Prince William Sound?

A Yes.

Q And did you understand that they wanted to waive pilotage from Rocky Point down to Cape Hinchinbrook?

A Well, I probably did at the time, yes.

Q When you received this letter – when you read this letter, did you have any understanding as to whether this letter was advising its recipients that the pilotage requirements had been waived?

A That was my understanding of the – the letter.

Q When you took the con of the vessel after Captain Hazelwood left the bridge just north of Busby?

A Yes.

Q And south of Rocky Point?

A Yes.

Q Did you believe that you were qualified to con the vessel in those waters, without a pilotage endorsement?

A Yes.

* * *

[2430]

MR. SANDERS: Your Honor, this next part is – goes to the subject of Captain Hazelwood's condition on the bridge just before the Valdez got underway the night of March 23rd.

BY VIDEO EXAMINER:

Q Did you observe any staggering?

A No.

Q Did you believe Captain Hazelwood was impaired or intoxicated in any way?

A No.

* * *

[2437]

Q Okay. After you took this 2339 bearing, is that when Captain Hazelwood came over to the radar scope with you?

A Yes.

Q Both of you were standing over at the ten centimeter radar?

A Yes.

Q Close to each other?

A Just about shoulder to shoulder, yes.

[2438]

Q Okay. Now, did you – you discussed with Captain Hazelwood this ice condition, was he in agreement with you as to where you saw the ice? You say you discussed with him when he was turning the con over, the situation with the ice?

A I don't – I can't really answer that question. He – he saw the ice. The conversation, as I recall it, was that this is – if we're going to avoid the ice, we're going to be out of the scheme altogether, and he said, yeah, we'll – we'll just start bringing it back when we get down abeam Busby and swing it back into the lanes.

Q Okay. And what did you take those directions to mean as to where you were to make the turn? You said you'd go down around abeam of Busby?

A Get abeam of Busby. Abeam of Busby, alter course to get back to the traffic lanes.

Q Yes. What I'm asking you, he said abeam of Busby, he used that general term, what was your general understanding that he meant, Busby is an island?

A Yes, Busby Island light.

Q You say when he left, he said he was only going to go for a few minutes, he used the word fewer minutes?

A Yes.

Q You actually used that expression; didn't you?

A Yes.

Q Now, I believe your testimony is that you had two meetings

[2439]

at the radar, two separate meetings; is that correct?

A Yes.

Q Was this the first meeting that you had?

A I believe it was.

Q Tell me what you and Captain Hazelwood discussed at that meeting, the first meeting.

A He explained to me what he had intended, as far as the deviation out of the traffic scheme to avoid the ice. That was the first that he spoke of coming abeam Busby Island and then begin the turn back into the lanes.

Q Okay. He told you that was his intention?

A Yes.

Q At this point, were you able to see any of the ice on the radar?

A Yes.

Q Did you see it in the form that you drew on Exhibit 48785 at that point?

A No, that was a bit later. The targets that we had identified as ice, the radar was picking up the chunks of ice that were to the north and not all of the – not –

Q Okay – don't get anything – can we have a blue marker, or red one, red one's even better.

Would you mind marking on Exhibit 48785 in red pen what you observed during your first conference at the radar – A At –

[2440]

Q – with respect to the ice?

A Okay. Fairly large targets like this standing down into here, down into the southern lane, something like that. Right here.

Q Okay. Would you just – all right. Would you initial in the area that you made those?

A (Witness complies.)

Q Okay. Good.

UNIDENTIFIED SPEAKER: I think we should either hold that up to the camera or let the record show that he put on numerous red circles.

VIDEO EXAMINER: Let the record show, do you see that? Yeah, that the witness put a series of red circles representing the ice –

MR. SANDERS: Your Honor, we apologize. We thought we had a blowup of that over here with the red circles and we didn't. We'll just have to show it a little bit later and I apologize. I know you can't see it on the screen.

VIDEO EXAMINER: – that they observed the first time that they stood at the radar, okay.

BY VIDEO EXAMINER:

Q Now, you said there was a second meeting at the radar. When did that occur in relation to the first meeting?

A Minutes later. I returned to the chart room. I don't know if there was – if I actually put a fix down. I had taken some

[2441]

ranges to determine exactly how far the ice was across the lanes, if it was in fact across all of the lanes or whether we really needed to go out of the lanes, to give me a better idea as to what the captain was talking about. I just – I hadn't been on the bridge that long. So I returned to the chart room briefly, picked off some distances that I had gotten from the radar, went back to the radar, and I believe that's when Captain Hazelwood and I spoke again. He was standing on the forward side of the radar. That's when I said, it looks like we're going to be – the ice is all across both of the lanes and that we're going all the way out of the lanes. He said, yeah, that's the point, we have to go out of the lanes to get around the ice.

Q Okay. You had made a determination by taking bearings and ranges?

A Ranges, yeah.

Q Oh, sorry, ranges, that in fact the ice that you observed on the radar extended across both lanes inbound and the outbound?

A Yes. Yes.

* * *

[2443]

Q When Captain Hazelwood told you the entire plan, which is

[2444]

to come down abeam of Busby and then turn back into the lanes in order to avoid the ice, did you concur with that plan?

A Yes.

Q Did you in fact feel comfortable with it?

A Yes.

* * *

[2463]

Q Now, going back to the – to the amount of time you had off duty and on duty or while you were resting or not resting, at the time that you stood your watch the night of the grounding, starting sometime before 8:00 that night?

A Right.

Q Did you feel like you were affected by any fatigue?

A No.

Q At the time that you took over the con some eight or nine minutes before midnight, did you feel fatigued?

A No.

Q Did you feel like fatigue had anything to do with your performance that evening? That night or that morning?

A No, I don't think it did.

* * *

[2472]

CROSS EXAMINATION OF WILLIAM SHEEHY
(Live)

BY MR. O'NEILL:

Q Could you tell us where you work.

A Right now I work for Sea River Maritime.

Q That's the old Exxon Shipping Company?

A Exxon Shipping, correct.

Q And when did you start with them?

A I started with them in I believe it was July of 1974.

* * *

[2476]

Someone in personnel told you that Captain Hazelwood would be returning to duty as the master of the Yorktown; is that a correct statement?

A That's correct.

Q And you were later told by your boss, who was John Tompkins, to meet with Captain Hazelwood?

A Yes.

Q And Tompkins told you that Hazelwood had been determined to be fit for duty in a medical sense?

A Yes, Tompkins told me that he was returning to sea. Yes, I believe he said that.

Q And he was going to be assigned to the Exxon Yorktown?

A Yes.

Q And the sum and substance of this conversation was about two minutes?

A Approximately.

Q And Tompkins never told you the reason for Captain Hazelwood's leave of absence?

[2477]

A When – when Tompkins and I had that conversation, we were both going to the same meeting. We were driving up north of town. I don't believe that he told me any reason then.

Q And you didn't ask him about the nature of Captain Hazelwood's medical leave?

A No.

Q And you learned later on that Mr. Tompkins was in fact aware of the reason for Captain Hazelwood's medical leave?

A I – I assumed that he was aware of it, yes.

Q Now, after your discussion with Mr. Tompkins and before your meeting with Captain Hazelwood, you called a Mark Pierce to find out what the situation was with Captain Hazelwood; you were curious?

A Yes. I called Mark Pierce because I had just relieved Captain Pierce, and so I decided to – before I left for the meeting, to call Captain Pierce and just probe the issue a little bit.

Q And Pierce told you that Captain Hazelwood had been in some kind of alcohol rehabilitation?

A Yes.

Q And that he described Captain Hazelwood's problem as drinking problems?

A I can't recall for sure – I believe he said that, yes.

Q And Captain Pierce was of the opinion that Captain Hazelwood's drinking may have been interfering with Captain Hazelwood's job?

[2478]

A No, I believe that what Captain Pierce told me was that – something along the lines that Captain Hazelwood went voluntarily to a rehabilitation program before it interfered with his job performance.

Q Did he at some subsequent time tell you that Joseph Hazelwood's drinking problems interfered with the performance of Captain Hazelwood's job?

A I believe that Mark did not tell me that, that he said there may have been a potential for it, but I don't believe he ever said that there were any performance problems.

Q Okay, sir, would you go to page 116 of your deposition transcript? And on page 116 of your deposition transcript at line 21 through page 117, line 5, would you read that?

A Starting on which line, line –

Q Line 21, there's a question on line 21.

MR. SANDERS: Your Honor, I'd ask that question go back to 116, line 5. Make it complete.

MR. O'NEILL: This is my examination, Judge. If he wants to redirect him –

THE COURT: Well, I think the rule says that you need to pick the relevant part. Take a look at it and see, see if you're getting all that's relevant.

MR. O'NEILL: The top of page 116 deals with the first Pierce conversation. I believe my question was at any time after 1985. Did Mark Pierce at any time after 1985 tell you

[2479]

how Joseph Hazelwood's drinking problem interfered with the performance of Hazelwood's job.

BY MR. O'NEILL:

Q Sir, Mr. Sheehy, Captain Sheehy, when I asked you the question, I want you to know I read it out of the transcript.

A Oh, I'm sure you did.

Q That's how I do it. I don't have the confidence to ask questions I don't know the answer to.

A Well, the thing that's relevant is he asks up on line 5 about problems interfering with Joe's job, and I said no, I don't think there were any problems interfering with Joe's job and I believe this – this is down –

Q Let's read the questions and answers out loud. I'll read the question an answer out loud.

A Okay.

Q And you tell me whether I read it out loud right or not.

A Okay.

Q Question, did Mark Pierce, at any time after 1985, tell you how Joseph Hazelwood's drinking problems interfered with the performance of Hazelwood's job?

Answer, I believe that a subsequent time he did tell me something about it.

Question, what did he tell you?

Answer, seems to me like he told me something about some problems on one of the vessels Joe was on and that was what

[2480]

actually precipitated his involvement with Joe and

encouragement to go to a program.

Were those questions asked and were those answers given?

A Yes.

Q And indeed, Captain Pierce told you that he was instrumental in getting Captain Hazelwood to seek help for his drinking problem?

A Captain Pierce said that he had some involvement with Captain Hazelwood going into a program. I don't believe he said he was instrumental, but he did say that he had some involvement with that, due to some problems that he had seen that I don't think were job related.

Q Are you at all aware of the Graves report?

A First time I saw that was when it was one of the

predesignated documents.

Q It would appear from the Graves report that Captain Hazelwood's drinking was job related; wouldn't it?

A Maybe at some point. I don't know.

Q Would you go to page 113 of your deposition transcript, line 19 and with regard to the word instrumental, was the question asked – let's start on line 20. There are a variety of questions and you eventually answer.

The question is yes, but the answer is, I believe that Mark said that he – he was involved in Joe's drinking problem and that he had told or that he had been instrumental in Joe

[2481]

seeking help and that it was a good thing that he did, and that, you know, he needed to seek this help and successfully complete this program in order to remain employed with the company, something along those lines that in the context of this last chance thing came in.

Did you say that?

A Yes, I believe so.

* * *

[2485]

Q Would it be fair to say that in the summer of 1985, you were on notice of a potential problem; that is, Captain Hazelwood, alcohol rehabilitation, and what Captain Pierce had told you?

A Captain Pierce – yes, Captain Pierce had – when – I believe that perhaps also when I relieved Captain Pierce in June, several months before the Windham meeting, I believe that Captain Pierce said something to me about Captain Hazelwood being on medical leave. We didn't get down to the details of any of it, nor did we discuss when he would be back.

Q And you understood during the period of time that you worked with Captain Hazelwood on the gulf coast that there was a fairly high likelihood that someone with an alcohol problem would start drinking again?

A I don't know if I was aware of what that likelihood was. I'm not sure if I could assign a percentage to it, but I certainly recognized that it was something to be concerned about.

[2486]

Q The term fairly high, the reason that I used that is that was the phrase that you used in your deposition. Would you

take issue with that now?

A I'd have to read that.

Q Let's find it.

A Okay.

Q Let's go to page 285, line 16. The question was, and what was your understanding as to the rate of recidivism? And your answer was that it was fairly high. Do you see that?

A Yes. That refreshes my memory, the discussion about recidivism a little bit.

Q We can take – we can take our time. We can go back here and take a look at what you need to look at, because there are – there's like 400 or 500 pages of transcript there.

A Yeah.

Q And you knew that a follow-up program was a necessary part of Captain Hazelwood's alcohol rehabilitation?

A The details, to my knowledge, about Captain Hazelwood's program were very limited, because it was a confidential matter that really only a supervisor would be privy to, so the details of his program and of his aftercare situation I was not privy to.

Q You knew as a general proposition that a follow-up program was a necessary part of an alcohol rehabilitation program?

A I know in – yes, in most cases it is, yes.

[2487]

Q And that was your belief at the time that Captain Hazelwood was under your watch?

A Yes, I believe that he was in some sort of program, yes.

Q And you made no attempt to determine if Captain Hazelwood could attend AA or aftercare meetings during his tours at sea; did you?

A The details of Captain Hazelwood's aftercare program, as I said, were not – not matters that I was privy to. I was still on the peer level with Captain Hazelwood. What his program was, how frequently, what – I didn't even know what group he was going to, whether it was AA or rapid recovery or any of those.

Q That's – that's fine. In fact, let's take that one step further. Would it be fair to say that no one ever told you to monitor Captain Hazelwood regarding his use of alcohol?

A Well, the fact of the matter is, is that I don't recall specifically being told and I think it's probably because I recognize that such monitoring of like that

that you speak was part of my job in the base case. I did not recall of specifically being told to do anything other than what I felt like I was doing already.

Q Well, my statement is correct, you were never told by anyone at Exxon to monitor Joseph Hazelwood regarding the use of alcohol?

A I – I may or may not have been told that. I don't recall

[2488]

being told that. I may have been.

Q Okay. Would you go to page 218 of your deposition transcript, and I'm going to read from line 2 to line 5 and you can follow along with me.

Okay, were you ever told by anyone at Exxon to monitor Joseph Hazelwood regarding use of alcohol; and your answer was, no.

Do you see that?

A Yes. But then on the same page I specifically say that I wouldn't necessarily be told that because it was part of my job to monitor that.

Q Well, you were concerned about this man; weren't you, just on your own? Your own investigation, without being told to monitor him, puts you on notice of a potential problem; didn't it?

A I felt like it was my job to – to monitor him, yes.

Q And would it be fair to say that you don't know whether anybody else specifically monitored Joseph Hazelwood regarding his use of alcohol?

A I don't know specifically what other monitoring plans or programs were.

Q Now, at some point in time a Mr. Jim Shaw comes to you with regard to Captain Hazelwood?

A Yeah.

Q Is that a correct statement?

A Yes.

[2489]

Q And he was a port steward while you were the port captain of the gulf coast fleet?

A That's correct.

Q And you view Mr. Shaw as being an honest man?

A I believe my testimony was that he's – he's honest and well-intentioned, but he also is prone to gossip, to exaggerate things rather – he lacks in credibility sometimes simply because of his gossiping and exaggeration.

Q He had never – are you finished?

A Yes.

Q He had never before or after reported any out of school drinking problems that he had. This is the only drinking report that Mr. Shaw ever brought to you; isn't it?

A I had had a lot of contact with Jim Shaw over the years, and I think he – he talked about all aspects of people's private lives over the years. I think I may have – I don't think I, while port captain, ever heard any other rumors from Jim, but I think perhaps when I sailed with him I had.

Q When you were port captain, Mr. Shaw didn't come in and tell you any other out of school drinking stories; did he?

A I can't positively say that he didn't, but I don't recall that he did.

Q And Mr. Shaw told you that Captain Hazelwood was acting funny?

A Yes.

[2490]

Q And you had to press him to get the story up; didn't you?

A Yes.

Q And you did press him?

A Yes.

Q And Mr. Shaw told you that Captain Hazelwood was drunk over in Baton Rouge when Mr. Shaw was on the ship?

A I believe that he alluded to that fact, that my discussion with Mr. Shaw – he was being so cryptic and so ambiguous in what he was saying. I can't recall that he specifically said he was drunk. I think he said that he thought Captain Hazelwood had fallen off the wagon, or something like that. I continued to question him about what he meant by that.

Q Did Mr. Shaw tell you that Captain Hazelwood was drunk?

A Like I say, as – as near as I can recall right now, he said that he had fallen off the wagon, or that he was acting funny.

Q The cure didn't work?

A May have said that.

Q And did he tell you that he was concerned about Captain Hazelwood being drunk on board ship?

A I don't know if he said that he was concerned.

Q Would you go to page 156 of your deposition transcript, line 16, and I'm going to read the 157, line 2 and why don't you follow along.

[2491]

Jim Shaw expressed concern that a lot of people saw Joseph Hazelwood drunk, question. And your answer was, I believe he said something like, hey, this man – this isn't too cool. I mean, we have all the people storing the vessel and Joe was, he said, misbehaving, or I can't remember exactly what terminology he used, but something like that. Like I say, it was somewhat cryptic and I may have said, what do you mean, you mean he was drunk, and he said yes, or I can't remember how it went, but that ended up being the bottom line, so to speak, Jim alleging that.

Is that a – does that fairly state what happened?

A I think so, yes.

Q It's a touchy thing for a port steward to report a master being drunk; isn't it?

A I don't think it's so touchy for Jim Shaw, because he regularly gossips about people's personal lives and things like that. I don't think that he felt uncomfortable about doing that at all.

Q At the time that Mr. Shaw brought this information to you, you had – you knew that Captain Hazelwood had been through the program and you, according to your testimony, had told him this was his last chance?

A I told him that I understood it was his last chance, yes.

Q Now, let's talk about the things that you didn't do after

the Shaw report. You didn't go and interview anybody else on

[2492]

the ship; did you?

A By the time I got the Shaw report, the ship had left.

Q At no time after that did you go and did you talk to the people that were on the ship and ask them about the Shaw allegations; did you?

A Subsequent to the Shaw allegations, I did go over to the vessel, talked to Captain Hazelwood and I made myself available to other crew members.

Q You made yourself available. Did you go and ask any of the other crew members anything specifically about the Shaw allegations?

A I did not specifically ask anybody if they had seen Captain Hazelwood drunk or anything like that.

Q And anything to the potential witnesses, crew members, there were a variety of other potential witnesses, the stevedores; isn't that right?

A Well, there were some stevedores on there, but my feelings about that whole report, due to Mr. Shaw's lack of credibility, I thought that it would be inappropriate to launch into an investigation that could possibly undermine Captain Hazelwood's authority based on such a scurrilous report from basically a non-credible source. So I felt that it was prudent to take other avenues before I did anything that I thought might have been an overreaction.

Q Would it be fair to say that with regard to the potential

[2493]

witnesses, with regard to the Shaw event, that is the other crew members and the stevedores, you didn't go and interview them?

A I did not interview the stevedores, no.

Q Now, Captain Hazelwood – you took this seriously enough, the situation seriously enough to call Mark Pierce; didn't you?

A Yes, I called Captain Pierce. Probably immediately after Jim Shaw told me the – the story.

Q And Pierce told you that if Captain Hazelwood was drinking again, he was going to be in big trouble?

A He said something like that. Yes. I'm not sure what the trouble was referring to, if it was a professional or a personal sense.

* * *

[2487]

Q That's – that's fine. In fact, let's take that one step further. Would it be fair to say that no one ever told you to monitor Captain Hazelwood regarding his use of alcohol?

A Well, the fact of the matter is, is that I don't recall specifically being told and I think it's probably because I recognize that such monitoring of like that that you speak was part of my job in the base case. I did not recall of specifically being told to do anything other than what I felt like I was doing already.

* * *

[2488]

Okay, were you ever told by anyone at Exxon to monitor Joseph Hazelwood regarding use of alcohol; and your answer was, no.

Do you see that?

A Yes. But then on the same page I specifically say that I wouldn't necessarily be told that because it was part of my job to monitor that.

Q Well, you were concerned about this man; weren't you, just on your own? Your own investigation, without being told to monitor him, puts you on notice of a potential problem; didn't it?

A I felt like it was my job to – to monitor him, yes.

* * *

[2489]

Q And you view Mr. Shaw as being an honest man?

A I believe my testimony was that he's – he's honest and well-intentioned, but he also is prone to gossip, to exaggerate things rather – he lacks in credibility sometimes simply because of his gossiping and exaggeration.

Q He had never – are you finished?

A Yes.

Q He had never before or after reported any out of school drinking problems that he had. This is the only drinking report that Mr. Shaw ever brought to you; isn't it?

A I had had a lot of contact with Jim Shaw over the years, and I think he – he talked about all aspects of people's private lives over the years. I think I may have – I don't think I, while port captain, ever heard any other rumors from Jim, but I think perhaps when I sailed with him I had.

Q When you were port captain, Mr. Shaw didn't come in and tell you any other out of school drinking stories; did he?

A I can't positively say that he didn't, but I don't recall that he did.

Q And Mr. Shaw told you that Captain Hazelwood was acting funny?

[2490]

A Yes.

Q And you had to press him to get the story up; didn't you?

A Yes.

Q And you did press him?

A Yes.

Q And Mr. Shaw told you that Captain Hazelwood was drunk over in Baton Rouge when Mr. Shaw was on the ship?

A I believe that he alluded to that fact, that my discussion with Mr. Shaw – he was being so cryptic and so ambiguous in what he was saying. I can't recall that he specifically said he was drunk. I think he said that he thought Captain Hazelwood had fallen off the wagon, or something like that. I continued to question him about what he meant by that.

Q Did Mr. Shaw tell you that Captain Hazelwood was drunk?

A Like I say, as – as near as I can recall right now, he said that he had fallen off the wagon, or that he was acting funny.

Q The cure didn't work?

A May have said that.

* * *

[2493]

Q Now, Captain Hazelwood – you took this seriously enough, the situation seriously enough to call Mark Pierce; didn't you?

A Yes, I called Captain Pierce. Probably immediately after Jim Shaw told me the – the story.

Q And Pierce told you that if Captain Hazelwood was drinking again, he was going to be in big trouble?

A He said something like that. Yes. I'm not sure what the trouble was referring to, if it was a professional or a personal sense.

Q Well, let's talk about that, because during that same phone call didn't Captain Pierce tell you that Captain Hazelwood's drinking problems had interfered with his job performance at another time?

MR. SANDERS: Your Honor, this has been asked and answered. We've spent quite a bit of time on it.

MR. O'NEILL: It's another time.

THE COURT: My sense of it is this is another time, but the jury will have to make that call for themselves based on the testimony.

BY MR. O'NEILL:

[2494]

Q Did he inform you of that in that telephone conversation?

A I believe that in that telephone conversation, here again, there was the one at this time and the one in August of '85. I don't believe that he ever said that there were any professional problems that – that has at yet affected Captain Hazelwood's job performance. He may have alluded to personal problems or problems in general, but I don't believe that he ever specifically told me that – he may have said there were some problems, maybe even problems on the ship, but – but nothing that had really negatively impacted performance at that point.

Q Did he tell you that there had been drinking problems that interfered with the performance of Hazelwood's job?

A I don't recall if he said that for sure.

Q Let's go to page 116 of your deposition transcript.

MR. SANDERS: Your Honor, this is exactly what we did before, exact same page, exact same line.

THE COURT: Is that the same page?

MR. O'NEILL: It is the same page, but the man is –

MR. SANDERS: Same question, there were two conversations. The answer to the first one is on line 5 and this one is where he's referring to again. It's the very same thing.

THE COURT: If we've been over it, Mr. O'Neill, let's don't do it again.

[2495]

MR. O'NEILL: I'll move on, Judge. I'll move on.

BY MR. O'NEILL:

Q At some time you also talked to an Ivan Mihajlovic?

A Correct.

Q And he is a friend of Captain Hazelwood's?

A Yes, I think. I think they live near each other. I'm not sure how close they are.

Q And it crossed your mind that Captain Hazelwood would tip – that Captain Mihajlovic would tip off Captain Hazelwood about your investigation; wouldn't it?

A Captain Mihajlovic was a classmate of mine through all four years of school and I believe that I could trust Captain Mihajlovic to discuss an issue with him if I wanted to. I may have had some concern about that, but I believe that I felt that over all, it would be better to – to discuss this with Captain Mihajlovic.

* * *

[2497]

Q And you had never talked to Mr. Koops before about Hazelwood's alcohol rehabilitation?

A I'm a little unclear about the temporal sequence of all this. I – I don't recall specifically talking to Dwight about Captain Hazelwood's rehabilitation, but as I had said, this – this was a confidential matter that I would have made the assumption that whatever arrangements that Captain Hazelwood had would have been with Mr. Koops and it would have been in a confidential status.

Q Would it be fair to say that you had never talked to Mr. Koops before about Hazelwood's alcohol rehabilitation?

A Before?

Q This report.

A Before this report, I – I may have talked to Dwight about it. I – I don't specifically recall discussing anything about Joe's aftercare or his rehabilitation program with Dwight.

Q And you made this report, that's – to Mr. Koops?

A Yes.

Q And after you told Mr. Koops about the Shaw report, you assumed that the ball was in Mr. Koops' court?

A I assumed that as far as further action on this specific allegation, that the ball was then in Mr. Koops' court, yes.

[2498]

Q And he was the gulf coast fleet manager?

A Yes.

Q And he reported directly to the company president?

A Yes.

Q And after Mr. Shaw's report about Captain Hazelwood, you can't recall doing anything different, yourself, in terms of watching Captain Hazelwood; can you?

A Well, I think from the very beginning when, you know, subsequent to my first conversation with Captain Pierce, you know, I probably had a heightened awareness or recognized the need to be more alert. I think it would be fair to say that with Captain Hazelwood's incident with Jim Shaw, if that would have maybe been some other person, that Jim Shaw was – was saying that about, I may not have – have even reacted as strongly as I did with that.

So I don't think it's a fair characterization to say that I never did anything different with Captain Hazelwood, because I always subconsciously knew of his background.

Q You knew that he was an accident waiting to happen; didn't you?

A No.

Q Let's go to Page 323 of your deposition transcript, line 8, and I'll read from line 8 to line 13.

A Which page was that, sir?

Q 323, sir.

[2499]

MR. SANDERS: Give us a second, counsel.

BY MR. O'NEILL:

Q Question, did you do anything different – did you do anything differently after the Shaw report in terms of monitoring or watching Hazelwood?

Answer, here again, I may have, but I don't recall of anything that significant that I can specifically tell you that I did do something different.

Do you see that?

A Yes.

Q And would it be fair to say that Mr. Koops, you're unaware as to whether Mr. Koops did anything differently? After the Shaw report?

A I'm not sure what Mr. Koops did, no.

Q And you don't recall ever discussing with Mr. Koops about whether you and he should watch Captain Hazelwood more closely?

A The – typically, when I would visit the ships, Dwight or Mr. Koops required us to make a report back to him. That was a one page written form that covered a number of issues. I know that I – they were called vessel visitation reports, and I'm sure I wrote those when I visited the Yorktown. Dwight and I may have talked about it or we may not. I can't specifically remember.

Q Okay. Let's go to the same page, 323 of your deposition transcript, and I'll read from line 17 to line 21, and you see

[2500]

if I get it right.

Question, I take it you never discussed with Koops, sat down and said maybe we ought to watch him a little more closely or something like that?

And your answer was, I can't remember having a conversation like that.

Did I get it right?

A Yes.

Q And indeed, this was the only discussion that you had with Mr. Koops about Hazelwood and alcohol, this one discussion?

A Well, as I say, I know that I discussed a lot of issues with Dwight, especially each time I – I visited the vessel. I'm sure I discussed Captain Hazelwood with Dwight. I'm sure Dwight asked me how Captain Hazelwood was doing and I reported on that. I think that Mr. Koops and I had an understanding between the two of us, what that meant, but specifically, I can't remember a date and a time when I discussed that specific issue with him.

Q Now, sometime in 1987, the issue of Captain Hazelwood being reassigned to the west coast fleet comes up; do you recall that?

A Yes.

Q And you had a conversation with a Mr. Andy Martineau?

A Yes.

Q And Mr. Martineau was, in the course of this conversation

[2501]

at least, concerned enough about Captain Hazelwood to ask the question whether Joe was drinking?

A Yes. He – he initiated this conversation with me regarding Captain Hazelwood's transfer to the Exxon Valdez. We discussed some of the – as well as some other reassignments that were being made at that time, and I believe after we discussed some of the other aspects of assigning Captain Hazelwood to the Valdez he asked me if we had had any problems with Captain Hazelwood drinking.

Q Wasn't the question he asked you whether Joe was drinking over there?

A Something like that.

Q And you told Captain Martineau that he wasn't drinking?

A I told Captain Martineau that his performance had been, in my opinion, above average, and in all respects that I saw no signs of him drinking. I may or may not have said there was one incident that we investigated, we found no substance to it and I believe Captain Martineau was satisfied with – with what I had told him.

Q Did you know that by 1987, Captain Hazelwood had in fact resumed drinking?

A No, I had no reason to suspect that at all, as I said, his job performance was above average, I felt.

Q His ratings weren't; were they?

A No.

[2502]

Q In fact, in 1986, the year prior to this 1987 conversation, his ratings were the worst that they had ever been; weren't

they, 35 out of 37?

A I was not privy to the list exactly. I – I understand that he was, in the final outcome of the seriatim, he was quite low on it.

Q So now would it be fair to say that Captain Martineau was on notice that there was this incident?

A No, I don't think that would be fair to say. I – I said that I may or may not have mentioned the Jim Shaw incident to Captain Martineau. As a matter of fact, I may have said well, we had one incident which we investigated, we found it not to be factual, and so in my opinion, everything with Captain Hazelwood was fine and that there would be no problems transferring him.

Q In point of fact, over the one year period prior to that conversation, you had never asked Captain Hazelwood, are you drinking, are you in AA, how's your rehabilitation going, how's your family going; is that a fair statement?

A During that time period, I had numerous conversations with Captain Hazelwood. I'm not sure that – I think we may have discussed his family, we may have discussed how he was doing in general.

I do not specifically remember talking about his aftercare or his rehabilitation program. I – I felt that I had somewhat

[2503]

of a rapport with Joe, but I also felt that that was a confidential matter and that in my opinion, his performance was such that it didn't warrant delving into his personal life.

Q It was a confidential matter. You knew about it; isn't that right?

A Yes.

Q Pierce knew about it?

A Yes.

Q Koops knew about it?

A Well, Koops knew about it because he was his supervisor. I knew about it.

Q Did Koops know?

A I knew about it on a more personal level.

Q You found out about it from Pierce. Andy Martineau knew about it; didn't he?

A I think he may have, yes.

Q Are you aware that it was a rumor in the fleet?

A I'm aware that there's not a lot of secrets in the fleet, so –

* * *

[2518]

Q All right. Let me go into that business just a tiny bit, because it's already been covered, but you had this conversation with Mr. Shaw?

A Yes.

Q And he was very cryptic; correct?

A Correct.

Q All right. When you got into it and pressed him, what was your concern?

A My concern first of all was that if, in fact, what he was saying was true, my concern was that – that Joe may have fallen off the wagon or may – may have started drinking again,

[2519]

so my concern was how that would affect the operation of the vessel.

Q All right. Did you think you had any duty or obligation to do something about that?

A Well, yeah, obviously I did, because I did. And I felt that that was squarely within my job responsibilities to investigate that.

Q All right. And did you investigate it?

A Yes.

Q All right. And as part of this investigation, you called Captain Pierce and Captain Mihajlovic?

A Yes.

Q Now, let me ask you, Mr. O'Neill asked you a question about calling Captain Mihajlovic and knowing that he was a friend of Captain Hazelwood's and that it entered your mind that he would tip – he might tip Captain Hazelwood off. Is that why you called Captain Mihajlovic so he would tip off Captain Hazelwood?

A No, that's not it at all. The reason I called Captain Mihajlovic was because I, too, know Mihajlovic very well. Like I say, I went to school with him. I felt that Captain Mihajlovic would tell me the truth. Part of it was on a personal level, and I felt that on that personal level, Captain Mihajlovic would not do anything that would jeopardize a ship or jeopardize any of the operations and I felt like Captain

[2520]

Mihajlovic would – would level with me.

Q All right. What did he tell you, specifically, as best you can recall?

A He told me that he was good friends with Joe, spent a lot of time with him at home, and that he was definitely not drinking and that – that there was no question in his mind that he was in some sort of aftercare or that he was still dry.

Q All right. Now, we'll get to Captain Mihajlovic again in a minute. After talking with Captain Mihajlovic and Captain Pierce, you've testified that you went to Baton Rouge?

A Yes.

Q Why did you go the Baton Rouge?

A I went to Baton Rouge because the vessel was on that run, it went down to Chiriqui Grande and back and I knew that would be the next U.S. port that it would be in. I went there because of what I heard and I wanted to ask Captain Hazelwood about these allegations and make him –

Q All right. Now –

A – make him aware that these had been presented to me.

Q When you met with Captain Hazelwood, did you ask him if he had been drinking or if these allegations from Shaw were true?

A I told Captain Hazelwood what the allegations were, just as Mr. Shaw had told me and Captain Hazelwood said that – that basically it was all fabricated, it was not true.

[2521]

Q What did he say? Don't tell us basically. If you can call any specifics.

A I can't really recall what he said, but I know I was very comfortable with the fact that he was telling me the truth and that what Jim Shaw had told me was basically not true. I felt comfortable with that as I left the vessel some six or seven hours later.

Q Did you spend six or seven hours on the vessel?

A Yes.

Q And you've already testified as to what you didn't ask. What was the purpose of staying on the vessel for six or seven hours?

A Well, I probably talked to the chief engineer, chief mate. Probably ate lunch on the ship. Probably talked to some of the unlicensed crew members. I can't recall specifically what any of the issues were, but I probably saw most of the people on the ship during that time.

Q Captain Sheehy, is it realistic, your view in 1985 or '86, whenever this happened, is it realistic or was it realistic in your view to expect that if there had been a drinking problem with Captain Hazelwood on board that ship that somebody on board the ship would have told you?

A I think that rumors like that always fly pretty fast, yes.

Q All right. Now, you came back after this and I believe you testified you met with Mr. Dwight Koops?

[2522]

A Yes.

Q Let me ask you first, before you get into that, Mr. Koops was at that time the gulf coast fleet manager, he had by that time taken over Mr. Tompkins' job?

A Yes.

Q Matter of fact, he had stepped in about a month after you got in as port captain? Two months?

A Little longer than that, yeah, couple months.

Q Did you tell Mr. Koops what you were investigating and what your conclusion was?

A Yes. I pretty much discussed everything with him. I believe that Jim Shaw came in and sat in with us when I had that discussion with Koops. I can't remember for sure, but I think that Jim Shaw came in, too, and added whatever he felt appropriate.

Q What was that?

A He basically, when we got done, he said that he was comfortable with what – you know, what we had done.

Q All right. Did you later hear on this issue? Did you later hear again from Captain Mihajlovic?

A Yes, somewhere along the way, and I can't remember exactly what point in time it was, if it might have been before I went over to Baton Rouge – as a matter of fact, I think it was, captain –

Q But it was after the Shaw – after you called Mihajlovic?

[2523]

A After the Shaw report, after I called Mihajlovic, but I think prior to me going over to the vessel, Captain Mihajlovic called me back and I believe that Captain Mihajlovic was on the Exxon San Francisco at the time, and that they were anchored together when they left the dock in Baton Rouge and they went down, they were both anchored in Chiriqui Grande, waiting to –

Q Excuse me just a minute. Could you tell the ladies and gentlemen of the jury what Chiriqui Grande is?

A That's the port they loaded down in Panama. It's about a five day trip, five and a half day trip, and the ships wait in this lagoon to go and load from a pipeline down there.

Q Sorry for the interruption. They were together there near the lagoon in Panama. Go ahead.

A They were probably – might have been within a half a mile of each other, actually. But Captain Mihajlovic told me he went over to Captain Hazelwood's ship and searched through his room and that he felt that everything he had told me over the phone still held and that there was – that he found no alcohol in Captain Hazelwood's room.

* * *

[2532]

Q One step removed. And you were on notice of the fact it was your opinion that the man suffered from the disease of alcoholism? At that point in time, that was your opinion? That's a correct statement; isn't it?

A Oh, I assume that he had been diagnosed as an alcoholic because he had been to a rehabilitation program.

Q And you knew that alcoholics could cause a lot of problems for you? You testified to that a couple minutes ago?

A I knew that an alcoholic could cause a problem if he resumed drinking, yes.

Q That he could cause a problem for the vessel that he was in charge of?

A He could, yes.

Q And the environment surrounding the vessel?

A Whatever associated with it, yes.

* * *

[2540]

DIRECT EXAMINATION OF PAUL MYERS (Live)

BY MR. O'NEILL:

Q How are you, sir?

A Fine. Thank you.

Q Tell us who you are, if you would?

A My name is Paul Myers.

Q And where do you work?

A I live – work for Sea River Maritime, formerly Exxon Shipping Company.

Q And when did you first go to work for any member of the Exxon family of companies?

A May 25th, 1970.

* * *

[2541]

Q When you finished working with regard to the building of these ships, then you were assigned to where?

A The west coast fleet office in Benecia, California.

Q And you were the – the what?

A Port engineer.

Q Port engineer?

[2542]

A Yes, sir.

Q And then you eventually became ship group coordinator?

A Yes, sir.

Q And your boss was Harvey Borgen?

A Yes, sir.

Q And Captain Hazelwood was the master of the Exxon Valdez when you became the ship group coordinator?

A That is correct.

Q And you became Captain Hazelwood's supervisor; did you not?

A That is correct.

Q You kept notebooks with regard to your duties?

A Yes, sir.

Q Is that a correct statement? And at some point after the

grounding of the Exxon Valdez, you entrusted those notebooks to your personal lawyer?

A Yes, sir.

Q And after some litigation, the notebooks were produced in discovery; that's a correct statement?

A I believe it is.

Q And you had a notebook that you kept generally up to about the time of the grounding?

A Yes, sir.

Q And you had a second notebook that you essentially started at or about a day or two after the grounding?

[2543]

A Yes, sir.

Q And immediately after the grounding, you received a call from Captain Hazelwood?

A No, sir.

Q Okay. What was the first – did you call Captain Hazelwood?

A Yes, sir.

Q So you called Captain Hazelwood on the vessel and you talked to him?

A Yes, sir.

Q And did you keep notes of that conversation?

A Yes, sir.

Q And you kept the notes in your notebook?

A Yes, sir.

Q And would it be fair to say, and I've got it up on the monitor, you've got a monitor there, if you want to – can you see that?

A Yes, sir.

Q That this is the copy of your notes of that telephone conversation?

A That's correct.

Q And in taking these notes, you tried to be accurate?

A Is that a question or a statement?

Q Yes, sir, it is.

A When I was on the telephone with Captain Hazelwood, I kept

[2544]

notes on a – what you might call these sticky things, post-it notes, and by the time the conversation was over, they were all over the kitchen table.

Q So –

A And this is transcribed from them, not necessarily in the order that it was actually spoken.

Q But these subjects were discussed?

A Yes.

Q And at least with regard to the entries for each of these subjects, you tried to be accurate?

A Yes, sir.

Q And Captain Hazelwood reported to you – well, you spoke to him personally?

A Yes, sir.

Q And let's just take a section of this, if we can. We'll do it in parts.

A Oh, now I can see it.

Q Just stick with me, and I'll help you out a little bit. It says here, right here where the arrow is, spoke to Joe Hazelwood; do you see that?

A Yes, sir.

Q And he told you that he was hung up aground?

A Yes, sir.

Q On Bligh Reef?

A Yes.

[2545]

Q And it says here, zig for ice, third mate, Joe just went below; do you see that?

A Yes.

Q Is that what he told you?

A Yes, sir.

Q And says Joe just went below to do paperwork. Is that what he told you?

A That's correct.

Q And Joe, my fault, I'm the blame, and then I can't read that. A Neither can I.

Q With regard to Joe, my fault, I'm the blame, is that what Captain Hazelwood told you?

A Yes, sir. He indicated that he'd just gone down below to do paperwork when this happened, and my impression was the third mate made an error and he said he should have been on the bridge.

Q Thank you. And there is a comment right here, concerned about stability?

A Yes, sir.

Q Is that a comment he made to you?

A Yes, sir.

Q And what is the, should keep yap shut?

A At one point in time, he indicated that he perhaps had said too much and perhaps needs a lawyer.

[2546]

Q Okay. And did he tell you that he thinks he can get it off?

A That was really the last thing that was said and certainly in retrospect, that was a – from where I'm standing, a pleasant way of ending the conversation. There was no – that was the last thing he said, it was, don't worry, we'll get it

off, it's not the end of the world type, that was the last thing he said before we hung up.

Q Have you ever heard the expression, you can't change the written word?

A No. I haven't.

Q Your notes at least reflect the fact that he said, thinks he can get it off; do you see that?

A Yes.

Q And then he also said right below that after departure, programming up to full speed; do you see that?

A Yes.

Q Is that what he told you?

A I had asked how fast were you going, and his response were – was that we were programming up, so I knew the ship had to be going more than 55 rpm.

Q And you transcribed these notes at some later point to start your second notebook?

A Yes, sir.

Q And with regard to your transcription the second time, is

[2547]

it fair to say that the transcription of your notes the second time is essentially – you had time to reflect and the entries are essentially the same?

A With one exception, I think I wrote down twice that Captain Hazelwood mentioned the – the third mate twice, something about, I can't let the third mate take all this by himself, I'm partially to blame, something to that effect.

Q Doesn't say, at least in your notes I'm partially to blame; does he?

A No.

Q He says, my fault, I'm the blame?

A Yeah, there's another entry lower somewhere, as well.

Q Okay. My fault.

A My fault, can't pin on – let's see, can't pin on third mate, normal operation.

Q Says my fault, can't pin on third mate, normal operation, should keep yap shut?

A Um-hum.

Q Okay. And on both of those entries, there is an indication that he was – think he can get it off?

A Those were the words that I wrote down and I just transcribed, as I said.

Q Now, you talked to him over the phone?

A That's correct.

Q And how did he sound?

[2548]

A Just as we're talking now.

Q Okay.

A Calm.

Q I want to play another conversation that he had at about the same time and ask you whether the tone, intonation, pacing, speech, style is the same as when he talked to you; okay?

A Yes, sir.

MR. O'NEILL: Can you play that?

(Audiotape Played)

BY MR. O'NEILL:

Q Can you compare his tone, intonation, pace, diction and the phone call with you and what we just heard there?

A They sound completely different.

Q Thank you. You were of the view that the grounding wouldn't have happened if Captain Hazelwood would have been on the bridge; aren't you?

A Yes, sir.

Q You became Captain Hazelwood's supervisor in early 1988?

A Took effect March 1st, 1988, but I was preparing for it in January and February.

Q And would it be fair to say that you got bad vibes from Captain Hazelwood?

A Yes, sir.

Q And you thought that there might be a problem down the road with regard to Captain Hazelwood because of these bad vibes?

[2549]

A Once the – as I met Captain Hazelwood sometime in the summer or fall of 1988, in my capacity as port engineer on the Exxon Valdez, and during the period of time from then up until I think my February visit, I found him to be very interested in the ship and very knowledgeable. And at that point in time, which is after the announcement of the new organization, I felt that he was somewhat put off by the fact that: Number one, I have an engineering background; number two, I am from outside of then Exxon Shipping Company, I'm an outsider; and number three, I was in a peer position and now I'm going to be in a supervisory position.

Q But all of that being taken into consideration, you've got these bad vibes and they were sufficient enough to where you went to Mr. Borgen, your boss, to discuss the subject, the bad vibes subject with him?

A That is correct.

Q As Clint Eastwood would say, you wanted to discuss an attitude problem?

A Oh, this was a concern that was discussed with the other ship group coordinators, as well as Mr. Borgen, and although this was the highest level, if you will, there was some of this – I could feel some of this from some of the other masters, but it wasn't as extreme.

Q And Mr. Borgen told you that Captain Hazelwood had gone through alcohol rehabilitation?

[2550]

A During the conversation when I related what I just related to you, he indicated that – or told me that Captain Hazelwood had undergone some sort of rehabilitation relative to alcohol, as well as some emotional concerns.

Q Okay. Now I'm interest in the way you just put that. Because you used the words indicated and told.

A Um-hum.

Q He whispered it to you; didn't he?

A Well, the door – actually, when I went into his office and started speaking to him, the door was open and when he got to the point where he discussed this, he looked at the door, because it is a confidential matter, and spoke in a low voice.

Q He whispered it; didn't he?

A Spoke in a low voice.

Q Whose term is whispered?

A I – I've used that term.

Q So we have two full grown Exxon executives whispering about alcohol rehabilitation?

A I wasn't whispering.

Q He was?

A He spoke in a low voice.

Q And you may have had one other discussion with Mr. Borgen about Hazelwood and drinking; is that right?

A About actual drinking?

Q Yeah.

[2551]

A I don't think the discussion had to do with actual drinking.

Q In the whole time between the time you became member of the management team and the time of the grounding, how many discussions did you have with Harvey Borgen about Joe Hazelwood and alcohol, drinking?

A I would monitor Captain Hazelwood, and I would come back to Mr. Borgen each time I visited the ship, and in essence report to him my observations so that he was aware of them. If that's what you're referring to.

Q My – did you come back repeatedly and say to Harvey Borgen, I checked on Joe and he isn't drinking? You didn't do that; did you?

A Not in those words, no, sir.

Q You – your understanding was that Captain Hazelwood was alcohol dependent?

A That is correct.

Q And he couldn't drink?

A Or if he did, he would be – he would be addicted to it, yes.

Q And he had emotional problems?

A Yes.

Q And he was supposed to abstain from drinking whether on or off duty? That's a correct statement?

A Well, if you – yeah, if you're an alcoholic, in essence

[2552]

you have to abstain.

Q Okay. And you – let's – do you know of anybody else who was monitoring him other than you or Harvey Borgen? You don't; do you?

A No, sir.

Q And you didn't document any of the monitoring; did you?

A There wasn't really anything to document.

Q Okay. We'll come to that in just a minute. But there is no document; is there?

A Not to my knowledge.

Q Not one piece of paper that you're aware of in the Exxon Corporation that reflects any monitoring?

A No, sir.

Q Okay. And you never visited the Exxon Valdez in the Port of Valdez; did you?

A Not in the port, no.

Q And did you ever ask of the Alamar people, we had a fellow from Alamar here yesterday, did you ever ask anybody at Alamar whether Hazelwood had a reputation for drinking or was drinking?

A No sir.

Q How about anybody at Alyeska, did you ask anybody at Alyeska?

A No, sir.

Q And there were never any random searches of Hazelwood's

[2553]

quarters?

A Not when he was master of the Exxon Valdez that I'm aware of.

Q And you never asked anyone at Exxon about past incidents?

A No, sir.

Q And you never asked any other supervisors of the west coast office about Hazelwood and alcohol; did you? Other than Borgen?

A That is correct. My understanding of this whole rehab situation is that the procedures that I have read indicated that there'll be no discussion on rehab or the details of it or any such thing and such as that unless the employee chooses to do so himself.

Q So it's top secret; is that right?

A That's my impression.

Q You never told Captain Hazelwood or you never asked Captain Hazelwood if he was in treatment, Alcoholics Anonymous, how his recovery was; did you?

A No. But I did – not in those words, but I did ask Captain Hazelwood if he had any personal problems, and he said no. I asked him if he had any problems at all, and he said no. And I believe that Captain Hazelwood knew that I was talking about alcohol.

Q So it's sort of kind of a thing that you'd understand or whisper?

[2554]

A Well, as I said, there's this confidentiality issue about rehab and I didn't feel it appropriate to go down and say, well, Joe, how's rehab going, how was the last AAA [sic] Meeting. I chose not to be a bull in a china shop but to handle it a little bit differently.

Q And in May of 1988 you got a call from Steve Day who told you that he heard Hazelwood order beer over the ship walkie-talkie?

A I did not receive, to my recollection, a call from Steve Day that addressed that issue. There was, however, a conversation in late May of 1988 where Steve did tell me that.

Q There was a call in May of 1988 where Steve Day told you he heard Hazelwood order beer over a ship walkie-talkie?

A Not a telephone call, no, sir, there was a conversation.

Q Conversation?

A In Mr. Day's office where he related that to me.

Q Did he tell you he found empty Henry Weinhards bottles on the vessel?

A No, sir.

Q Did he tell you that the walkie-talkie incident had to do with Henry Weinhards beer?

A No, sir.

Q Mr. Day testified that he came in and reported this to you; did he?

A He – he reported to me that he heard Captain Hazelwood

over the walkie-talkie asking for beer. And at that point in time, I said, did you go over and investigate? He said no. I asked him a series of other questions and I can't remember specifically what was said, but the last question I said is, did you see anybody drinking, and he said no.

Q So for – does that allow you to wash your hands?

A No, I went in to Mr. Borgen after this, this conversation, and – and spoke to him about the possibility that Captain Hazelwood might be drinking.

Q And Mr. Borgen already knew about it; didn't he?

A That is correct.

Q And you were shocked; weren't you?

A I was sort of surprised that I didn't know about it.

Q Everybody knew about it?

MR. NEAL: Objection.

THE COURT: Sustained. Jury will disregard that.

BY MR. O'NEILL:

Q The word shocked is your word; isn't it?

A Yeah. I was surprised. Here I am three months on the job, I find this information out, go to my boss and he is already aware of it, so, yeah, I was a little surprised.

Q So would it be fair to say that at this point in time you knew that captain – you were of the view that Captain Hazelwood was an alcoholic, he had to abstain, he ordered beer over a walkie-talkie in the Portland shipyard and that you and

[2556]

your boss both knew about it?

A Well, when I left the conversation with Mr. Borgen, my understanding was that he had done – or some sort of investigation was done and there was nothing to tie Captain Hazelwood with drinking during that incident.

Q So you –

A And one other thing, that I would continue to watch Captain Hazelwood closely.

Q And then at some point in time, you talked to Messrs. Kimtis and Glowacki; isn't that right?

A Separately, yes.

Q And did you know that Mr. Kimtis was the one that Captain Hazelwood was drinking beer with in Portland?

A No, I did not know that.

Q Did you know that Mr. Glowacki – at that point in time you wouldn't know that Glowacki was in Valdez drinking before the grounding. Did you know that Hazelwood and Glowacki drank on occasion?

A Not until the – after the incident.

Q Now Captain Hazelwood said in his testimony, we talked at great length about his conversation with you?

A Which conversation?

Q The one in May or June of 1988?

A I talked to Captain Hazelwood, I think in May he called me from the shipyard, and in June I was on board the ship for the

[2557]

stewardship review and to give him performance feedback.

Q Okay. And he says that you and he talked, at least at one point in time in his testimony, he said that you and he talked and he told you that he was drinking beer with Chuck Kimtis back at his apartment?

A That –

MR. NEAL: Objection to that, unless Mr. O'Neill brings out the fact, that makes that misleading, really. Mr. O'Neill knows what that story is. I'll get to it, never mind, I withdraw my objection.

THE COURT: Thank you, sir.

MR. O'NEILL: So we can get it clearly in mind.

(Portion of video of Captain Hazelwood played as follows)

BY VIDEO EXAMINER:

Q Did Mr. Myers discuss this event with you?

A I think it was the subsequent voyage. We left Portland, loaded, dropped a bunch of people off that had ridden with us in Long Beach. Went to Panama and returned. I think it was our last run to Panama.

Q And where did the discussion take place?

A As I recall, Anchorage and San Francisco.

Q And what did he say to you and what did you say to him?

A He was – it was part of a general commentary on how did things go to the yard and, you know, it basically was a shakedown voyage for all this repair work that had been done

[2558]

and I don't know if it was the beginning or the end – I have a feeling it was the middle of this discussion, went on for about five or six hours, about all the concerns in the yard and he says, I got a report from Herb Leyendecker about some beer being ordered or referred to on the walkie-talkie, and in sum and substance, I told him the same thing I've testified to

today, what happened, said okay.

Q Did he say anything else besides okay, when you gave him the –

A No. He just said I just wanted to be sure there was no violation of the alcohol policy, and I said as to my way of thinking, there was none.

Q Did he – at this point, did you tell him that you had consumed some of that beer later?

A I believe I did. I said Chuck Kimtis, and I went and watched the Bruins play whoever they were playing in the Stanley Cup finals, I think it was. I explained the whole scenario to him.

Q You explained the scenario, including the fact that you subsequently drank some of the beer while watching the football game?

A Hockey game.

Q Hockey game?

A I believe I did, yeah.

Q You refer to Mr. Timmons, I forget, he was on the other end

[2559]

of the walkie-talkie during the – during the conversation?

A Simmons, Timmons, something like that. I've forgotten.

Q Who was he again, remind me?

A I think he was a rigger foreman. He was in charge of the riggers for the day shift at that time.

Q Did you tell Mr. Myers how much beer you drank during the hockey game?

A I don't think specifically. I think it was a six-pack of beer and I think we indicated to him that we finished it or drank it.

(Portion of video of Captain Hazelwood concluded)

BY MR. O'NEILL:

Q Have you ever seen that before?

A No, sir.

Q In the conversation, would it be fair to say that he does say that he related to you the fact that he drank beer with Kimtis back in his apartment?

A Well, that's what he said, but–

Q That's what he says?

A That's what he said, but –

Q I'm going to let you – I'll give you a chance. Go.

A Number one, I never had a conversation with Mr. Leyendecker in relationship to this and I think Captain Hazelwood is mistaken because that discussion never took place. With Captain Hazelwood. It just didn't take place.

[2560]

Q Okay. That's fine. Would it be fair to say as you sit here today you thought he was an alcoholic, you knew he wouldn't be – he shouldn't be drinking, those are correct statements?

A Yes.

Q And you knew that a drinking alcoholic captain, master of a vessel, presented a risk to the vessel and the environment around it; okay? Is that all fair so far?

A Yes.

Q If Captain Hazelwood's version of this facts is correct, assume it is – may or may not be, but let's assume it is – your not doing something about that would have been reckless?

A Well, first off, it wasn't. It didn't happen.

Q I'm asking you to assume it was.

A Well, since it didn't happen, it's sort of difficult.

Q Let's say it's somebody else, say it's Mr. X, same context that we're talking about, knowledge of alcoholism, knowledge with regard to shouldn't be drinking, knowledge with regard to tanker risks, and

Mr. X gets a report, as we saw Captain Hazelwood give him a report, if Mr. X didn't take action, wouldn't it be fair to describe that conduct as reckless?

A Well, in Captain Hazelwood's situation, I do not believe that he was drinking, and/or if he was drinking, then perhaps he wasn't an alcoholic. Because I was on the ship all the time. Every time it came in, the ship came into Northern

[2561]

California or Long Beach. I was in there for extended periods of time and I know what to look for and I ensured that every time I came on board the ship I got close enough to him to smell his breath. I talked to him. I made myself available to other members of the crew. And I got a number of unsolicited positive comments, more than I had for anyone else. And it didn't –

Q Let me ask the question a different way.

A Okay.

Q If we assume Captain Hazelwood's version of the facts, which we all just looked at.

MR. NEAL: Your Honor, this is too much. Can we approach the – approach the side bar?

THE COURT: Not at this point. Let's see what the next question is.

MR. NEAL: Then I'll have to set up the video again where Mr. Hazelwood comes back and corrects this. Apparently Mr. O'Neill is not going to do that.

THE COURT: You'll have your chance.

MR. O'NEILL: Thank you, Judge.

BY MR. O'NEILL:

Q If we assume Captain Hazelwood's – that version of Captain Hazelwood's testimony, and I'm happy to admit that there are at least four versions, okay, there are four versions, two in which he says that, two in which he says the conversation

[2562]

didn't take place, happy to admit that. We've got four versions of the same conversation, but let's assume the version that we just looked at. If we assume that that version is the one that took place, you're partially responsible for the Exxon Valdez; aren't you?

A No.

Q Okay. Now, at some point in 1988 you attempted to get Captain Hazelwood transferred; didn't you?

A No.

Q You didn't?

A No.

MR. NEAL: Page, Mr. O'Neill.

MR. O'NEILL: 169.

BY MR. O'NEILL:

Q Would it be fair to say that there was a meeting in August of 1988?

A That's correct.

Q And there were ship group coordinators there including Deppe, McRobbie, and Sheehy?

A That's correct.

Q And you were talking personnel matters because people were being promoted at that point in time?

A Right. There was the ranking and rating in June and as a result of the ranking and rating, there were people that were promoted and the object was to even out the personnel on the

[2563]

fleet, so there was a meeting and Captain Deppe said that he needed somebody for the – I think it's the Yorktown that was working for I think PRI, which is a customer of ours, and he indicated that – or said that he needed a good ship handler and everybody's told me that Captain Hazelwood is the best, probably the best ship handler Exxon Shipping Company had, so I said do you want to take him on that ship. It wasn't – it was more like looking at the general interest of the company rather than saying get this guy off my ship.

Q Did you suggest that he go to another vessel?

A Other than that conversation, no.

Q That conversation, did you discuss that he go to another vessel?

A I suggested that if Mr. Deppe wanted him for the Yorktown, that would be okay. Because of the requirements he had.

Q And Captain Deppe didn't want Captain Hazelwood; did he?

A No. Because he's not politic.

Q He's a wise guy?

A Not a wise guy.

Q Now, at some point in time, you get a report, do you not, with regard to a second incident concerning Captain Hazelwood in San Francisco Bay concerning Captain Reeder and Mary Williamson?

A Captain Reeder, I – I had a conversation in March of 1989 where Steve Day said officers busting Reeder's chops. To my

[2564]

knowledge and recollection, there was nothing said about Captain Hazelwood.

Q So it's your testimony, as you sit here today – well, let's see what Steve Day said, and then you can deny it, not deny it; okay?

A Um-hum.

(Portion of video of Steve Day played as follows)

BY VIDEO EXAMINER:

Q What did you tell Paul Myers?

A From what I recall, I – I initiated the conversation, went into Paul's office in Benecia, shut the door and related to him essentially what I've – what I've told you here, what Mary observed and thought he, as – he should know about it.

Q Do you recall what, if anything, Paul Myers said in response to your report?

A He didn't say very much, from my recollection. Vaguely remember some, you know, questions of when, what day, and you know, but that's about – yeah, that's about all. It was very short, actually.

(Portion of Video of Steve Day concluded)

BY MR. O'NEILL:

Q The Mary Williamson incident is the incident Mr. Day had previously talked about concerning whether Captain Hazelwood had been drinking aboard a launch that evening, and here he reports that he reported it to you or testifies that E reported

[2565]

it to you. My question is simply, did he?

A He did not mention Captain Hazelwood. My recollection is that during that time frame, we had a turbocharger problem, and I'm sure you're aware that the Exxon Valdez was delayed from the Monday, I guess that would be the 13th, through Saturday, the 18th because of a turbocharger problem, and I was dealing with this, which I normally wouldn't have done, and Steve is a hot shot engineer, diesel engineer, and I went into Steve's room and asked him some questions about if he could help me with the turbocharger or if he had any ideas, because I had three different firms, one Sulzer, one our own people and one the turbocharger manufacturer all saying that they were different things, trying to find out which one it was, so things were a little tense for me.

And Steve was busy and he really didn't have anything to offer and there was a lull in the conversation, and I remember him saying after that, officer's busting Reeder's chops, and someone else came into the room and I left and got back on the turbocharger case.

Q So just so the record is clear, you deny that Mr. Day told you about what we – about Mary Williamson observing Captain Hazelwood in a possibly inebriated state?

MR. NEAL: Objection, Your Honor, to total misquotation of the record.

MR. O'NEILL: Well, I think that's –

[2566]

MR. NEAL: Possibly inebriated state, she said she couldn't say that–

THE COURT: Mr. O'Neill – Mr. Neal – I knew I'd do that sooner or later – just take it a little bit easy, please. The jury will decide for themselves what the testimony of these various witnesses were.

You may continue, Mr. O'Neill.

MR. O'NEILL: Thank you, Judge.

BY MR. O'NEILL:

Q Mary Williamson describes an incident aboard a launch with – right before the Valdez leaves north to go on the fateful voyage. And she reports it to Mr. Day, whatever the characterization of it is. Mr. Day has testified that he reported both the Williamson incident to you and a heated conversation between Captain Hazelwood and Captain Reeder in which profanity was used. Mr. Day's testified that he reported that to you. My question for you, sir, is, did he?

A You said just before the ship left. I was on board the ship the 17th, overnight to the 18th.

Q My question is, did Mr. Day report that to you?

A Not that – not that I'm aware of, no, sir.

Q Why would Mr. Day lie about that, if you know?

A Certainly on the surface, I have – I have no explanation on why he would.

Q Now, knowing what your state of mind then was with regard

[2567]

to Captain Hazelwood, and his treatment and his alcoholism and the fact that he wouldn't be drinking, if indeed Mr. Day made this report to you and you didn't act on it, that would be reckless; wouldn't it?

A Well yeah, I think if he said that to me and I didn't, yeah, I would be a bad boy, so to speak.

Q Reckless?

A No question.

* * *

[2612]

Q Now, you testified that when you talked to Mr. Kimtis and Captain Hazelwood about this review that you talked to them because they were, quote, the management representatives on board; do you recall saying that this morning?

A We're talking about captain – I mean, Chief Engineer Kimtis.

[2613]

Q And Hazelwood?

A Yes.

Q And they were the management representatives on board?

A Yes, sir.

Q Would you explain that to us?

A The captain and chief engineer are certainly responsible for their – their various departments and in relationship to this, if you will, the stewardship or the management of the vessel, the stewardship activity, I believe, started roughly ten years – no – yes – let's see. About late '70s, early '80s when it was determined that the folks that ran the respective departments would be management on board the ship and the stewardship process started.

Q To some extent that's what Mr. Iarossi talks about in his talk, surrounding the memories; have you ever heard that or read that?

A I've read it, but I don't remember the details.

Q But in any event, the concept was to change the role, the traditional role of the captain from someone who drove the boat to someone who managed the vessel and its activities as essentially an economic unit?

A I think that's what I was getting at when I mentioned that each individual fleet office for – since the late '70s or early '80s, this is my understanding, I wasn't there, had specific stewardship activities. I think the thing that changed in the time frame that I came into the organization is

[2614]

that the stewardship requirements were going to be the same for both fleets of ships, rather than a little different for one fleet than the other, and the other aspect that was cranked into this is the safety aspect that wasn't actually part of the stewardship before. It was like a separate entity.

Q So at least by the time, by 1988, 1989, the captain and the chief engineer were the management of the company on board the ship?

A I wouldn't – management of Exxon Shipping Company; is that what you're saying?

Q The management representative on board the ship?

A Yeah, I would say so.

Q Now, I want to talk to you for a minute about this Mr. Day coming in to talk to you about the Mary Williamson incident and the possibility that you may have been less than attentive during the conversation, if in fact the conversation took place. Does that make sense?

A Yes, with the exception I was – I went to him on another topic.

Q Okay.

A There's a little disagreement there.

Q The issue of Captain Hazelwood and drinking was an important issue in your mind; wasn't it?

A I would say so.

Q And the issue of a drinking captain who had gone through

[2615]

alcohol treatment was one that you knew could present dangers to the vessel, to the safety of the vessel, to the environment surrounding the vessel. You were aware of the risks?

A I was aware of the policy.

Q You were aware of the risks, too; weren't you?

A I was also aware of the policy.

Q Were you aware of the risks?

A What risks are we talking about?

Q That a captain who had an alcohol problem, who suffered from alcoholism of a supertanker presented a clear and present danger to the vessel if he was drinking again, to the vessel and the environment –

A If he was drinking. If anybody was drinking, actually.

Q Now, the rankings that you looked at today, where you had him in the middle, those were not the final rankings; were they? Those were your recommendations?

A That was the – I believe the final ranking for the west coast fleet.

Q Was that the final Exxon Shipping Company ranking for that year?

A I believe they were melded with the gulf coast masters.

Q Would it be fair to say, from your testimony today, that on the evening of the 23rd, there was no need for the Valdez to go out at night and there was no need for the Valdez to have run the risk of that ice at night, that it could have waited for

[2616]

another day?

A If there was a specific reason, the ship could have stayed.

Q Are you aware at all of the ice telex?

A Which ice telex?

Q Captain Martineau sending an ice telex on or about March 16, 1989 to some part of the west coast fleet recommending that Exxon Shipping Company vessels only take passage, because of ice conditions, during the day?

A I've heard about that, but I don't remember seeing it.

Q You've heard about it, though?

A Yes, from counsel.

Q You testified that you monitored Captain Hazelwood and I'm just going to ask a series of questions that all have to do

with monitoring, whether you did or didn't do it; okay? Did you ever talk to anybody in the medical department about

Captain Hazelwood?

A No, sir.

Q Did you ever talk to anybody in the – what is it, human resources section or department that Dan Paul heads up about Captain Hazelwood and drinking?

A No, sir.

Q Did you document any of the so-called monitoring of Captain Hazelwood?

A There's nothing to document.

Q Okay. Did you ever inquire of the Exxon Shipping Company

[2617]

agent Alamar in Valdez about Captain Hazelwood and drinking?

A No, sir.

Q Did you ever do a random search of Captain Hazelwood's

quarters?

A No, sir.

Q Did you ever search the ship?

A No, sir. However, the – all of the ships in the west coast fleet in the – I believe in 1989, were going to be randomly searched, and one had been scheduled for the Exxon Long Beach and then canceled just prior to the incident because they couldn't get the dogs, but this was – this was planned.

Q Would it be fair to say that during your tenure, there were no searches of the Exxon Valdez with regard to alcohol?

A That I am aware of, that's correct.

Q And you never asked anyone at Exxon Corporation, other than the conversation you related with regard to Mr. Borgen, about Captain Hazelwood and drinking on duty; did you, about his history?

A About his history?

Q Yes, sir.

A No, sir.

Q And you never discussed Captain Hazelwood's – the issue of Captain Hazelwood's alcohol problems with other supervisors in the west coast fleet office other than Mr. Borgen; did you?

A My understanding was that Mr. Borgen told me that in

[2618]

confidence, and the policy is clear that the whole issue of rehab is not to be discussed unless the employee brings it up.

* * *

[2622]

DIRECT EXAMINATION OF RICHARD L. MASTERS (Live)

BY MR. MONTAGUE:

Q Dr. Masters, could you please tell the jury your educational background?

A I went to college at Wayne University in Detroit, Michigan, where I received a bachelor's degree in psychology. I then started work on a master's degree and had a teaching fellowship in psychology. I did not complete the master's degree because I had an opportunity, somewhat unexpected opportunity to enter medical school, and I went to the University of Michigan for four years and graduated from there.

Q Doctor, could you keep your voice up a little bit? I think we're having trouble hearing you.

THE COURT: Doctor, that silver microphone will amplify. If you get it over in front of you and speak into it, it'll broadcast your voice.

THE WITNESS: Thank you.

MR. MONTAGUE: Thank you very much.

THE WITNESS: I graduated from the University of Michigan in 1957 with an M.D. degree, took an internship, then entered the United States Air Force.

I was in the Air Force for a total of nearly ten years. During my work in the Air Force, I took a master's degree in

public health, preventive medicine and occupational medicine at Harvard University and completed my residency training for my board certification.

BY MR. MONTAGUE:

Q What is occupational medicine, Doctor?

A That's the study of the diseases of work environments as they affect humans and the – and the effect of humans in their work environment.

Q Okay. And today, do you have a specialty?

A Yes.

Q Could you tell us what it is?

A I'm a special – I'm board certified by the American Board of Preventive Medicine in aviation medicine, and my specialty is preventive medicine, aviation and occupational medicine.

Q Do you have any special expertise in alcohol abuse programs?

A Yes.

Q And does that include the monitoring of employees in safety sensitive positions?

A Yes.

Q Could you tell us how you developed that expertise?

A Well, skipping anything that I might have had contact with in the Air Force, I start with my assignment or my work after I left the Air Force at the Lovelace Foundation for Medical Education and Research. At that organization I became the

[2624]

chairman of the department of preventive medicine, and as a part of that work there I was responsible for a number of consulting contracts with various organizations, probably the most significant being the – what we called then the atomic energy commission.

Q And what did you do with respect to the atomic energy commission?

A Well, I had a number of roles there, but –

Q I mean, relating to an alcohol abuse program?

A Yes, sir, relating to that. I was a consultant to the commission in drawing up and enhancing the standards for the selection for the continued duty and for special evaluations of the persons who had hands-on contact with nuclear weapons, the couriers who transported those weapons and the methods of transportation by land, sea and air.

Q Have you received any grants from the National Institute of Alcohol Abuse and Alcoholism?

A Yes.

Q What is that, what is that institute?

A That's one of the national institutes of health that deals with, as the name says, alcoholism and alcohol abuse.

Q And could you tell us if that grant included within it the area of monitoring of safety sensitive positions?

A Yes, it did.

Q And when did you get that grant?

[2625]

A The grant – the grant began on September 11th, 1974.

Q And when did you finish your work officially under that grant?

A The official cessation of the grant was December 31st, 1982.

Q So that was approximately an eight-year project?

A Yes, sir.

Q Okay. Now, can you tell us what you just – very briefly what you did under that grant?

A Basically, we developed a program for the dealing of alcoholism in the safety sensitive positions in the airline industry.

Q And does that – the study that came out of that grant, does that have a name?

A Yes. We called it the Human Intervention and Motivation Study, and the acronym for that is just HIMS, HIMS.

Q Okay. And as a result of HIMS, Doctor, have you had occasion to familiarize yourself with alcohol programs, including monitoring programs in industries other than aviation?

A Oh, yes. Before you get a grant, for example, you have to provide a very detailed written request detailing precisely what you're going to do, and we did a great deal of study of programs that were in effect before the onset of the grant, and then as a consequence of having the grant, we did a wide study,

[2626]

collected hundreds of programs from major industries around the country.

* * *

[2630]

Q So back in '85 or before, if a corporation wanted to have a monitoring program, especially for persons in safety sensitive positions and especially where they've returned from some form of alcohol treatment, that information was readily available; is that a fair statement?

A Yes. From those organizations, as well as interchange of information between corporations or organizations.

Q Is that the sort of information alcohol abuse programs, and ways to do it and monitoring, is that the type of information, in your experience, that large corporations are willing to share amongst themselves?

A I've rarely seen anyone refuse to share that information.

Q Okay. Now, can you describe for us as you understand it and based on your experience, the major features of a monitoring program? And I'd like you to do that, if you can, based on what was available in the early '80s or at least

1985. And again, relating to employees in safety sensitive positions who have returned from some form of alcohol treatment.

A Well, monitoring is a concept that needs to be formalized in a plan, and it needs to involve a relationship between the operational supervisors and the medical department and the individual or individuals being monitored.

Q And can you tell us – can you sort of tell us the roles that each of those – well, first of all, when you say a

[2631]

formalized plan, what's that supposed to set forth?

A Well, it should be a written plan and it should be explained very carefully, the relationship between supervisory personnel and the medical department personnel and what their specific roles are.

Q Okay. Could you tell us, for example, what the – what the role of the supervisor is and what – and its relation – and the supervisor's relationship to the medical department?

A Well, the supervisor is responsible for looking at the overall behavior of an employee who has returned to work, and for keeping in mind that you have to have a broad concept in dealing with this. He has to understand the employee as well as he can, he has to be concerned about the employee, and he has to be alert to any observations that he might make about changes in that employee's behavior, the way he approaches his job, that type of thing.

Q Okay. And does the supervisor get any – should there be interaction between the medical department and the supervisor before the supervisor begins to watch that particular employee or keep an eye on him?

A Yes. The medical department would play a very key role in this, assuming for example that they would have made a return to work or fitness for duty determination after the person comes out of the inpatient treatment program. The medical department would interact with the supervisor of a given

[2632]

individual and together they would talk about what the monitoring program should be. The medical department should meet with the individual before he's returned to duty, and then should have periodic meetings with him throughout the time of his monitoring, as should supervisors.

Q Okay. Now, would it be fair to characterize the supervisor as the eyes and ears of the medical department?

A That's a.

Q Is that a fair –

A Yeah, that's a good term, yeah.

Q Now, when the supervisor sees something that is unusual or notices something in behavior or hears a report about behavior or drinking or whatever, what – how does he then interact with the medical department?

A I think the medical officer should be consulted by the supervisor. They should have a conference, discuss the – the findings or observations of the supervisor. We're certainly assuming that the supervisor will have done some preliminary investigation of the problem and can give a fairly good description to the medical officer of what the problem might be.

Q Okay. Now, is it monitoring – is it monitoring if the supervisor never reports anything to the medical department?

A No, not under the plan that I've described.

Q And why not?

[2633]

A Well, the – the whole monitoring program is aimed toward prevention. What you're looking at is making sure that the person has continued in his progress and his aftercare program, is in continuing care, and is being observed very closely in every way. Medical department may have information pertaining to this particular case, which might cause them to have reason to perform a formal professional evaluation, for example.

Q And might that be information that is not available outside of the medical department?

A Yes, they had – would have the records from the treatment center. They would have the frequent reports from the aftercare program, all of those types of things.

Q And what if they didn't have those records?

A Well, I think they would have to have them. I don't think it would be an adequate monitoring program if they didn't.

Q Does a – in a responsible monitoring program, is the – is it proper for the medical department to require the employee who has been in treatment to make his records available? As a condition of returning to his safety sensitive position?

A I believe it is. I believe that it would be quite important. I can't conceive of how the medical department could make judgments without having that information available to them.

Q Would it at least be appropriate to ask for them?

A More than appropriate.

[2634]

Q Okay. Now, let's get back on the beat here. Once the supervisor spots something and reports it to the medical department, someone in the medical department – and I take it that's a doctor?

A Yes.

Q Okay. Then what's the next step?

A Well –

Q In this –

A Let me interrupt you, if I may. That could be the

physician or he might have assigned a particular employee, assistance person, program person, to accept the initial reports like that, but generally, it would be the physician, himself, especially in the role of great responsibility.

Q Would it be fair to say it would be a physician or someone especially trained?

A In all cases, yes.

Q Now, let's assume that the report is made, then, to that – to the medical department and the person within it who should receive it. What happens next in the medical department?

A The medical officer should review the report carefully, discuss it carefully with the supervisor, make any determination that he feels able to make at that point in time, but most likely should see the employee face to face.

Q And that's the person in the medical department?

A Yes.

[2635]

Q And after that, then, is it the person in the medical department that determines what steps should be taken with respect to the employee in that safety sensitive position?

A Well, it always has –

Q Do you understand that?

A I think I do. It would always have – it would always have to be done in conjunction with the supervisor. Medical department interactions involve the responsibility of making recommendations.

Q Okay. And then that's – the medical department would make its recommendation after it's interviewed the employee?

A Well, it may do more than that. You know, the medical department would have to perform a professional evaluation of this individual in their meeting with this individual, and there's a whole gamut of things that, you know, the medical – you know, the medical department might need to do. The outcome of this meeting in the medical department could be anything from go back to work, calling the supervisor, saying look, I don't think this is important, I see no evidence of a problem here, or they might say, well, look, he's having some problems with – with one of his children, we're going to get some family counseling introduced. Or he's got financial problems, we're going to get one of our financial people, all of those types of things, or the medical department may wish to have a more specialized professional evaluation on the individual and

may call in other people or send the individual to – to another type of specialist, maybe a psychiatrist, whatever, call the aftercare monitoring counselor, see if he's got any input, what he thinks. He might want to, you know, increase the monitoring program. He might want to enhance it, so to speak. He might say, look, let's, in conjunction, say with the counselor at the aftercare program, he might say, well, let's go ahead.

Q Might he pull him off the job, say wait until we get the evaluation?

A I was talking about a gamut, and that's sort of the end of the road, but if he has to go that far, yes, he would pull him off the job, do whatever is necessary, have other evaluations and so forth, sure.

Q Okay. Now, have you reviewed Exxon's alcohol policies and their supervisors' guidelines with respect to those policies?

A Yes, I have.

Q And have you heard the testimonies in this courtroom of Drs. Montgomery, Gould and Nealy?

A Yes, I have.

Q And have you looked at their depositions?

A Yes.

Q And have you heard the testimony of Mary Williamson last Friday, and Steve Day?

[2637]

A That was read.

Q Yes.

A Yes.

Q And the video deposition of Steve Day on Monday?

A Yes, yes.

Q And were you here to hear the testimony of Captain Sheehy and Paul Myers?

A Yes, for both gentlemen.

Q And on that, based on that information, in your opinion, did Exxon – did Exxon's alcohol policy and program, whatever it was, provide for monitoring?

A I found nothing in the paperwork that I didn't find – I didn't find the word "monitoring" in any of the provisions, so

I would have to say no.

Q All right.

In your opinion, what captain Hazel- – I'm sorry, what Exxon did as to Captain Hazelwood as described by Captain Sheehy and Paul Myers, does that constitute monitoring?

A No, it does not.

Q I'd like to – I'd like to take some notes this morning and you recall Mr. Myers testifying that, with respect to the Portland Shipyard incident, he said I spoke to Hazelwood alone, I asked Hazelwood if he had any personal problems or any problems at all and he said no.

Do you recall that testimony?

A Yes, sir.

[2638]

Q Is that what a professional in the medical department would do if he were interviewing Hazelwood, Captain Hazelwood after that type of report?

A No. It's not even what a supervisor should do.

Q Okay. And I also – Mr. Myers was asked by Mr. Neal what would you have done had you heard Steve Day when he – when he mentioned the San Francisco Bay-Mary Williamson story, and he said I would have asked Day to accompany me to Mr. Borgen's office, we would have brought in Mary Williamson, we would have brought Captain Hazelwood in, Captain Hazelwood to hear his side of the story. Is that what a medical department would do if it were reported, that incident?

A No. I don't – I don't – I wouldn't – I wouldn't take that type of action.

Q Well, is that what you would expect?

A No, it's not what I would expect.

Q Is it correct that people in the medical department are trained to know how to determine if a person who has been through alcohol treatment and who is in a safety sensitive position, that they're trained to be able to ferret out if someone is in denial or whether they're actually – they're more apt to be able to ferret out what's really going on?

A They should be if they're going to make monitoring work effectively.

Q And is that normally the case?

[2639]

A That, in my experience, yes.

Q And monitoring, as you've described it, is it effective?

A I think it's quite effective, yes.

Q Okay. Now, I want to turn for a minute to job performance and you've heard testimony that Exxon, in their alcohol policy, their supervisors were looking to job performance as the main criteria as to whether someone was okay; and is that a proper criteria on which to base a monitoring program?

A No, it's not. It's – I would characterize it as even dangerous to base everything on that.

Q Dangerous?

A Yes.

Q Why would you say it's dangerous?

A Well, first of all, it's not preventively oriented. You need to take in all elements of the person's conduct and behavior and the way he approaches his work. I feel that both performance and skill in professionals is one of the last things to go; and I really wouldn't want to have that happen when a safety-sensitive person is driving a train, controlling a ship, flying an airplane.

Q In other words, the first – the first mistake that manifests itself could be the big one; is that what you mean?

A Yes. I don't want to see that happen, you know, on approach to Kennedy airport with a load of passengers, for example.

[2640]

Q Okay. Now, I want to turn for a second to monitoring – monitoring program and paperwork, and if a monitoring program is in effect, would you expect – you testified that there would be a written plan?

A Yes, sir.

Q And would that include written guidelines as to what the medical department should do and what the supervisors should do and how they interact?

A Yes, sir.

Q That would be explicit?

A Yes.

Q And did you find that in Exxon?

A No.

Q And would you expect also to find paperwork documenting the activities of the supervisors if they found anything or reported anything to the medical department?

A Yes.

Q And would you expect to find anything when the – in the files of the employee in the safety-sensitive position when the medical department made its evaluation of that report?

A Yes, the file would start with, you know, a

fitness-for-duty and then make any further reports of any special evaluation conducted which were brought to their attention or that they found out in their interviews with the person. But those reports would have to be handled in a very

[2641]

confidential manner, and the report itself merely would be a record of what was done. That's all that would get to the personnel file: I've examined this person and I find him fit for duty, or this person was removed for duty for a period; and so forth.

Q And when there are no such records, either a written plan or guidelines telling employees how to act, both the medical department and the supervisor's department and where there's nothing in the files of the employee, either the personnel files or the medical records or anything like that, does that suggest to you that there's no effective monitoring program in place?

A Yes.

* * *

[2656]

Q Dr. Masters, directing your attention to your testimony about what you would consider to be appropriate monitoring procedures for a company employing people who have safety-sensitive jobs, first of all, is it your testimony that you know that the standards that you described are followed in industry generally?

A It is my testimony that I know of the wide dissemination of the information. It is my testimony that I know organizations that use this technique and I don't – I don't know what you

[2657]

mean by "widely disseminated".

Q I said used in the industry generally.

A Generally.

Q Used in industry generally?

A I couldn't answer that because I don't know about all industry.

* * *

[2662] Q By the way, when I asked you earlier about the FAA requiring monitoring for a pilot who wanted to return to duty, in this memorandum the FAA set up standards in which it would grant exemptions to pilots who had a diagnosis of alcoholism, did it not?

A That's the general purpose of this document.

Q And that document specified that, in order for a pilot to receive that exemption, he would have to be subjected to monthly monitoring meetings of the type you described in your direct testimony; isn't that true, sir?

A That's true.

Q By the way, this document evolved from a grant you received from the National Institute for Alcohol Abuse and Alcoholism?

A Yes.

Q Now, with reference to the diagnosis of alcohol abuse, if – if a pilot in 1982 had been diagnosed as having – as having a case of secondary alcohol abuse secondary to dysthymia, that would not require his license to be revoked by

[2663]

the FAA; isn't that correct?

A No, that's not correct. He would have to report his

inpatient treatment and the FAA would have probably required the documentation and would have reviewed the medical records in great detail and would have made an individual determination on that case.

Q Is it true that, if the FAA determined that the diagnosis was alcohol abuse secondary to dysthymia, that that would not require the pilot's license to be suspended or revoked?

A If they determined that that was the exact diagnosis, that could be the case. But they would make an individual determination based on their review of all of the medical records.

Q So if they made the determination that a pilot was suffering from dysthymia, primary problem; alcohol abuse episodic, secondary problem, then that pilot could continue to fly; isn't that correct?

A That requires a lot of assumptions that you haven't given me.

Q It is true, is it not, Dr. Masters, that that is – that if the FAA concurred in a diagnosis of dysthymia and alcohol abuse episodic, that the FAA regulations would not call for the cancellation of that pilot's license?

A If the FAA concurred in that, yes.

* * *

[2672]

Q So, just so I understand, an airman who had had – a pilot who had had his license to fly suspended or revoked because of a clinical history of alcoholism and remained sober for two years could get his license reissued, even if he told the agency that he occasionally had wine with dinner; is that accurate?

[2673]

A Yes. Since he wouldn't get a special issuance, I believe that would be accurate.

* * *

[2675]

Q Okay, now, does that mean that you think that a good monitoring program obligates a supervisor to pass on to the medical department every rumor that they hear?

A No.

* * *

[2676]

Q Let me see if I understand this. If a supervisor received a rumor from a notorious gossip and the supervisor didn't believe the rumor, is it your testimony that that supervisor should call the medical department and drag this employee in for a medical evaluation?

A No, it's not my testimony.

Q Okay.

A And drag in, I think that's rather strident.

[2677]

Q Oh, I'm sorry, I didn't mean to be strident. Invite the employee in for a medical evaluation?

A Yes.

Q Now, is it your view that the supervisor should do that?

A Under the circumstance you suggested?

Q Yes, sir.

A A rumor? No, I suggest the supervisor investigate the rumor; if he doesn't think there's anything to it, that's fine.

* * *

[2698]

DIRECT EXAMINATION OF JERZY GLOWACKI

BY MR. CHALOS:

Q Hello, Mr. Glowacki.

A Good morning.

Q What is your present occupation?

A I'm presently self employed and I'm also on the faculty of an engineering department at State University of New York, Maritime College.

Q What is your present employment?

A As self-employed?

Q Yes.

A Yes. I do consulting work in the maritime engineering field.

Q How long have you been doing that?

A Since 1990.

Q And how long have you been in an instructor at Maritime College?

A Since about two years ago.

* * *

[2705]

Q Now, once the Exxon Valdez was constructed, did you sail on her as a chief engineer?

A Yes, I sailed on her from the maiden voyage on, that's correct.

Q When did the vessel come out of the yard?

A Mid December '86. I don't recall the exact date.

Q And you were the permanent chief engineer on that vessel from 1986 until the grounding?

A One of the two, that's correct.

Q Who was the other chief engineer?

A Chuck Kimtis.

* * *

[2716]

A Captain Hazelwood made arrangements with one of the pilots to give us a ride into town, and I believe we waited for him for a little bit.

Q At the end of the jetty?

A That's correct.

Q Did anyone besides yourself and Captain Hazelwood decide to go to town?

A Yes, the officer, radio operator.

Q That was Mr. Roberson?

A That's correct.

Q What was he going to do in town?

A He just came along with us and had opportunity to get a free ride into town.

Q Now, you say you were picked up by a pilot?

A That's correct.

Q Do you remember his name?

A Bradford. I never met him prior to that time.

Q Let me suggest a name: Bradley?

A Fine.

Q That sound correct?

A Fine.

Q Where did Mr. Bradley take you after he picked you up in

[2717]

his car?

A He took us to – obviously out of the terminal into

downtown Valdez to our agent's office, Alaska Maritime Services.

Q Before we get to the Alaska Maritime Office, you checked out through the gate, I take it?

A That's right.

Q When you got to the gate, did you have to log out?

A I don't recall physically signing out, no. Or individually signing out.

Q Do you remember what time you left the gate?

A It had to be shortly before 11:00.

Q We have evidence here and we put it up before that you left at 10:59. Does that comport with your recollection?

A It is with the sign-out sheets, yes.

Q Now you said you went to the Alamar office. Did you go to the Alamar office directly?

A That's correct.

Q You were driven by Pilot Bradley directly to the Alamar office?

A That is right.

Q All three of you?

A That's right.

Q What did you – what did you do when you got to the Alamar office?

[2718]

A Their office on the second story, so we all went to their office and they provided us with a couple desks where we could use the phones, and Captain Hazelwood proceeded to make his phone calls and I proceeded to make my phone calls, plus I had some lubricating oil samples from the turbochargers that I had to have Fed Ex'd to San Francisco for analysis and that was basically the nature of the business, what I had to do there.

Q Did Pilot Bradley go up to the Alamar offices with you?

A I don't recall. He didn't stay with us, if that's what you mean.

Q Yes, that's what I was driving at.

A No, I don't recall that.

Q So the three of you got out of his car and walked upstairs to the Alamar office?

A That's correct.

Q What time did you get to the Alamar office?

A Have to be about 11:30.

Q And how long did you remain in the Alamar office?

A Approximately an hour.

Q Till about 12:30?

A Correct.

Q During that period of one hour, did any of you leave the other site or, to say it a different way, did you all stay together?

A That's correct.

[2719]

Q You all stayed at the Alamar office?

A That's my recollection, yes, sir.

Q Now, you said you had to make some phone calls as well?

A That's correct.

Q Who did you call?

A I called our repair superintendent out of the Benicia office, all regarded the turbochargers; and I also called turbocharger manufacturer's representative. And there might have been a couple others; I don't recall.

Q And plus you made arrangements to send the samples by Federal Express?

A That's correct.

Q So that whole thing took a period of time, I take it, and then you were waiting you said for Captain Hazelwood at this point to finish what he was doing?

A I was done with whatever I had to do earlier than Captain Hazelwood was, yes.

MR. CHALOS: Your Honor this may be a good time.

THE COURT: Take our second recess, ladies and gentlemen. We'll be in recess for 15 minutes.

THE CLERK: This court is in recess for 15 minutes.

(Jury out at 12:02 p.m.)

(Recess).

(Jury in at 12:17).

THE COURT: Mr. Chalos.

[2720]

MR. CHALOS: Thank you, Your Honor.

BY MR. CHALOS:

Q Mr. Glowacki, before we go back to the Alamar office: I notice you speak with a slight brogue, is that a Bronx accent?

A No, it's not a Bronx accents.

Q Where were you born?

A I was born in Poland.

Q You immigrated to the United States?

A I'm sorry.

Q Did you immigrate to the United States?

A That's correct, I did.

Q Just one more question: When you left Exxon – in 1990, you said?

A Yes, I did.

Q – was that a retirement on your part?

A I had the opportunity of taking 20-year retirement and I took it, yes.

Q Okay, back to the Alamar office when you were there for the one – one hour, from 11:30 to 12:30, you said?

A Yes.

Q Did there come a time when you overheard a radio transmission from the vessel regarding the sailing time?

A Yes, the vessel did get in touch with the agent and did notify the agent of a change in sailing time.

Q From what to what?

[2721]

A It was moved back one hour to 10:00.

Q So when you left the Alamar office at 12:30 in the afternoon, was it your understanding and Captain Hazelwood's understanding that the vessel's sailing time had been pushed back one hour, to 10:00 from 9:00?

A Yes, it was.

Q Incidentally, we spoke a little bit about the sailing board. Is the sailing board, the time that's listed on the sailing board for sailing, is that something that people who are going ashore can rely on?

A It has been my experience, that's correct.

Q Okay. So what happens that 12:30?

A Captain Hazelwood and Pilot Murphy made arrangements to have lunch together, and myself and Mr. Roberson were also invited to lunch.

Q Did – Captain Murphy was a pilot up in Valdez; was he not?

A Yes, he was.

Q Did there come a time when Captain Murphy picked you up, the three of you up?

A After we got done with whatever we had to do at the agent's office, we went downstairs and we waited for Pilot Murphy to pick us up; that's correct.

Q Where did you go downstairs?

A I'm sorry.

Q Where, at the Alamar office?

[2722]

A At the Alamar office.

Q And did you wait in the parking lot?

A We waited in front of the office.

Q Did you go anywhere else during that period of time while you were waiting for Pilot Murphy?

A No, we just stood outside the office downstairs.

Q And did the three of you stay together?

A Yes, we did.

Q And did Pilot Murphy come directly to pick you up at that point?

A I believe we waited a few minutes, something of that order, but yes, he did; did actually come and pick us up.

Q And did he – did he drive you somewhere?

A We all – yes. He drove us to the place where we was going to lunch.

Q What was the name of that place?

A Pizza Palace.

Q And did you in fact have lunch at the Pizza Palace?

A Yes, we did.

Q Did you drink anything at the Pizza Palace?

A Yes, I did.

Q What did you drink?

A I had beer.

Q How many beers?

A I believe two.

[2723]

Q How about Mr. Roberson, did he drink?

A I believe he also drank beer.

Q How many beers?

A I don't know.

Q Did Captain Hazelwood drink?

A Yes, he did.

Q What did he drink?

A He had ice tea.

Q Did he drink anything of an alcoholic nature?

A At the Pizza Palace?

Q Yes.

A No, he did not.

Q How about Captain Murphy? Did he have any alcohol at the Pizza Palace?

A No, he did not.

Q How long did the lunch take?

A I would say slightly over an hour.

Q Let me ask you this.

During this lunch that you said took slightly over an hour, did any of the three of you get up and leave to go any place?

A No.

Q You remained together?

A Yes, that's correct.

Q All right. After lunch was finished, where did you go?

A Pilot Murphy took us back in his car to – back to the

[2724]

center of town.

Q And all three of you?

A That's correct.

Q Did he drop you off somewhere?

A I believe there was a supermarket there in front of the supermarket, which is – to me is the center of town, Valdez.

Q To the best of your recollection, about what time would that have been?

A Around 2:00, or shortly after.

* * *

[2727]

Q Did there come a time when Captain Hazelwood joined you at the Pipeline Club?

A Yes. He joined me about 20 minutes to half an hour after I showed up, after I went to the Pipeline.

Q What time would you say he came in?

A Approximately 4:30.

Q Had you already ordered a drink by the time Captain Hazelwood arrived?

A I did, yes.

Q What did you order?

A Gin and tonic.

Q Did you get a gin and tonic?

A Yes, I did.

Q When Captain Hazelwood came in, did he come over to speak to you?

A Yes, he came toward me, that's correct.

Q Okay. What did he say to you and what did you say to him?

A I don't believe we said anything other than How you doing, something like.

Q Did he ask you if you wanted a drink?

A I'm sorry.

Q Did he ask you if you wanted a drink?

A No, I still had the drink I ordered.

[2728]

Q So he didn't buy you a drink at this point?

A No, I don't recall anything of that sort, no.

Q Did Captain Hazelwood go up and order a drink for himself?

A Yes, I believe so.

Q Did you hear what he ordered?

A I believe he ordered vodka, yes.

Q And did he come back with the vodka?

A That's right.

* * *

[2761]

Q You knew, though, that Captain Hazelwood had a reputation for partying; didn't you?

A I wouldn't say that I knew, no.

[2762]

Q Had you heard rumors prior to the grounding that Hazelwood had a chemical dependency problem?

A No, sir; first time I learned of that was after the –

after the grounding and there were hearings and testimony was given.

Q Would you go to your NTSB testimony at page 865?

A 65? 865?

Q 865.

A Yes.

Q And let me read the questions and answers, and you tell me if I read them right.

When did you become aware that Captain Hazelwood may have had a chemical dependency problem? That was the question.

"Answer, I can't say exactly, but being – working for a company for 19 years, you hear certain rumors, but these are innuendoes and rumors and I cannot exactly answer you.

"Question, When did you first hear a rumor to that effect?

"Answer, I don't recall, sir.

"Question, Was it prior to the grounding?

"Answer, Yes. It could have been a few years before that, I can't tell you.

"Question, But you think it would have been before the grounding?

"Answer, Oh, yes, certainly."

Were those the questions asked and the answers that you

[2763]

gave?

A Yes.

* * *

[2774]

Q Now, did there come a time in March of 1989 when a man named Hazelwood came into your place of business?

A That's correct. But I didn't know who he was at the time.

Q Okay, what day or date was that, that you recall?

A The spill was on the 24th?

Q Yes.

A Then it was the day before.

Q If the spill was on the 24th, what day would it have been?

A It was in the daytime before the spill.

[2775]

Q So that would have been March 23, 1989?

A Yeah, right. Right, the 23rd.

Q What are you looking at, ma'am?

A I'm looking at the telephone bill where I put his credit card through, to make sure I'm right.

MR. CHALOS: I'm showing DX – let me see if I have this, yeah, DX3456. And DX3457 Alpha.

Oh, wait that's because I'm fooling with the focus instead of the zoom.

MR. SANDERS: On-the-job training.

THE COURT: We all got to learn sometime.

MR. CHALOS: Can you see? Is that clear? I thought I knew how to do this one.

BY MR. CHALOS:

Q All right, well before – well, before we get into that, let me ask you about Mr. Hazelwood's visit.

A gentleman came into the store?

A Correct.

Q What do you recall by his appearance, how he was dressed?

A Very well dressed. He was very pleasant, he looked around the shop. He walked around. He came up to the counter, which was – I was closer to him than I was to you; you know, like about one table away. And he spoke to me, and the only reason he stood out in my mind is I used to live in Long Island, and when he sent flowers to Huntington, I tried to be congenial

with all my customers, I asked him how Long Island was; and we discussed Huntington. And I lived in Malverne which is in Long Island and we discussed Long Island. And if he'd been drinking, I would have smelled it. And he could not – and he was not drinking at the time he was in my shop.

Q In addition to talking about your respective homes in Long Island, did Captain Hazelwood buy anything from you?

A Yes. He sent – he wired flowers and I put his credit card through the machine.

Q To where did he wire the flowers?

A To Huntington, Long Island.

Q All right. Now, let me show you another piece of paper, which is Exhibit 3456.

Have you had a chance to look at it?

A Yes.

Q Have you seen this before, Ms. Kaiser?

A Well, yes. I wrote it.

Q This is all your handwriting?

A All my handwriting.

Q What is this form?

A Okay, every person that comes in, I write an order out for them so I have a record $45 was what he bought, a dozen long-stem red roses. What they cost in Long Island, eight is for the phone call and the delivery, and it comes to $53.

Q A total of 53?

[2777]

A Right.

Q And the message in that section – let me start again.

That telephone number is at the top is what, what number, ma'am?

A The number of the person that it's going to.

Q That it's going to, okay. And they delivered to Mrs. Susan Hazelwood, that's the person to whom it was sent; is that right?

A Right.

Q And when you said you didn't know what the relationship was, you just knew it was a woman's name?

A Yeah, I didn't know if it was his mother or his wife.

Q And then the florist is listed there?

A Main Street Floral, and the lady I spoke to was Jean.

Q And what did Captain Hazelwood order, looking at this?

A A dozen long-stem red roses arranged in a vase.

Q What was the occasion for sending this; do you know?

A I don't know if it was Easter or – I don't remember. I really don't remember. I do so many.

Q Do you recall that this was Easter weekend?

A I think it was over Easter weekend, but I don't remember. I'd be lying if I say I know definitely what he sent it for. Q Let me do this, Ms. Kaiser. Let me go – before I get to this telephone bill, how long would you say Captain Hazelwood spent in the store from the time he came in until the time –

[2778]

Q Okay, let's go back to what you said about your being close to him and having a considerable conversation with him.

A We were face to face.

Q And being face to face, you smelled no alcohol on Captain Hazelwood's breath?

A No, I did not.

Q Was he sober, ma'am?

A Yes, he was sober. And I know the difference because I had an alcoholic husband, so I know the difference between – and I see a lot of people that drink in my shop and I can tell the difference. He hadn't been drinking. I mean, if he did, he was hiding it. But he didn't reek from alcohol, and when you

[2779]

talk to something that close, you can tell.

Q There was no sign that he was intoxicated?

A No sign.

Q And you just said a moment ago that there was no sign that he had been drinking in any way at all?

A Correct.

Q Now, you said that you've had people come into your shop that had been drinking, you had a family experience with it. What do you look for in trying to detect whether somebody's been drinking or not?

A Well, at that particular moment, I wasn't looking for anything. He was just another customer.

Q Right. I'm not – I'm not even asking now about this particular moment. I'm just asking you generally, what are the kind of things that you would see generally in somebody who might come into your shop or you might otherwise run across who had been drinking?

A They don't usually – they're not usually able to carry on a normal conversation, be polite sometimes.

Q So it may affect their courtesy?

A Correct.

Q Or their manner of speaking?

A That is correct.

Q You saw nothing like that in Captain Hazelwood, is that right?

[2780]

A Not a thing. Nothing, no.

Q You said a moment ago or a few minutes ago something about if he were, he might have been hiding it. You didn't see any sign that he was trying to hide that he had been drinking, had you?

A No, he was doing everything every other customer comes in my shop does, just looking around.

Q All right. Let me get to the telephone charge with you – and let me mark one last piece of paper as an exhibit and have you look at this, too, Ms. Kaiser. And we'll mark this as 3457

A. Ms. Kaiser, you can see that this exhibit I just put in front of you has atop across the top, Cooper [sic] Valley Telephone Cooperative – or that's the top printing on it?

A Correct.

Q And there is a bill that you – you look down, I think it's seven lines from the bottom?

A Right.

Q There's a telephone charge for a call to Huntington?

A Right.

Q All right, Ms. Kaiser, let's look at the exhibit we've marked for the deposition and one that was used at the Hazelwood trial.

This is a copy of some of your telephone calls in March of 1989, is that right?

[2881]

A Correct.

Q And these are all calls made from the Hobby Hut, Kelly's

Floral?

A Correct.

Q Now –

A Excuse me, can I tell you, it's also my home phone number. It's the same one.

Q All right. Now, let's go left to right across this bill and see what you can tell me about it.

Down the left-hand column – we're going to look at the Huntington, New York entry, okay? Are you with me?

A Right.

Q Let's look at the left-hand come first, where it says 03 slash 23?

A Correct.

Q What does that mean to you?

A The date I put his credit card into my machine and made the call.

Q All right. What is the second entry, telephone number, the 835-4483?

A That's my telephone number.

Q And the third entry says Huntington, New York?

A That's the place I called at the time.

Q And what's the telephone number next to Huntington, New York, the 516/271-0160?

A The number of the shop that I called to order the flowers.

Q And then there's a column labeled MINS, and there's a Number 2 in this Huntington, New York entry. You see that?

A Yes.

Q Do you know what that stands for?

A That it took two minutes to call.

Q All right. The next one says time and the entry is 14:02?

A Correct.

Q What does that mean to you?

A The hour that it was placed.

Q All right. So does that mean 14 hours into the day, two minutes after the 14th hour of the day, 1402? Is that what it means to you?

A I guess that's what it means, yes.

Q Would that be 2:02 p.m.?

A Correct.

Q And you said before this call – before this – wait a minute, let me start again.

And you said before that this call represented your putting the card through. Is that how you put it?

A Yes.

Q What do you mean by that?

A I have a machine that processes credit cards, and it went through the credit card machine plus my telephone bill.

Q And that's something you do routinely when you get a credit

[2783]

card charge?

A Right. I phone in as fast as I can.

Q Okay. At the time that you go through this exercise of putting the card through and having the credit card charge verified, I guess it was Captain Hazelwood was still in the store?

A I'm pretty sure he was, yes. I put it through right away, yes.

Q You used the card physically to do it, didn't you?

A I used it physically, right, so he had to be there.

Q So he must have left sometime after this?

A Right. Correct.

* * *

[2822]

Q Now, in watching them walk, did you see yet any sign to cause concern on your part about whether they might be impaired or a danger to themselves or danger to the property?

A No, I did not.

Q So neither the first fellow nor the other three caused you any – gave you any reason up to that point to be concerned?

A Correct.

* * *

[2824]

Q Now, from the time you saw them arrive to the time they spent with you in the security office to the time they exited and went to the cab, did you see anything which suggested to you if any of them was under the influence or impaired by alcohol?

A No, I did not.

Q Did you see anything to indicate that they were in any way lacking in coordination, stumbling or walking funny?

A No, I did not.

Q Anything about their speech that indicated to you that they might be using alcohol?

A No, I did not.

Q Okay. Now, at that point in time, March 1989, was it a regular part of your responsibility at the security gate to watch for alcohol, signs of alcohol on incoming tanker people?

A Yes.

Q And did you observe that occurring? I mean, had you seen

[2825]

people come through who you observed to be and judged to be affected by alcohol?

A Yes.

Q Had you observed people who were – who you observed to have had something to drink but were not – were not so impaired that they were unsafe?

A Yes.

Q And had you observed people who were – not only had something to drink but impaired and you judged them to be a danger to themselves?

A Yes.

Q Now, if you observed someone in that condition, was it your practice to try to videotape the behavior of the people in the – in the security office?

A Which condition?

Q In a condition where their impairment might present a risk to themselves or a risk to the property?

A Yes.

Q That would have been Mr. Shoop's responsibility?

A Yes.

Q And he was working under your supervision?

A Yes.

Q As of that time, were you – well, strike that.

Approximately how often or how frequent did you observe indications of alcohol consumption on incoming tankers?

[2826]

A Specifically on the night shift as the night crew, later, say after 10:00, when everything else is pretty much closed except for the bars, and particularly after midnight it was very common.

Q So it was not uncommon for you to observe people and judge them to have had something to drink?

A Yes.

Q And again, sometimes they were under control and sometimes they weren't?

A Correct.

Q By either test, did you judge these four individuals to have had enough to drink to be noticeably affected by what they may have drunk?

A No, I did not.

* * *

[2840]

DIRECT EXAMINATION OF FRANK IAROSSI
(Live)

BY MR. NEAL:

* * *

[2845]

Q In 1982, then, to get down to it, you became president of Exxon Shipping Company?

A Yes, sir.

Q And Exxon Shipping Company is the company that owned the Exxon Valdez as of March 23, 1989?

A That's correct.

Q When did you leave the Exxon companies?

A I believe it was April 2nd of 1990.

* * *

[2861]

A Well, we felt we had to establish safe operations and safe operating procedures for all of what we felt were the critical aspects of ship operation. Probably the most important initiative we took was development of what we call the bridge organization and navigation manual, which was very extensive undertaking, started back in 1977, as I recall, went through a major revision in around 1983 or so, but it was a manual which outlined the responsibilities and roles and approach and procedures that needed to be followed for the operation and navigation of our vessels.

Q And were the masters and officers required to follow the instructions in this manual?

A Yes. It was – it was put forward as the manner in which the company wanted its vessels operated. Certain segments of it were guidance, certain segments of it were requirements.

[2862]

Q Now, was – did this bridge navigation manual, was it required to be read and studied by every officer and was it required to be placed on every vessel?

A Yeah, there were two copies assigned to every vessel. One was to be in the master's cabin and one was to be on the bridge. The officers being assigned to the vessel, there was a signed sheet in the front of the manual where they had to sign that they read it and understood it.

* * *

[2874]

Q Now, did this policy, and the guidelines attached to this policy, have anything to say about how supervisors should monitor employees for alcohol or drug problems?

A Yes. We had – we had one, the training programs I was talking about earlier, but also in addition to that we had guidelines for supervisors and also fleet officers as to how to recognize signs of alcohol or drug abuse and what to do when there was suspicion of use.

Q Did this – what were they supposed to look for or look at in monitoring employees?

A Well, the key was job performance and how the individual performed his or her job.

* * *

[2875]

Q Did you consider – did you intend or consider that your supervisors would monitor an employee when he's off duty or at home, that sort of thing?

A No, I – my personal feeling, I think it was the company's position very definitely, that we had no business in the employee's private life. In fact, it was probably illegal, and therefore, all of our activities were associated with on-the-job performance or time periods when the employee was on Exxon facilities.

* * *

[2879]

Q When Mr. Graves is telling you, and you're having this conversation about Captain Hazelwood, did you understand from Mr. Graves that the conduct that Mister – that Captain Hazelwood was telling about had occurred some years earlier? A Yeah, the – the subject that caused Ben to get in contact with Hazelwood had to do with an incident that occurred

[2880]

sometime prior to – to ‘82, and so the whole context of discussion that Ben was relating to me was some years prior to the incident.

* * *

[2886]

Q Did you intend or expect anybody to monitor his private life or the times he was off duty and at home?

A No, absolutely not.

Q You said you expected them to monitor him primarily for job performance?

A And job performance and any sign – I think I used the term that he was off the wagon was the exact term I used.

* * *

[2896]

Q All right. Now then, did you, at these fleet conferences, have occasion to see and be with Captain Hazelwood?

A Yes. I remember especially subsequent to the

rehabilitation.

Q I'm talking about subsequent to the rehabilitation. A Yes. I – there was one fleet conference in March of 1988 that I recall because of a specific incident related to Hazelwood. Then there was another one, it was either the ‘86 conference or the ‘87 conference, I don't recall which one, and during those times, I – I made it a point during those five days to watch Joe, not only to see whether – how he was participating in the program, one of the things that I was curious about was whether Joe was fully participating in the program, how he was behaving during the course of the five days, but also what he was consuming as far as liquid refreshment, and I never at any time saw Joe consume any alcohol during that time, whether it was during meals – he was not drinking wine, was not drinking beer during meals or

[2890]

anything.

Q These were over five days each time?

A Yes.

* * *

[2903]

Q I have placed in front of you your testimony in this case under deposition, your testimony before the National Transportation Safety Board, and a number of exhibits, and we may want to use those as tools as we proceed here for the next hour or so.

The first thing I'd like to do is just figure out the chain of command. It's going to be on the monitor right next to you. This is great.

Just prior to the grounding, you were the president, FJI;

[2904]

that's a correct statement, right?

A Yes.

Q And then reporting to you with regard to the west coast was Borgen?

A Yes, Harvey Borgen.

Q And he had a ship group coordinator named Myers?

A Yes, that's correct.

Q And then there was a Captain Hazelwood; is that correct?

A Myers actually had an assistant called a port captain, but under Myers were a series of masters who – actually, pairs of masters who alternately were in charge of vessels and Hazelwood was one of two masters in charge of Exxon Valdez.

Q And Mr. Cousins was on the bridge at the time of the grounding?

A Cousins was one of the deck officers assigned to the Valdez at the time of the grounding.

Q And he was the deck officer who was on the bridge at the time of the grounding?

A Yes, that's correct.

Q Now, you left Exxon Shipping Company three years before retirement in 1990?

A April of 1990.

Q And Mr. Borgen was transferred to special projects in Houston within a month or two after the grounding?

A Yes.

[2905]

Q And Mr. Myers was transferred to Houston within a month or two after the grounding?

A No, actually, Myers was assigned first out of San Francisco for the repair of – of Exxon Valdez, which took three or four months.

Q Then he went to Houston?

A Then he went to Houston.

Q And Captain Hazelwood was terminated?

A Yes.

Q And Mr. Cousins, I guess, quit?

A I'm not sure of that.

Q He left?

A Yes. I guess.

* * *

[2906]

A Yes, sir.

Q I'm going to keep this.

Now, the Exxon Valdez won the fleet manager – or the fleet award in 1977 and '88?

A Yes.

Q And it didn't win it in '89; did it?

A No.

Q And indeed, somehow or another the awards it got were pulled off of the vessel; weren't they?

A Yes, sir.

Q Now, on the bridge manual, the bridge manual is an important document; isn't that correct?

A Yes.

Q And after the grounding, you made the determination that Captain Hazelwood was not on the bridge when he should have been on the bridge?

A I was told that Captain Hazelwood had told Paul Myers that he was not on the bridge at the time of the grounding. Subsequent to that, Exxon lawyer had told me, Bob Nicholas had told me that he had asked Hazelwood where he was and Hazelwood had confirmed he was not on the bridge and that other crew members also confirmed that Hazelwood was not on the bridge.

Q And not being on the bridge at that point in time was such a serious breach of the bridge organization manual that that in and of itself was sufficient reason to terminate him from his

[2907]

job?

A It was part of the policy that there were certain times when the navigation and bridge organization manual stated that the master had to be on the bridge and there were certain circumstances defined. In my judgment, this particular passage would have qualified as one of those times.

Q And it was reckless not to be on the bridge; wasn't it?

A No, I just said that it was my judgment that – that the captain should have been on the bridge at this time.

Q And it was a serious enough breach, in your judgment, to terminate the man's job?

A He had failed, in my view, to – to live up to a policy and that clearly the – the result of not living up to that policy

included termination.

Q You stated that with regard to the seagoing employees, quote, there is very little opportunity as managers to observe them on vessels; and, quote, we have so little opportunity to see the employees on the vessels; do you recall that testimony?

A Yes.

Q Those are true statements?

A Yes. Most – you know, the opportunity to see a master perform really is primarily associated with either in port periods while the vessel is discharging, or other opportunities, such as conferences or things like that. But

[2908]

you can't watch his vessel performance.

Q Now, you talked – I want to go to the topic of self

identification.

A Yes.

Q You talked at great length about self identification?

A Set the basis of the whole program.

Q With Captain Hazelwood you opined that he self identified?

A Yes, absolutely.

Q Would it be fair to say that with regard to exactly how Captain Hazelwood's – and how Captain

Hazelwood and the subject of alcohol came to the attention of Exxon Shipping Company, that specific topic, you don't know about, you're surmising –

A The first –

Q – or guessing or putting together what people may have told you, including lawyers, but you don't know how Captain Hazelwood either brought it to the attention of Exxon Shipping Company or was caught; do you, one way or the other, you don't know?

A What I was told first through the memo of May 29th or whatever the date was, 1985, from Ben Graves was that he, Ben, had found out, and I don't know how, that Hazelwood had turned himself in to a rehabilitation program subsequent to that, Ben had had the conversation which was the – the point of the memo that he wrote to me.

[2909]

Q Would you go to page 196 of your deposition transcript.

A Yes.

Q And page 196, line 20, and I'm going to go through 197, line 6. At the time you discussed Captain Hazelwood's condition with Mr. Graves and made the decision then to return him to duty –

MR. NEAL: Excuse me. Could we hold on? What page?

MR. O'NEILL: 196, line 20.

BY MR. O'NEILL:

Q At the time you discussed Captain Hazelwood's condition with Mr. Graves and made the decision then to return him to duty, would it be fair to say that you, at that point in time, didn't know whether Captain Hazelwood had self identified? Answer, it was my assumption that he had identified his problem to Ben Graves and that he had some contact to the medical department, because the medical department had awareness of the problem, as I understand it.

Question, do you know? Answer, exactly what the contact was, no. Do you see that?

A Yes, that was my statement.

Q Now, Captain Hazelwood has testified here on the same topic and the question was, you didn't self identify; did you?

Answer, no, no.

[2910]

You got a call from Exxon Corporation through Captain Pierce who said you have a problem, I think you ought to get some help or work it out or – Yeah.

And at the time Mr. Graves was reporting, Mr. Graves was investigating instances of drinking prior to going to South Oaks? Judging from the date of the report, yeah. So you didn't self identify? Answer, no.

You see that?

A I'm reading it, yeah.

Q Are you aware of – were you aware before you came in here today of that testimony?

A Absolutely not.

Q You've also testified that you became aware of the fact that Captain Hazelwood was going through treatment, I think it was just by chance? Do you recall that, to the NTSB?

A Well, I found out about it from Graves who informed me of his discussion with Hazelwood after Hazelwood had completed the program, and what Ben told me was that – try and recall the exact words. Told me that Joe had turned himself in for rehabilitation.

Q Why don't you go to page 921 of your testimony before the National Transportation Safety Board. Your testimony now is

[2911]

that – well, let's read what your testimony was then.

Beginning on line 19, I'll read the question and then why don't you read the answer.

Question, how did you become aware of that after he got out? And what was your answer?

A I said, we learned through, I think it was just by chance, one – I believe the administrative manager had been trying to get ahold of Captain Hazelwood and, as I remember it, had learned that he was in the hospital in New York, Long Island, I believe it was, and tracing it down across this situation.

Q Now, I'm going to state another proposition with regard to how you found out. I'm going to tell – I'm going to say that you found out because of an investigation that was going on. Okay? Not an investigation that happened after, but you found out because of an investigation that was going on. Would you agree with that statement or not?

MR. NEAL: Your Honor, could we approach the side bar?

THE COURT: I'll allow the question. But simply a straightforward answer to nothing but that question.

THE WITNESS: Yeah, there was – Ben Graves was following up on a complaint.

BY MR. O'NEILL:

Q Would it be fair to say that the risk of Captain Hazelwood's continued use of alcohol brought in the question of

[2912]

safety to the vessel?

A I think the risk of anyone using alcohol or drugs while on duty brings in a safety question.

Q Let me ask – reask the question, would it be fair to say that the risks of Captain Hazelwood's continued use of alcohol after 1985 was that it brought into question the safety of the vessel?

A If it was on duty, yes.

Q Let's go to your deposition transcript. This is going to be a long day. Let's go to page 87 of your deposition transcript, line 15?

A Yes.

Q And the question was, and the risks of his using alcohol were what, what were the risks if he continued to use alcohol?

Answer, well, the risk if he continued to use alcohol was that it brought in the question whether he could discharge his responsibilities.

Question, it brought in the question of the safety of the vessel? Answer, yes. Do you see that?

A Yes.

Q You never received any report from the medical department of Exxon Shipping Company related to Captain Hazelwood up and through the time of the grounding; did you?

[2913]

A Me personally?

Q Yes, sir.

A No.

Q Do you know or are you aware of whether Captain Hazelwood, after his rehabilitation in 1985, received any health advisory services from the medical department of Exxon U.S.A.?

A I do not know.

Q Now, you testified here today that this conversation that took place with Mr. Graves dealt with the subject of depression and then some kind of associated drinking; do you recall that testimony?

A What – what I was told was that the actual symptom, I don't remember the medical term, was a mild depression, and during the periods of mild depression, Joe drank, I think the term was excessive drinking.

Q You were told that he went through alcohol abuse treatment?

A I was told he went through rehabilitation.

Q Alcohol abuse treatment?

A I don't recall that.

Q Okay. Let's go to page 76 of your deposition transcript. The question is, okay. And he voluntarily went for alcohol abuse treatment in 1985? This is at line 10. And your answer at line 12 was, yes, I learned that subsequently.

[2914]

Do you see that?

A No, I'm not with you.

Q Okay. Page 76 of the deposition; not the NTSB testimony.

A I'm on page 76.

Q And the question on line 10 is, okay. And he voluntarily went for alcohol abuse treatment in 1985?

And your answer was, yes, I learned that subsequently. Do you see that?

A Yes.

Q And when you get over to the next page, on line 9, now, you say you learned of his going for alcohol abuse treatment six to eight weeks after he commenced it? Answer was, yes, I think it was late May when I first learned of it, and I think his treatment started sometime in April. Do you see that?

A Yes.

Q I was interested when you said and you were talking about Ivan Mihajlovic, and you testified Ivan Mihajlovic, here in court, said he heard a rumor in the fleet; do you recall that?

A Yes, there are often rumors in the fleet.

Q But because of this rumor of Mihajlovic he went and did some investigation?

A Yeah. I believe it was the same rumor of Jim Shaw saying that Hazelwood was acting kind of crazy or kind of strange.

[2915]

Q You talked at some length about this Shaw matter, and I'd like you to go to 961 of your deposition transcript – I'm sorry, 961 of your NTSB testimony and the NTSB asked you when you were under oath before the NTSB about whether you heard of any allegations and the question put to you before the National Transportation Safety Board was, has Exxon Shipping ever been made aware of allegations of Captain Hazelwood's drinking or abuse or failure to follow any other company policies, and your answer was, subsequent to rehabilitation, no. Is that what you mean, subsequent to rehabilitation; do you see that?

A Yes.

Q And the question concerned merely allegations of Captain Hazelwood's drinking or abuse; isn't that right?

A Yes.

Q And that was the answer to the question you gave before the National Transportation Safety Board when you were under oath isn't that correct?

A That's correct.

Q And you did not mention the Shaw situation; is that correct?

A Shaw situation mentioned nothing about alcohol. Somehow what was reported to me, he came back and he said Hazelwood's acting kind of strange.

Q Would it surprise you to know or would you be concerned if indeed Mr. Shaw said, and to use a term that you used today,

[2916]

Hazelwood has fallen off the wagon?

A That was not reported to me that way.

Q It wasn't?

A No. Absolutely not.

Q If indeed there was a report in the company that Hazelwood had fallen off of the wagon, that he was drinking on board the vessel, that there was a party on board the vessel in Hazelwood's room, those are serious allegations; aren't they?

A If those were the allegations, they were serious

allegations, yes.

Q And the people who were witnesses to that situation, participants in that situation, under your company policy, should have been brought in and asked about them; isn't that right?

A If it was known by company management, yes.

Q And indeed, if it was known by company management and those people weren't brought in and interviewed, that's wrong; isn't it?

A Clearly, if anyone knows of drinking on board, they should make it known to the supervisor, yes: The policy was clear as to that.

Q Were you aware of the agent – we had testimony from a fellow who worked with your agent in Valdez, Alamar. Were you aware that Exxon Shipping

Company had an agent in Valdez; Alamar, Alaska maritime agency?

[2917]

A I learned after the grounding.

Q This fellow came in and testified, I can't recall his name, but he testified that Captain Hazelwood had a reputation, at least among the Alamar employees, as a drinker. Are you aware at all of that?

A No.

Q Now, you testified, and I – you may have misspoke on this, because this is not a subject that you know a lot about, but in the IDR, just so you know, – I can't read this copy. Can we bring it up, the IDR? See if this is any better. Do you know whether on the IDR there's any notation as to whether he's fit for duty or not?

A I have never seen an IDR.

Q Okay. So when you testified with regard to what, in fact, is on the IDR, you'd never seen the IDR. Have you ever seen it up to today other than the fact that it's before you?

A I don't recall ever seeing it, but certainly before the incident I had never seen one.

Q Captain Hazelwood has testified here that no one from Exxon Shipping Company told him not to drink, that he resumed drinking in 1986, and that he didn't hide it from anybody. Does that surprise you?

A Yes.

Q Now, you testified this morning that you had told your subordinates to make sure that Captain Hazelwood completed the

[2918]

rehabilitation plan?

A The program.

Q The program. Captain Hazelwood has testified that after about a month or a month and a half he quit his aftercare program. Is that something that you would – his aftercare program as prescribed by South Oaks. Is that something that you would have expected your subordinates or people under their control to follow up on to make sure that he completed his aftercare program?

A What I told Ben was to make sure that he was fit for duty and that the medical department agreed with that or concurred with that evaluation.

Q My notes, and I wrote them right here on my outline. You can see my outline is not much use to me, but my notes this morning were that you testified to make sure that he completed his rehab plan. Is that now not your testimony?

A What I meant was that he went fully through the program and was declared fit for duty.

Q Now –

A I'm talking about the program leading to a fit for duty determination.

Q Do you know whether there is a fit for duty determination in any of Exxon Corporation's or Exxon Shipping Company's records anywhere?

A I was told that he was declared fit for duty by his – by

[2919]

his private physician and that the medical department concurred with that conclusion.

Q My question is, do you know if there's a piece of paper anywhere that documents that?

A I do not know. I don't know what the files are.

Q Do you know if there's a piece of paper anywhere in your company or your then company, Exxon Shipping Company, that details any of this monitoring stuff anywhere?

A I would be surprised if there is, because we were trying to handle it strictly confidential. I didn't write anything down.

Q You didn't write anything down?

A No.

Q Sir, was there a rehabilitation plan for Captain

Hazelwood?

A There were two facets to –

Q My question was, was there a plan?

A A written plan that said we do this and do that?

Q That's right.

A No.

Q I want to, if we could – your testimony also today was you had directed your employees to make sure that there were no signs that he was, quote, off the wagon, close quote; do you recall that?

A Yes, I told that to Ben Graves.

[2920]

Q And –

A Later to John Tompkins.

Q And if somebody's off the wagon, it means they're drinking again; isn't that right?

A That's what I meant, yes, sir.

Q So any drinking, again, he's off the wagon, you want to know about it?

A Yes, sir.

Q And indeed, if your employees, Ben Graves, Jim Shaw, Andy Martineau, Harvey Borgen, Herb Leyendecker, if any of those people knew or had reason to suspect or heard rumors that this man was drinking again, they should tell you; shouldn't they?

A Well, the management – the people that reported to me were Ben Graves, John Tompkins, Dwight Koops, Harvey Borgen. They were the people who communicated to me, who reported to me and who I consulted with on this project. The other people that you talked about, I had essentially no contact or very little contact and no direct management contact. I may have seen them in the halls.

Q You didn't actively participate in this monitoring program at all yourself; did you?

A The two or three occasions during those management conferences that I talked about and spoke about where I was in Joe's presence on and off for four or five days at a time.That's the only opportunity I had.

[2921]

Q You didn't supervise the monitoring; either; did you?

A I did not supervise the monitoring directly, but I kept in contact periodically with John Tompkins, Dwight Koops, later Harvey Borgen, and I left each of those contacts with the clear direction or direction to them that if they came across anything of significance on this subject, I was to be informed.

Q Let's just take a look at your – you've been asked the question. It's deposition transcript.

MR. NEAL: What page?

MR. O'NEILL: I don't know. We're going to play it on the screen. Is that coming up?

(Portion of Video of Frank Iarossi played as follows)

BY VIDEO EXAMINER:

Q And is it fair to say that other than the conversations that you detailed to us, you did not supervise the monitoring?

A I was not a supervisor, I was the president of the company.

(Portion of Video of Frank Iarossi concluded)

BY MR. O'NEILL:

Q And the conversations you referred to there were conversations you had with Harvey Borgen and Dwight Koops?

A And John Tompkins, yes.

Q Now, I'd like to, if we could, go over some of your policies. Well, let me just ask you while we're on this

[2922]

subject.

Was an incident – did Mr. Herb Leyendecker ever make a report to you with regard to an incident in the Portland Shipyard?

A No.

Q With regard to Captain Hazelwood ordering beer over a walkie-talkie?

A No.

Q Did anybody from the west coast fleet ever make a report to you that beer was ordered over a walkie-talkie and there were Henry Weinhards' bottles found on board the Valdez and Henry Weinhards were ordered over the walkie-talkie, anybody report that to you?

A No.

Q At the time when Captain Hazelwood was on board the vessel, anybody report that to you?

A No. First time I heard about it was after the grounding.

Q They should have reported it to you; shouldn't they?

A If there was any evidence, yes.

Q And they should have reported it?

A I instructed Harvey Borgen that anything out of the ordinary, let me know.

Q And indeed your policies require that in situations where there's allegations of alcohol use that's in violation of a company policy, drinking on ship, that the suspect or the person in question is supposed to be questioned by two members of management; isn't that right? Do you know what your policies dictate with regard to that?

A Perhaps I'd have to review it. I knew it required follow up, but I can't tell you exactly what the follow-up was.

Q Was a situation ever brought to your attention with regard to San Francisco Bay a week or two before the Valdez – a week before the Valdez started up north on its fateful voyage concerning a Mary Williamson and a Captain Reeder?

A No.

Q After this –

A Following, subsequent to the grounding, I heard about it at NTSB or something like that.

Q And should have been brought to your attention; shouldn't it?

A If there was anything to it, yes.

Q And it was reckless not to have, if there was any substance to it?

A The instructions that I left with Harvey very clearly would have said that if – if he found out about any – any violation of company policy, he had to let me know. I had to be informed.

Q Now, I want to go back to the time when you talked to Ben Graves and the concept of a rehabilitation plan. You were of the view that part of Captain Hazelwood's rehabilitation was to attend AA meetings when he was at home; isn't that right?

A I – I don't believe I ever was told of any AA meetings or what it was. What I was told is that he was going on 90 day leave of absence during, which he was going to attend AA meetings.

Q Did you tell the National Transportation Safety Board that, to your knowledge, part of his rehabilitation was to attend AA meetings when he was at home?

A During this 90 day period.

MR. NEAL: Page?

MR. O'NEILL: 926.

THE WITNESS: The context I remember of Ben Graves'

discussion of AA was during this same first meeting. He said at that time, Hazelwood was already out, that he had requested 90 day leave of absence, which we had granted, and that he was going to be attending AA meetings while he was at home.

BY MR. O'NEILL:

Q Now, with regard to your company policies, I want you to, if you would, to take a look at Exhibit 3617, Defendants' Exhibit 3617, which is an Exxon document. Do you have that? And I'm going to –

A I'm going through.

Q I'll put the page up on the screen then and we can take a look at it, the document, so we can put it in date context.

A I have it.

Q It's dated October of 1988?

A Yes, I have it.

Q And the section of the document that I'm interested in is the section that I've got highlighted on my copy, which says, post-rehabilitation testing not addressed in current policy, variation in application across company, commonly done in industry, aids successful rehabilitation, recommendation, revise guidelines to incorporate post rehabilitation testing; do you see that?

A I'm not familiar at all with this document.

Q You've never seen the document before?

A No.

Q Well, let me ask you another question. Have you ever seen Defendants' Exhibit 3683, which I've put up on the screen?

A I don't believe I ever saw this.

Q What's the management committee?

A That's Exxon Company U.S.A. management committee, which is the – the president of Exxon Company U.S.A., and three or four senior vice-presidents of Exxon Company U.S.A. I was not a member of the management committee.

Q With regard to people who violated the company's alcohol policy in 1985, you regularly terminated people who violated the company's alcohol policy; didn't you?

A We had, I believe, from about 1982 to the time of the grounding.

[2926]

Q 55?

A I was going to say about 37 terminations, I think is what I recall. We had another 24 suspensions without pay for certain periods. Those are the statistics I remember over that seven year period.

Q So if, in fact, somebody was violating company policies with regard to drinking on vessels or returning to vessels drunk, you had the power and, in fact, you did terminate them?

A Yeah, the – the violations clearly were possessing or using alcohol on board or being impaired in the course of duties. Those were the two company violations. And where we found people drinking on board, possessing alcohol on board or being impaired or intoxicated during duty, during a watch, then clearly, we were not very easy on people and we terminated a number of people. Some of which, by the way, were returned to the fleet after arbitration and arbitrators forced us to take them back.

Q But you did do it?

A Yes, we were not easy on them.

Q And indeed, it was the company's policy that if an employee's request for rehabilitation is made after the company's discovery of a violation of the policy, the company will take disciplinary action which may include termination?

A That was our policy.

Q So if you got caught, you were going to be subject to some

[2927]

kind of disciplinary action and that disciplinary action could include termination?

A Yes.

Q Does Captain Hazelwood's personnel file, or any other company record that you're aware of, reflect any adverse personnel action with regard to the Graves report?

A This occurred – this statement in this conversation between Ben Graves and Captain Hazelwood occurred after Hazelwood's rehabilitation.

Q Could you answer my question?

A Would you ask it again?

Q Was there any adverse personnel action taken as a result of this?

A None was required.

Q None was taken, whether it was required or not?

A None was taken, none was required.

Q Now, with regard to Captain Hazelwood's assignment to the Yorktown, you discussed this anguish about that. In point of fact, you found out that Captain Hazelwood was assigned to the Yorktown four weeks after he was already on board the vessel; didn't you?

A Yes, I think it was in September.

Q And when you found out, you were upset?

A I was upset that I hadn't been told beforehand.

Q And with regard to his reassignment to the Valdez, you were

[2928]

told that after the fact?

A Yes.

Q After he was on board the vessel?

A Yes.

Q And you were, quote, shocked?

A I was surprised that he had been reassigned without them informing me, without either Harvey or Dwight informing me.

Q I want to go back to, if we could for a minute, our earlier discussion about aftercare. Was it your understanding that after the 60 day outpatient period, Captain Hazelwood would be evaluated again?

A I did not know that. Other than the fact that – that I wanted somebody in the shipping company to – to interview Joe and make a decision that – that he was fit for duty, if that's what you mean, clearly that's what I wanted.

Q Let's go – do you know that following the inpatient treatment there would be a 60 day outpatient period and then he would be evaluated at that point?

A I don't know if there was a medical evaluation or whether his physician – the evaluation I wanted was for somebody in the shipping company, before we gave him an assignment was to meet with him and clearly make a decision based on that face to face meeting that he was fit for duty. Irrespective of what the doctor said.

Q Okay. And what kind of – you wanted somebody from the

[2929]

shipping company to meet with the man and in order to make that determination as to whether he was fit for duty, I would get – that would entail a lengthy heart searching conversation to get to the bottom of what happened, how he was now, his treatment, his rehabilitation?

A I didn't specify.

Q Whether it would be perfunctory or detailed, careful or not careful?

A I think a face to face meeting would have helped us understand whether Joe was clear, whether he understood, whether he recognized the problems he had, and clearly one of the things we were looking for is would he in fact – was he out of the denial phase.

Q Was he clear?

A Was he clean.

Q Was he clean, was he out of the denial phase, and that's what – those are the subjects that you wanted your people to go into when they had this face to face with him before he was reassigned to the Yorktown that's what you expected of them?

A I didn't spell it out in detail.

Q But that's what you expected?

A Yes.

Q Just good common sense, care, care for the individual, care for the situation, carefulness?

A Yes.

[2930]

Q What is the denial phase? You used the expression denial phase. What is that?

A I'm not a – I don't have a medical background at all. I – the little I know about – about rehabilitation is that the first sign you look for is, does the individual acknowledge that he has the problem. And it's important – apparently an important outcome of rehabilitation is that the individual acknowledges that there was a problem and that he has to now address it. That is what I understand the denial phase – or getting out of the denial phase.

Q Getting out of the denial phase. Somebody is open about their problem and is talking about it, working on it, that's getting out of the denial phase?

A Yes, as I understand it.

Q If it had been brought to your attention that Captain Hazelwood had had a prescribed aftercare treatment program and he had quit going to that, would that have given you cause for concern?

A If I understood it was a mandatory part of his program he wasn't following, I think I would have been a little concerned, yes. I would certainly ask some questions.

Q Now, you related to us a discussion that you had with Mr. Graves about the Federal Disabilities Act?

A Yes.

Q You did not go to your lawyers and say, hey, lawyers, with

[2931]

regard to Captain Hazelwood, tell me what the law is about that; did you?

A No. Ben told me he had conferred with the Exxon lawyers and that was the opinion of the Exxon lawyers.

Q So we ought to ask Ben, then, as to whether he conferred

with them and if neither you nor he conferred with the Exxon lawyers about this particular topic and a decision was made on this assumed law that nobody ever asked about, something's wrong; right? You expected him to take care of it for you?

A He was my expert on – on employee relations matters, including contact with law, and if he told me that that was the opinion of the Exxon lawyers, I believed him.

* * *

[2932]

MR. O'NEILL: Do we have that? Can you pull that up for me?

MR. NEAL: Plaintiffs' Exhibit 173.

BY MR. O'NEILL:

Q Here is Plaintiffs' Exhibit 173. Is that the press release?

A I believe so.

Q And you cleared the press release; didn't you?

A I authorized its release.

Q And in the press release there is a statement, Frank Iarossi, president of Exxon Shipping Company, said that the decision to terminate the employee was made because he violated company policy concerning alcohol; do you see that?

A Yes.

Q And that was what you told the world about why you fired Captain Hazelwood?

A It was the press release, yes.

Q Now, with regard to this topic – because you talked to the core group of Exxon Shipping Company officers in the summer or fall of 1989; do you recall that?

A I believe I had a meeting with a group of officers.

Q And it was – was it to, among other things, address the Exxon Valdez situation?

A We certainly talked about that as part of your lessons learned and how to make sure it doesn't happen again.

[2933]

Q It has been reported to us here by one of the participants in the conference that you made a statement to the following effect, that you couldn't believe that they had spent the afternoon in Valdez at a number of bars. Did you make that statement?

A I don't believe I made that statement, no.

Q You deny it?

A I don't recall making that statement.

Q Okay. Now, were you disappointed and outraged that an officer in such a critical position would have jeopardized the ship, crew and the environment through such actions?

A I was very angry. I guess I could certainly use the word outraged. Outraged at the fact that the vessel was – had grounded, the fact that there were

32 square miles of oil all over Prince William Sound, the fact that I was spending five hours a day in front of the press answering questions. I was – I was outraged.

Q You still can't get away from answering questions today; can you?

A No.

Q And I'm interested in the second paragraph, the last paragraph where it says, critical position; you see that?

A I – yes, I see critical position.

Q Is a ship captain a critical position?

A With regard to operation of the vessel, he is the most

[2934]

critical member of the crew. With regard to operation of that vessel, yes.

Q And indeed, he was also part of the management team and part of management; wasn't he?

A He was part of the management of that vessel. He was not part of Exxon Shipping Company management. He had no responsibilities outside of that vessel when he was on board that vessel.

Q With regard to the vessel, wasn't it a major program of yours, as related in Surrendering the Memories, to turn the ship captains from people who drove boats into people who participated in the management of this vessel as an economic unit?

A Actually went well beyond the ship master. It included the entire, what we call the shipboard management team, was the – the senior officers, the four senior officers assigned to the vessel at that time, and then their counterparts, so there were really eight. They formed what we call the shipboard management team and their role was to manage the activities of that vessel.

Q So we had four members of this management team who managed this vessel as a business unit, economic unit, safety unit for Exxon Shipping Company?

A They were responsible for the safety and whatever took part. They weren't responsible – I have to hedge on

[2935]

economics, because they weren't responsible deciding what cargos they carried or what rates they got for it.

Q No, but within the context of safety?

A Yes. They were responsible for the safety of the vessel, yes.

Q And they were also responsible for, within the context of safety, getting the vessel moving, being – being prudent with regard to ship stores that were put on – not put on, the management of the personnel on the vessel, all those kinds of things?

A Yes.

Q And one of your contributions as the president of Exxon Shipping Company was, through the years, to upgrade these guys from ship drivers to this management team?

A Yes. We were trying to give them a broader perspective and understanding of their – of their role as it related to all facets, safety, safe operation.

Q And at the time of the grounding of the Exxon Valdez, you had a member of this management team and indeed the key manager of the vessel who violated his duty under your policy manual when he left the bridge?

A The – yeah, the bridge navigation manual, in my view, required his presence there. There are other opinions who say, no. My opinion is –

Q I understand at that time –

[2936]

A – opinion he should have been on the bridge.

MR. NEAL: Let him finish, Mr. O'Neill.

BY MR. O'NEILL:

Q Are you finished, sir? I wasn't trying to cut you off. Are you finished?

A Yes.

Q So we have a management team member who, in your opinion, violated the bridge policy manual by leaving the bridge?

A In my opinion, one of the circumstances – the

circumstances of the vessel were in – were one of those circumstances which required his presence on the bridge.

Q And the reason for that is so you can have four eyes on the bridge instead of two?

A That's true.

Q And, in fact, there weren't four eyes on the bridge instead of two?

A That's correct.

Q And the vessel ran aground without the help, aid, assistance of this additional pair of eyes?

A In my view it was a contributing factor.

* * *

[2943]

Q The normal procedure, once you get to the gate here coming out to where the ship is – well, why don't you just tell me what happens there.

A Well, this was – this was a new – it was a new situation to me. I – the cab driver got out and opened the back door so I can get out, and I gave my identification card to the guard and he gave it immediately back. Usually in the past, we have all given – all the occupants in the cab have given their cards, their Z cards or what have you to the driver and gone through the metal detector or what have you and have them given back to the driver. This time it was changed. We gave our Z cards to the guard and he gave them immediately back. Then we went through the metal detector, got back in the cab and went on our way.

Q All – all of you did that?

A As far as I can remember, yeah.

Q When you were in the cab, was there anything you noticed, as far as whether the other people had been drinking?

A No.

Q I'm not saying that they were drunk, but had they been drinking?

A No, I have no occasion to notice any – they – the other people seemed to be perfectly standard type people coming back to the ship. I didn't know who they were or I – I had no occasion to remark on their condition one way or the other.

[2944]

Q So there was nothing that stood out to you, as far as any of the other people?

A No.

Q And you didn't talk to any of the other people during this –

A Well, I think I probably said hello and thank you, or one thing or another.

Q Who did they let out – they let them out first?

A No, I was first out.

Q You were out first and they went to –

A Yeah. I was surprised at that because I was dozing and I thought – I don't know why I thought it, but I thought that they were from the other ship that's still here, and when the cab stopped I was told it was berth 4, okay, I got out.

Q When they paid for the bill, were you in the cab when they paid for their part of the bill?

A No.

Q You paid yours?

A Yeah.

Q Just about when they were in this security building, when you were in the security building going through the metal screen or whatnot, were you right with the other three guys where you might observe them walking and moving in there, ah, or were you alone?

A I was in their company but not with them.

[2945]

Q You were in the same general area?

A Yes.

Q The point is, did you have an opportunity to see them if they were, ah, stumbling or whatever, or did you not even have the opportunity to see them?

A Oh, I had the opportunity to see them, but I think – but – and I think, I'm not sure, but I – as I said to the security man last night, I had nothing to cause me to notice what they were doing.

Q Nothing triggered your interest?

A No.

Q You –

A They behaved like people coming back to a ship.

Q You had went off for, I believe, approximately two hours?

A Yeah, two, two and a half, something like that.

Q Did you – well, when you were downtown, did you drink?

A Oh, yeah.

Q Did you have anything to drink that night?

A Of course.

Q Did you – would it be like one drink or two drinks?

A Oh, I may have had three or four. I don't know.

Q But still, there wasn't anything noticeable to you about the other three?

A No.

Q Is there anything that you can think of that you would want

[2946]

to say before I turn the tape recorder off?

A About their condition or – or –

Q Anything? Or if you have a question?

A The only thing I can remember that actually had to be brought to my attention last night when the security guys, they had a couple of pizzas with them. When I climbed into the backs seat, I was careful not to sit on one.

* * *

[2952]

CROSS EXAMINATION OF HARRY CLAAR

BY MR. O'NEILL:

Q You left the employ of Exxon Shipping Company some months after the grounding?

A Yes.

Q And you work for Arco now?

A Yes.

Q Before you sailed with Captain Hazelwood, you knew that he had a reputation as a partier; didn't you?

A I had heard that.

* * *

[2988]

DIRECT EXAMINATION OF RAY JONES (Read)

BY MS. STEWART:

* * *

Q You graduated from Kings Point in 1976. What was your first job upon graduation?

A My first employment was with Exxon U.S.A., that was the name of the company at that time. Exxon Company U.S.A., as a third assistant engineer.

[2989]

Q You never sailed as a mate; did you?

A No, I did not.

Q Did you work for anyone besides Exxon?

A No, I did not.

Q When did you get a chief's license?

A Approximately two years after that.

Q What year would that be?

A 1986, thereabouts.

Q What was the first vessel you worked on with Exxon U.S.A.?

A The Exxon Chester.

Q Did you work on quite a few Exxon vessels?

A Yes, I did.

Q You were on the Exxon Valdez when she was christened; right?

A Yes, I was.

Q Were you generally a regular crew member of the Exxon Valdez?

A Yes, I was.

Q Well, from 1986 until 1989, did you ever work on any other vessels other than the Exxon Valdez?

A No, I didn't.

Q Generally, what were the duties of a first engineer?

A First engineer is responsible for the overall running of machinery plant. He's responsible – he's the primary supervisor of all the other engine department personnel and he

[2990]

reports directly to the chief engineer under his supervision.

* * *

Q I'm not going to hold you to these specific times so you don't necessarily have to refer to that, but can you just give us a chronology of the whole time you were in Valdez and when you sailed? And take your time and be as specific as you can. A That morning, we had had some turbocharger problems when we left San Francisco. So my intention that day was to open up the oil sumps up on those and inspect them, which I proceeded to do. And that took basically the entire day. That afternoon, I was in the engine room basically the whole time doing those inspections. That afternoon, I can't be specific about the time, but I was notified that there was a telephone call for the chief engineer in the radio officer's room. I went up there to talk to Paul. I can't even remember his last name now, the port engineer from San Francisco wanted to talk to the chief engineer about this turbocharger problem.

[2991]

I went up, I had a conversation with him. I went back below. I finished the turbocharger inspections and proceeded to get the plant ready to leave that night.

Q This is the 23rd now?

A This is the 23rd, Thursday, standby leaving the dock was at 2054. That was uneventful. Everything proceeded normally.

Q Had you seen Joe Hazelwood any time that evening?

A No, I hadn't. I talked to him on the telephone. After we were clear, it was our usual procedure as a routine to wash the efficiency boosters on the main engine and before I did that, I always informed the bridge that I was going to do it. I talked to him. I called the bridge to let them know that I was going to proceed to do this. Captain Hazelwood answered the phone. Informed him of my intentions, he said fine, go ahead. Then we joked. This was – I think Pete Rose had just gone through his problems and I made a comment about that and we laughed. I hung the telephone up and I went below and proceeded to wash the turbochargers. After this was completed and I was headed up, when I got back to the control room, the chief engineer was there, Mr. Glowacki.

* * *

[3110]

DIRECT EXAMINATION OF LLOYD LECAIN
(Read)

BY MR. SANDERS:

* * *

[3117]

Q What was Exxon's policy concerning watch officers standing watch, leaving port as far as when they are on duty leaving port, not having been on duty for six hours out of the required 12 hour period? Do you understand what I'm saying? Did you ever hear any regulation?

A I heard a Coast Guard regulation, something about it.

Q Do you know what the regulation is?

A No. Like I say, I really don't know. I don't know about

[3118]

that.

Q Did you ever stand a watch leaving port with Exxon, you said you did on occasion, where you had not been off duty for more than six hours in the 12 hour period preceding – preceding period?

A Many times.

Q So that was a violation of the regulation, as you understand it?

A No, that's what you're telling me.

Q Well, assuming there is a regulation that says you're not to have been on duty for at least six hours within a 12 hour period when leaving port, you either – there were occasions when you had been on duty for more than six hours in a 12 hour period when leaving port; isn't that correct?

A Occasionally.

Q And Exxon Shipping Company – does Exxon Shipping Company pay its deck officers for overtime?

A No.

* * *

[3177]

17th Coast Guard district in Alaska in 1975. How long did that continue?

A I served in Alaska for three years; one of those as chief of operations, two of the remaining two [sic] as chief of staff.

Q Sir, can you tell me what factors you determined as Commandant of the United States Coast Guard to have caused the grounding of the Exxon Valdez?

A I formed the opinion that the causal relationship here – I'm not sure I'm using the term word causal in the legal sense that – that all of you are used to, so not being a lawyer, I'm treading on thin ground; but in my view, the primary cause or the causal effect of that grounding was a perfectly qualified third mate on a bridge of a ship that, through a period of a few minutes of inattention to duty or lack of knowledge of exactly where he was, ran the ship aground on a clear night with all the navigational aids watching him. That's the – that's the primary cause.

* * *

[3181]

This is not a treacherous area as you people in the press have called it. It is not treacherous in the area they went aground, it's ten miles wide. Your children could drive a tanker through it. Did you make that statement, sir?

A I did.

Q The last sentence of that statement, your children could drive a tanker through it, I think you testified earlier that

[3182]

you received some feedback from various sources in regards to that comment. Is that a fair statement?

A Yes. That comment was an overstatement, it was an obvious exaggeration and, well, there should have been laughter, as it overstated my position considerably.

Q In regards to the remaining portion of that statement, do you still stand by what you said there?

A I do.

* * *

Q Did you ever look into whether or not crew fatigue was a factor in the grounding of the Valdez on Bligh Reef?

A Only to the extent that I was briefed on the manning of the bridge at the time of the accident. The fact that the crew had been working all day and loading the tanker and getting ready for sea, which is normal, that they had departed Port Valdez in the early evening after dark and had been at sea for – had departed about three or four hours earlier, prior to the accident, three or four; so it's likely that any ship that departs the port in the early morning, that there might be some fatigue in the crew, but that is normal operating practice on

[3183]

every Coast Guard ship, Navy ship, merchant ship in the world, that when the time – when the ship is loaded and it's time to go, you sail. Time and tide waits for no man came out of the sea, but I'm going away – but I'm not aware that fatigue was a factor in this ship going aground.

* * *

[3185]

The Coast Guard currently has a proposed rulemaking which, if finalized, will eliminate the requirement for pilotage on PWS – meaning Prince William Sound – quote, between the high seas and Rocky Point. Why have you made this proposal? In view of the Exxon Valdez incident, do you feel that this is a good proposal? And the major points are, first, quote, statutes require the secretary to designate the waters of Prince William Sound

[3186]

upon which a vessel will not require a pilot, end quote. Do you have a recollection of that statute, sir?

A Not specifically the statute, but I'm aware of the impact of it, yes.

Q And that was a statute sponsored by Congressman Young of Alaska?

A I don't know whether Congressman Don Young, that was his statute, what Don – the initiative by Don Young in support of the Alaska Pilots was to eliminate pilotage in that particular piece of water.

Q And that was the water in which the Exxon Valdez evidently ran aground; is that correct?

A I think it was. That's a very long piece of water and the Exxon Valdez went aground on a rock in a part of it.

Q Okay. And that was the part we discussed earlier that was ten miles wide and, in many places, 500, 600 feet deep; is that right?

A It was at least at least ten miles wide in many places, yes.

Q And item two of the major points is, quote, Opinion of the maritime community and Alaska state pilots is that pilotage is not necessary seaward of Rocky Point, end quote. Is that statement correct, to the best of your knowledge?

A When you talk about the maritime community, I don't know who all that is. But the State pilots went to Don Young, as I

[3187]

understand, and asked him to propose this. They had specific reasons for wanting to do so and perhaps valid reasons, and when it went out as a proposed rule-making, the Coast Guard put it out as proposed rule-making, I understand that nobody commented on it. That means either the maritime community didn't have any problems with it or didn't take any notice of it; it was just not a major issue.

Q Is it accurate to say that the Coast Guard, in formulating a proposal rule-making about pilotage, would use its best judgment, the best judgment of its staff and its experts as to whether or not pilotage was objectively required; is that –

A That's correct. And the major input would be from the captain of the port in the area.

Q Well, my point is – but I guess my point is, the Coast Guard would not simply issue a rule-making to eliminate pilotage requirements on the ground that the Alaska pilots had some reason for wanting to do it that way?

A No, I think before the Coast Guard would even go out with an advance notice or proposed rule-making that they would have to feel that there was some justification and they would want them to get comments from a much wider group, which they did.

* * *

[3205]

the case may be. I've agonized the same way about somebody recovering from alcohol problem and you have – and you rehabilitate them and you bring them back on duty and you sit there as the separate leader and decide, do I let this guy go back to his job or do I ruin his life and his career when he's just made a great effort to be rehabilitated; and it's a very difficult corporate decision.

* * *

[3285]

Q I'd like to have put up on the screen PX10, Plaintiff's

Exhibit 10.

You'll notice there is a video screen right next to you, also one here too (indicating), if you prefer to look at this one. I'd like you to look at this document that's been displayed up on the screen. Is that the individual disability report that you reviewed?

A Yes, it is.

Q It is your understanding that this is the individual disability report that was sent to Exxon Corporation by

Dr. Vallury?

A Yes.

Q Is it possible to have that brought up a little bit, in the center? Doctor in looking at this particular individual disability report, can you see an area here which relates to Captain Hazelwood's diagnosis?

A Yes, I can.

Q Can you tell us where that is?

A I am sorry, I don't have a pointer, but it's the line – yes, that is it.

Q (Indicating). Now, what is it that you see here that you say is the diagnosis?

A Those are two diagnostic code numbers which are derived

[3286]

from the Diagnostic and Statistical Manual III which is, in parentheses, DSM-III.

Q There's here, right this little thing here, DSM-III in parenthesis?

A That's correct.

Q And those are code numbers?

A Those are code numbers.

Q So if one wanted to determine what Captain Hazelwood's diagnosis was in looking at this form, you would look at these code numbers and you would go to the manual DSM-III?

A That is correct.

Q And that would tell you, correct?

A Yes.

Q Now, can you tell the jury what DSM-III is?

A Diagnostic and Statistical Manual III was a publication compiled by the American Psychiatric Association following contributions by experts in the field for describing the diagnostic criteria for establishment of a diagnosis of an individual who had a psychiatric illness.

Q Now, in 1985, Doctor, was DSM-III the primary diagnostic manual for individuals in the United States?

A It was the – not only primary, but I would say the

exclusive diagnostic manual which achieved consensus in most inpatient and outpatient settings in the United States.

Q Now, in terms of this diagnosis, right here on the

[3287]

diagnosis section, 300.40 and 305.02, according to the diagnostic manual DSM-III, what is this diagnosis?

A That diagnosis is dysthymia.

Q That's 300.40?

A That's correct.

Q And this diagnosis, 305.02, what is that diagnosis?

A That is alcohol abuse episodic.

Q Now, in conjunction with the fact that the dysthymia is listed first and the alcohol abuse episodic is listed second, is there any medical significance to that?

A Yes, the primary diagnosis in any medical record is usually the first listed diagnosis.

Q So you would conclude, then, that the primary diagnosis on this form is what?

A Dysthymia.

Q And the second carry diagnosis is what?

A It would be alcohol abuse episodic.

Q And, Doctor, in terms of DSM-III, what it says in DSM-III, the manual, is that diagnosis a diagnosis for alcoholism?

A It is absolutely not a diagnosis for alcoholism.

Q Why is that not a diagnosis for alcoholism?

A Because in order to achieve the diagnostic criteria for alcoholism, the diagnosis would have to include criteria which indicate either alcohol withdrawal or significant alcohol intolerance.

[3288]

Q In conjunction with that, Doctor, under the criteria of DSM-III, if that were the case, diagnosis would be alcohol dependency as opposed to alcohol abuse episodic?

A That is correct. DSM-III states explicitly that alcoholism is – alcoholism is alcohol dependency.

Q As opposed to –

A Which is not alcoholism.

Q Now, I'd like you to explain as best you can in layman's terms, what is dysthymia? What is the primary diagnosis dysthymia? What does that mean?

A Well, dysthymia is a form of depression. It's relatively common; many, many individuals have experienced it. It's characterized by feelings of sadness at times, by inability to sleep well, either sleeping too short a time or sleeping too long a time. It's characterized by difficulties that individuals may have in their perception of happiness or sadness in the world about them. They may have difficulties eating, they may have difficulties sleeping, as I mentioned. It is not a severe depressive disorder but a relatively common one.

Q So would you say that it's a mild form of depression?

A It's a mild form of depression.

Q All right. Now, the secondary diagnosis there, alcohol abuse episodic. Will you please explain to the members of the jury what that is?

[3289]

A Well, alcohol abuse episodic is basically inappropriate use of alcohol on an episodic basis. It is alcohol abuse but not alcohol dependence or alcoholism.

* * *

[3324]

DIRECT EXAMINATION OF MICHAEL FOX (read)

BY MS. STEWART:

Q When did you begin your training as an Alaska state trooper?

A I was hired more or less by accident first summer I was here to work on a seasonal basis for the department of public safety, division of fish and wildlife protection. I was hired to be an aide, that was the time of the job, to fish and wildlife protection officers, as they were called at that time. I was an assistant maintenance person, assistant law enforcement guy. Just a summer hire.

Q And at some point, I take it, then, you were commissioned as a full time?

A I spent a second summer in doing the same work, and then that fall of '78 I went through the hiring process. And I was hired and sent to the state trooper academy in Sitka in January

[3325]

of 1979.

Q Have you been continuously employed by the department of public safety since January of 1979?

A Yes.

Q What is your rank in the department at this point?

A Trooper.

Q Trooper Fox, when did you first hear about the grounding of the Exxon Valdez?

A It was about 2:30 in the morning approximately.

Q How did you hear about it?

A Phone call from the Coast Guard.

Q Was there another phone call between or phone conversation between you and the Coast Guard and the marine safety office later that morning?

A Yes.

Q What was the nature of that call?

A They wanted me to go out to the ship.

Q Do you recall who you were speaking with in that conversation?

A That was with Commander McCall.

Q Trooper Fox, about what time was it when you made it aboard? I understand there was some problem about actually getting on board the Valdez, but what time was it when you arrived on deck, on the deck of the Valdez?

A Just after seven.

* * *

[3328]

Q At that point, were you trying thinking to yourself that you need to look for signs of alcohol impairment?

A Sure.

Q Did you see any?

A No.

* * *

[3339]

Q Did you have any conversation with Captain Hazelwood?

A Yes, I did.

Q Tell us, then, about the conversation you had with the captain.

A I introduced myself and told him that I was on the boat representing the State of Alaska, and that we were going do be trying to figure out what happened. I don't know if I used the word investigator or not. And after that I just looked into his eyes and said, what the heck is the problem here? And he said, You're looking at it.

* * *

[3343]

DIRECT EXAMINATION OF MARK PIERCE

BY MR. SANDERS:

Q Good morning, Captain.

A Morning.

Q Captain Pierce, by whom were you are you employed?

A Previously by Sea River Maritime.

Q Is Sea River Maritime the successor company or the name change from Exxon Shipping Company?

A That is correct.

Q And as a captain are you assigned to a particular vessel?

A Yes, I am.

Q What is your vessel assignment at this time?

A The S/R Mediterranean.

Q And that is, of course, the former Exxon Valdez?

A Yes.

* * *

[3389]

Q And Mr. Graves said to you, when you said, I have trouble with a captain; Mr. Graves said to you, Does his name start with H?

A That's correct.

Q And Mr. Graves was over the human resources department?

A Yes, he was in charge of that department.

Q Now, there's another telephone call that takes place

[3390]

sometime thereafter, and that is to Mr. Tomkins. And that's to inform Mr. Tomkins that Captain Hazelwood was going on leave or on disability leave?

A That was not a phone call.

Q It was?

A It was a conversation with person in the office in Baytown, and I informed Mr. Tomkins that Captain Hazelwood was going on medical leave.

Q And Mr. Tomkins was your boss and his boss?

A That is correct.

Q And Mr. Tomkins had a one-word answer, or a one-word response to this information, and his one word was –

A As I recall was "good".

Q "Good." And the anonymous caller who – the anonymous caller called you in a situation where you already had felt some undercurrent, that something was wrong?

A That's correct.

Q And the anonymous caller identified himself as an officer at Exxon – Exxon Shipping Company?

A Just said an officer who had sailed with Captain Hazelwood.

Q An officer who sailed with Captain Hazelwood. And you were the – at that time you were the ship group coordinator, and as part of your duties, Captain Hazelwood's ship was a ship that – whose activities you coordinated?

[3391]

A That's incorrect.

Q His ship didn't fall under your responsibility at all?

A I wasn't a ship group coordinator.

Q I'm sorry, what were you?

A I was a port captain, and as such I liaisoned between the ships and line management.

Q Including Captain Hazelwood's ship?

A Including his ship, yes.

Q And that was part of your duties?

A That's correct.

Q And the anonymous telephone caller who called, if in fact he was a ship's officer and working with Captain Hazelwood was a part of his duties?

A Yes.

Q And I want to – you tell this series of events in 1985, but other people have come in here and have said that Captain Hazelwood was the most monitored man in the fleet. Okay?

You're aware of no monitoring, are you?

A In what time period?

Q Time period that you worked – the time period that you worked with Captain Hazelwood.

A Well, we had contact with Captain Hazelwood as we would any other master during that time frame.

Q You're aware of no monitoring, are you?

A No.

[3392]

Q And indeed, you had information with regard to Captain Hazelwood and Captain Hazelwood going into a hospital for some kind of treatment, and later on that Captain Hazelwood had something to do with Alcoholics Anonymous, and you passed that on in one cryptic conversation to Mr. Tomkins, and you passed it on to nobody else, did you?

A I'm not aware that I passed it on to Tomkins other than he was going on medical leave.

* * *

[3397]

Q And tell me who you saw as soon as you entered the bridge?

A My recollection of – the first person I remember is Captain Hazelwood.

Q What was he doing?

A As I recall, he was looking – I have a notion that he was looking out over the deck.

Q You recall that or this is –

A My – the thing that I remember most is when I saw him, he said, Hi Dan, I believe. I said, Hi captain. I didn't

[3398]

recognize him.

Q You hadn't recognized him when you first saw him?

A Yeah.

Q Didn't you just testify the first person you saw on the bridge was the captain?

A Well, what I'm saying is I learned that he – you know, learned that it was at captain.

Q Did someone introduce him to you at that time?

A I don't have a good notion on that.

Q Now, how close did you get to him?

A A few feet.

Q Did you shake his hand?

A I don't recall.

Q Now, my question now related to your meeting on the bridge. That was what I asked you. And I asked you what you had testified at an earlier time I think in response to the question whether you had smelled alcohol on his breath or person, and I believe your testimony at that time was that no, you did not. Is that correct?

A That's – I think that's what I said just now, too.

Q The other question I have, and this is something I believe you've testified to earlier, besides not smelling any alcohol on his breath or person at the time, did you notice any unusual – anything else unusual about the captain at that time?

[3399]

A I believe my testimony was my recollection – and my recollection is that he was pensive, and – my recollection and my sense of Mr. Hazelwood was that he was pensive and that – concerned about what had happened.

Q Would you consider that to be a normal reaction [illegible]

A Hell, yeah.

Q – the situation at hand? Sorry?

A Yes.

Q Did you can notice any impairment in a physical way on Captain Hazelwood? By that were his motor functions in any way impaired as best as you can tell from that initial meeting? A I believe I earlier said that I – that wasn't the focus of what I was doing. I didn't recall anything that came to mind.

Q Did you notice any unusual speech patterns in the course of speaking with him in your initial –

A Not that I recall.

Q – contact?

Have you ever seen anyone intoxicated or under the influence of alcohol?

A I have.

Q You've seen someone drunk, basically?

A Yes.

Q Who – where has that happened?

A Well, in the – life.

Q Did there come a time when you needed to use the MARSAT

[3400]

phone on the vessel?

A I did.

Q Did you not?

A Yes, I have some vague notion that the captain helped, or at least made it possible for me to use the phone.

Q What do you mean, made it possible? Did he hand you the phone?

A I have some notion that there was some instructions given to the radio officer or something of that nature.

Q Was he there physically when that happened?

A I have a recollection that I saw Captain Hazelwood in the radio room and on places other than just the bridge.

Q When you met the captain in the radio room, did you smell alcohol on his breath or person?

A I don't recall that.

Q Did you see him acting in any – did you see any physical impairment about any of his actions?

A I don't recall.

Q Did you see him speaking in a slurred manner?

A I don't recall, no.

Q Now, that's at least two times we've said that you've seen the captain on board the vessel, right? Now you've mentioned a third time or – I'm not trying to suggest it's in this chronology, by the way, but you did mention passing him by in the stairs or –

[3401]

A I have a recollection of – I was either going downstairs and he was coming up or vice versa, and it's a very narrow companionway, and that is the first time that I was within a foot or so of him.

Q Now, how soon after the initial meeting on the bridge was that?

A I think it was sometime afterwards but I don't recall the –

Q Was he going up the stairs or going down the stairs?

A I don't recall.

Q Well, let's see. Let's turn to your – were you going up and down stairs? By the way –

A Yes.

Q – someone was going up and someone was going down?

A That's just what I testified to, yes, sir.

Q Okay. Did you see Captain Hazelwood having any difficulty going up or down the stairs that you're referring to?

A I don't recall.

Q Did he fall at any point or stumble that you recall?

A Not that I recall.

Q By the way, that passing in the stairway, did that occur before or after you were in the radio room with him during your efforts to use the MARSAT phone?

A I don't know.

Q You don't recall. You don't recall –

[3402]

A I don't recall, excuse me.

* * *

[3404]

DIRECT EXAMINATION OF GABRIELLA GUERRA

BY MR. SANDERS:

Q Miss Guerra, where are you employed?

A I'm with Sea River Maritime, Incorporated.

Q And that's Exxon; right?

A That's correct.

Q And before that, how long have you been employed by Exxon?

A I joined Exxon September 8th of 1969.

Q Would you tell the ladies and gentlemen of the jury about your educational background?

A I graduated from the University of Houston in secondary education with chemistry and math as my teaching fields, and I have some course work after that in computer science.

Q Now, in the spring of 19-and-85, what was your job at Exxon?

[3405]

A I was with Exxon Shipping Company in the administrative department in human resources section there, and I coordinated the merit compensation program and administered the savings and investment plan benefits and the disability benefits for the ocean fleet.

Q Now, I want to ask you some questions today before I ask you to put on your disability section hat.

A All right.

Q Okay. Now, as the person who – were you the only person responsible for disabilities, the disabilities section, for Exxon Shipping Company?

A For the ocean fleet, yes.

Q What is in the ocean fleet?

A The deep sea tankers and the men and women that crew those tankers.

Q All right. Was the Exxon Yorktown part of the ocean fleet?

A Yes, sir.

Q And was Captain Hazelwood a person as master of the Yorktown that was within your realm there as the disabilities person?

A Yes.

* * *

[3420]

Q But in order to end the disability period, you had to have something from Dr. Montgomery to say, Well, the disability period is over?

A That's right.

Q And you called Dr. Montgomery?

A That's right.

Q Did you make a request of him?

A Well, I called for advice and – from him, and that's the information he gave me.

Q Did you ask him to get in touch with Dr. Vallury?

A I don't know whether I asked him to do that or whether he had already done that.

[3421]

Q Okay. In any event, were you able to, at least for pay purposes, for disabled benefits purposes, were you able to terminate this disability?

A Yes.

Q And is there a specific form that you use or as in –

A Yes.

Q – all other things in life, are there some initials you use to do that?

A It's a DTR, disability termination report form.

Q And I'm circling DTR issued, and there's a date beside that. A May 20th, 1985.

Q Does that show the date that you terminated the disability termination – or let me start again. The initials have gotten me confused. Is that the date on which the disability termination report was done by you?

A Yes, sir.

* * *

[3424]

CROSS EXAMINATION OF GABRIELLA GUERRA

BY MR. O'NEILL:

Q Ma'am?

A Yes.

Q Let's take a look on this form, if we could for a moment. We'll go the same thing we did before?

A All right.

Q Where it says diagnosis it says alcohol treatment. You testified that you got that information from Ben Graves who told you that the captain was entering an alcohol treatment facility or center?

A That's correct.

Q So the company's state of mind at the time you made this

[3425]

entry was the captain was entering an alcohol treatment facility or center?

A That's what I understood from Ben Graves.

Q Okay, and you dutifully made the entry in the company record, the best you could?

A Yes, sir.

Q And then this says, 4-16-85 through hospital through 4/20/89, and then leave of absence for group – and then what does that say?

A IND for individual.

Q Yes.

A And then marital therapy.

Q I want to admit, I once thought that was marital axe?

A Marital.

Q Marital therapy. So the records reflect he would be hospitalized through 4/29 and then after 4/29 he would be in for group – he would have a leave of absence for group, individual and marital therapy and Alcoholics Anonymous and lectures?

A I copied that from the individual disability report.

* * *

[3456]

CROSS EXAMINATION OF JESSE WATTS (read)

BY MS. WAGNER:

Q Tell me what you're understanding was of the alcohol policy around the time of the Valdez spill, before the spill like in '88, '89?

A It was the same policy. Supposed to be the same policy it was in 1970 when I joined the ship, but it was not enforced.

* * *

[3485]

DIRECT EXAMINATION OF THOMAS FALKENSTEIN

BY VIDEO EXAMINER:

Q For the record, commander, would you identify yourself?

A My name is Thomas G. Falkenstein. I'm a lieutenant commander in the United States Coast Guard.

Q When in 1987 did you arrive in Valdez?

A I reported in on July 31st, 1987.

* * *

[3492]

Q You had not seen anything in Captain Hazelwood's behavior or demeanor to suggest that he was intoxicated, had you?

A From my observations, no.

Q Let me ask you specifically, at the time that you spoke to Captain Hazelwood aboard the vessel, did he appear to you in any way to be either in shock or incapacitated?

A When I initially spoke with him on the bridge right after I got aboard, he looked a little shocked or stunned or – understandably upset about the condition that he – his ship had come into.

Q Now, did he appear to be incapacitated?

A No, sir.

Q You, as the Coast Guard on-scene investigator, had the authority to relieve the captain that you – if you felt that he was intoxicated or in any other way unable to command the vessel. Is that correct?

A Yes, sir.

Q And it is also a fact that you did not relieve Captain

[3493]

Hazelwood of his command of the Exxon Valdez on that night; is that correct?

A Yes, sir.

* * *

[3509]

Q Are you familiar with vessels that have deviated on occasion outside the traffic lanes because of ice extending across those lanes?

A Yes, sir. They have deviated.

* * *

[3510]

Q And what did you do upon – upon boarding the vessel?

A The seaman on – at the head of the ladder directed us to the bridge. We asked him where the captain was, I believe, and he indicated the bridge, and we proceeded immediately to the bridge.

Q Did you come upon the captain at that point?

A Yes, sir. I went over and spoke with the captain.

Q Do you recall what you said?

A I introduced myself and asked him what the situation was.

Q And what did he tell you?

A I believe he indicated that the ship was hard aground, they were unsuccessful in – the engine was amid – engine was off, shut down, was amidships.

He may have given me the vessel's heading and told me that they were unsuccessful in trying to get it off the rock at high tide.

Q Commander, you said when you went out on the bridge wing with Mr. Delozier that he asked you if you – if you smelled alcohol, and you said that you answered yes?

A He asked me if I smelled the captain's breath, and I said yes.

Q Commander, when you – when you say that you smelled alcohol, what – can you be anymore specific than that?

A No, sir.

[3511]

Q You just smelled alcohol?

A I smelled like an alcoholic beverage had be consumed, yes, sir.

Q Did that alcohol smell fresh?

A No, sir.

Q Did it smell stale?

A Yes, sir.

Q Didn't Trooper Fox ask you if the Moussy beer on his hand smelled similar to what Captain Hazelwood's breath –

A He asked me if that smelled like the smell on the captain's breath, not did I smell the captain's breath. And I told him to the best of my recollection, it could be, but I didn't think so.

Q Why didn't you think so?

A Just didn't smell the same way, exactly. But that was poured freshly on the back of his hand, so we're talking two different circumstances.

Q What was the smell up on the bridge when you were standing next to Captain Hazelwood?

A Smelled like the captain had been consuming an alcoholic beverage.

* * *

[3526]

you follow me?

A Yes, sir.

* * *

[3527]

Q Continue on, Mr. Cushing.

A All right. At this point, the vessel had increased its speed even further now because of the load program up. The vessel was at this point traveling at 11.3 knots.

* * *

Q All right.

A All right. Just after midnight, then, at about two minutes past midnight, the vessel's head started to swing to the right, and the vessel followed a –

Q Now, before you do that, how would you know that at two minutes after midnight the vessel begins to swing to the right?

* * *

[3528]

A The vessel is equipped with a course recorder, and the course recorder which has a clock in it indicates the time and it indicates that the direction of the vessel was pointed at all times. It's tied into the gyro system of the ship.

Q All right. The vessel begun to swing to the right or now, as we've all learned, swing to starboard at about two minutes after midnight; is that correct?

A That's correct, yes, sir.

Q All right. Now, if the bow – if the course recorder

reflects the two minutes after midnight the bow begins to swing to the right, okay, when would the rudder have to be put on? Let's say it's ten degrees. When would you have to put on the rudder on the helm ten degrees to get an indication on the course recorder that the vessel is beginning to swing to the right at two minutes after midnight?

A That would have to have been done between 20 and 30 seconds before that.

Q All right. So the rudder, then, was moved to right rudder at some degree about a minute and a half after midnight; is that correct?

A That's correct.

* * *

[3529]

Q All right. What degree of right rudder was put on the vessel as you say a minute and a half after midnight so that you can see the bow turn on the course recorder at two minutes after midnight?

A Well, we have determined that that rudder angle was ten degrees.

Q Ten degrees?

A Yes, sir.

Q So according to your – in your opinion, in your work, rudder angle was put on of ten degrees right at a minute and a half after midnight and the vessel began to show some turn at two minutes after midnight?

A Yes, sir.

Q All right. Now, were you able to – how long did the ten degree right rudder continue in effect?

A That continued at least through the period of – period of five minutes, at which point the vessel struck a pinnacle in Bligh Reef.

* * *

[3534]

Q All right. Let's show the Ladies and Gentlemen of the Jury that. Now, explain to the Members of the Jury and the Court what they're seeing here.

A Well, the initial part of the track is the blue track we've just described, but at a point just south of abeam of Busby light, in other words, 2355.30. We've shown a track where the bow of the ship would have – the track the vessel would have followed where the bow of the ship would have started to swing at 25 – 2355.30, or five minutes, four minutes and 30 seconds before midnight.

Q All right. Now, you have said that the vessel was abeam Busby Island light at 2355?

A Yes, sir.

Q Why do you have 2355.30 on there?

A Because if the vessel were to have followed this – this red course here, the order would have had to have been given at 2355 to cause the vessel to start swinging at this point.

Q So you're assuming, this assumes a ten degree order was given and executed at 2355?

A Yes, sir.

Q And what you're showing here is what the course – on the course recorder it would be approximately 30 seconds later before you'd see the bow begin to swing?

[3535]

A Yes, sir.

Q All right. Now, go ahead. And the red line there, what does that show?

A Well, that is the track of the vessel if that ten degree right order, right rudder order had been given abeam of Busby Island light and executed, and you can see that the course actually curves well north of the – the track that the vessel actually took.

Q If that – if that had been carried out, if a ten degree right rudder had in fact been carried out at abeam Busby Island light, how much would the vessel have missed the grounding point?

A By over a mile.

Q All right. You're aware, are you not, that the testimony in this case is that Captain Hazelwood asked Mr. Cousins to come back into the lanes a abeam Busby Island light?

A Yes, sir.

Q Now, at my request, did you do something else, did you assume a five degree turn?

A Yes, sir, we did.

Q At abeam Busby Island light?

A Yes, sir, we did.

Q Now, would you explain to the Court and the Members of the Jury what you're demonstrating here?

A Well, the yellow – the yellow trace shows the track that

[3536]

the vessel would have followed if a five degree –

Q Is that yellow?

A Well, dayglow or whatever.

Q All right.

A If a five degree order had been given and executed abeam of Busby light, it would have followed this yellow track, just slightly, curving just slightly further south than the ten degree course.

Q Okay. And if even a five degree turn had been put on at abeam Busby Island light, how far would the vessel have missed the grounding spot?

A By a little over eight-tenths of a mile.

* * *

[3537]

Q Let's do one other thing. Let's assume that there is – it's two minutes after midnight and let's – when the bow begins to turn, correct, according to your testimony?

A Yes, sir.

Q Let's assume that a 20 degree right rudder was put on rather than a ten degree. Do we have that now?

A Yes, sir. Orange, I believe orange in color. 20 degrees right rudder at two minutes after midnight would cause the vessel to follow this – this orange trace here.

[3538]

Q And would it have missed the reef?

A Yes, sir, by – close to it, but by a tenth of a mile.

Q Mr. Cushing, the record in this case reflects that two other vessels went out of the – two other tankers went out of

the Port of Valdez on March 23, preceding the Exxon Valdez.

Are you aware of that?

A Yes, sir.

Q At my – and those vessels were the Brooklyn and the Arco Juneau. At my request, did you prepare a track line of the Brooklyn and the Arco Juneau as they exited Prince William Sound on the night or – day or night of March 23, 1989?

A Yes, sir, we did.

Q Would you, looking at Defendants' Exhibit 1735-Able, A or Able, would you explain to the Court and the Jury what they're seeing there?

A The orange trace, again, is the – a track of the tanker Brooklyn as she travels southward through Prince William Sound, first in the traffic lane and then leaving the traffic lane to avoid reportedly or what I understand to be ice in the traffic lane.

Q Now, is she – she, is the Brooklyn totally outside of the traffic lanes, itself?

A She is at this point here.

Q And she continues on further out?

A Yes, sir, she does.

[3539]

Q Or farther out? Okay.

A Until she's abeam of Bligh Island, Bligh Reef light.

Q How close does the Brooklyn come to Bligh Reef? Were you able to figure that out?

A Yes, sir, we were.

Q And what is the distance?

A The closest point of approach to Bligh Reef was about eight-tenths of a mile.

Q Eight-tenths of a mile?

A Yes, sir.

Q All right, sir. And you testified that had the order been carried out on the Valdez, you'd been over a mile away on a ten degree right rudder?

A Yes, sir.

Q All right. By the way, were you able to determine the times, what times of the day do these tracks – let's start with the Brooklyn, what times of the day are represented by the track line of the Brooklyn?

A Well, the Brooklyn left Port Valdez early in the morning around 8:00 in the morning and she was up – up at this point here about 10:47 in the morning, and her – her charts from which we got this information show the times at which she was at the various points along the track and she arrived down at this point here at about 11:26.

Q So you are representing on your chart here a time for the

[3540]

Brooklyn that begins at about 11:47 and ends up at – I mean 10:47 and ends up at what?

A 11:26.

Q All right. And let's take the Arco Juneau, then. What color represents the Arco Juneau then?

A That's this kind of yellowish green, dayglow color.

Q And does it go entirely out of the traffic separation scheme?

A Yes, sir. The Arco Juneau was traveling southbound in the northbound lane, in this portion of the track, and she exits the lane also and obviously travels further, further away from the traffic lane, curving back and then finally reentering the traffic lanes down here.

Q All right. What time is represented – what time period is represented on your chart by the track line of the Arco Juneau?

A The Arco Juneau left Port Valdez in the afternoon of the 23rd, about 4:00 in the afternoon.

Q Okay. And what time is represented there?

A She arrives at this point here about 6:53 in the evening and travels through this course, arriving down here at about 7:22 in the evening.

Q Now, was the Arco Juneau put on a direct line to Bligh Reef at some point?

A Well, when she left the traffic lanes, she was pointed directly at Bligh Reef, on a course directly at Bligh Reef.

[3541]

Q How close did the Arco Juneau come to Bligh Reef?

A She came to within six-tenths of a mile.

Q Six-tenths of a mile?

A Right.

Q Now, Mr. Cushing, a Mr. Jerry Aspland of Arco Marine testified in this case, and I want to read you a question and answer: Question, did you have – was there ever – were there ever any rules as to what speed would be considered a prudent speed in transiting through ice in Prince William Sound; and the answer, I don't recall having put out a written memo, but I do recall having discussed that we could go – if there was ice in the area, we could go up to five knots. Was there ice in the area when the Arco Juneau was transiting this part of the Prince William Sound you've discussed?

A That's my understanding, yes, sir.

Q Were you able, nevertheless, to determine the speed of the Arco Juneau as it transited that portion of Prince William Sound?

A Yes, sir, we were.

Q And what was that speed?

A That was 12. – sorry, 12.96 knots.

Q 12.96 knots?

A Yes, sir.

* * *

[3583]

DIRECT EXAMINATION OF JOHN TOMPKINS (Live)

BY MR. SANDERS:

Q Mr. Tompkins, let me ask you to speak into that silver microphone or lean forwards so we can hear you a little bit better. I'd like you to tell the jury your educational background first?

A I'm a graduate of the United States Merchant Marine Academy in 1965. I got a bachelor of science degree in engineering. I then got a masters in business administration from Adelphi University in 1976.

Q The last university was Adelphi?

A Adelphi University on Long Island.

Q Long Island. Now, when did you start working for Exxon?

A In 1965.

Q All right. And do you work for Exxon now?

A I work for an affiliate of Exxon.

Q Sea River?

A Sea River Maritime.

* * *

Q Let me take you back to the spring of 1985. You were, of course, gulf coast fleet manager in the spring of 1985?

A That's correct.

Q And Captain Hazelwood was a captain under your direct supervision in the spring of 1985; was he not?

A Yes, he was.

Q Did you become aware in the spring of 1985 that Captain Hazelwood went on medical leave?

A Yes, I did.

Q And did you become aware – do you know about when you found that out?

A It was sometime in the latter part of March that I understood that, when I received a phone call.

Q Okay. And from whom did you receive a call?

A I received that call from Mister – Captain Hazelwood, telling me that he was checking himself into rehabilitation.

Q Did he tell you what kind?

A I'm sorry, I didn't hear the question.

Q I'm sorry. Did he tell you what kind of rehabilitation?

A Yes, I do – I think I recall him saying for alcoholism.

Q In any event, at some point thereafter you did understand that his treatment did involve alcohol; is that correct?

A Yes, I did.

[3588]

Q So by the late spring of 1985, you knew that one of your captains that you supervised had gone into some sort of a treatment program which did involve alcohol; am I right?

A That's correct.

Q All right. Now, did Captain Hazelwood return to work while you were still his supervisor?

A Yes, he did.

Q Prior to his returning to work, did you do anything?

A Yes, I did. I arranged to have a meeting with Captain Hazelwood.

Q Do you recall getting a phone call about having such a meeting?

A Well, I recall that – I believe it was Ben Graves had called me and suggested that I have a meeting with Captain Hazelwood before he returns. He suggested that I make sure he understands that he only has one more chance when he comes back, and he also suggested that I should have some kind of way to keep an eye on him, make sure I monitor him when he is back in the fleet.

Q All right. Did Mr. Graves tell you that that – those suggestions came from someone else, or did he just simply tell you, I suggest this?

A I don't recall. I don't recall.

* * *

[3589]

Q All right. Now, based on that, is the prompting that you got – was the prompting that you got from Mr. Graves, was that necessary?

A Not really. I had intended to meet with Captain

Hazelwood. I wanted to make sure that I had my own evaluation, that I knew that – I felt comfortable that he was in pretty good shape, how he looked, how he chatted. I had some other things that I wanted to talk to him about. I also wanted to make sure that he understood that he had his opportunity for rehabilitation and that he cannot afford to have any further problem with alcohol or he would be disciplined.

* * *

[3593]

Q All right. You had – you then met with Captain Hazelwood in a conference room on the second floor of the Windham Hotel in Houston, Texas, near the airport. Would you tell the Ladies and Gentlemen of the Jury, as best you recall it, what your conversation was with Captain Hazelwood?

A Well, again, what I wanted to do and what we did was to talk with each other, and my intent in the initial conversation was to see how Joe was, how he responded, how'd he feel, and he – I thought he did quite well. I asked him, I remember, was he ready to go back to work, or something to that effect, and he was. I also mentioned to him that – brought him up to date a little bit on the activities associated with the Exxon Yorktown, the ship he was going back to, and some of the things that had been going on in the fleet, and also my expectations, one of which was that he needs to understand that he's had his opportunity and that he cannot have any further problems with alcohol or he would have – he would be subject to discipline.

[3594]

I also recall that we had a discussion about what type of support he may have or he may have planned, was he planning on going to any meetings when he got into port in order to continue to support his activity. I don't recall all the details of the conversation, but in general, that was what we talked about.

* * *

[3595]

Q And with that assumption, did you have any sort of a plan to watch Captain Hazelwood?

A Well, I had a plan that when he comes into port, I would try to visit the ship as much as I could, recognizing that I was – very short period of time, I was transferring out of that job, but I had planned to do that, and my recollection is I got to visit, I believe, on one occasion before I left my position.

Q Now, I asked you about your plan or your intention. Did you think that was adequate for the job?

A Yes, if –

Q Why do you think that your plan, your intent with respect to Captain Hazelwood was adequate to deal with the situation that you thought you had?

A Well, if – if Captain Hazelwood, assuming he was an alcoholic, which that was my understanding, then if he started to drink again, he wouldn't be able to – I don't believe he could control that. So my visiting the ship, I would clearly learn that he had a problem and I most likely would have a high probability of seeing that and talking with him.

[3596]

Q All right. Now, would you rely solely upon your own observations?

A Well, I had planned primarily to do that. I didn't ask anyone else to do that kind of thing.

Q But whether or not you asked them, did you think that you would be able to detect, other than from your own observations of him, any sort of problems that might crop up?

A Clearly. When I go aboard the vessel, I would be chatting with other folks and I know that I felt that I had the respect of others in the organization, that if there was a problem that I would have – that I would be made aware of that.

Q You think it's realistic to expect that people in the fleet – was it realistic for you to expect that people in the fleet would let you know if they saw a problem with Captain Hazelwood?

A I think so.

Q What's your basis for thinking that?

A Because I have been told in the past, when there was an individual that I referred to before that I had a – that had a problem, I was notified.

Q I want you to speak up a little bit more. I'm having trouble hearing you and maybe some other people are, too.

A Sorry.

Q My question is not your understanding of the disease of alcoholism. My question is, what basis did you have for

[3597]

believing that people that worked under you would let you know if they saw something amiss?

A Well, I believe that I had the respect to the organization and the rapport with the folks that they would tell me.

* * *

Q All right. You mentioned that you were transferring to your new job with project EXCEL, and you mentioned that that occurred sometime in September of 1985. Do you recall the months in which you met with Captain Hazelwood at the Windham Hotel?

A Yes, I believe it was in August, very early August.

Q All right. Now, when you were being replaced by Mr. Dwight Koops, was there an opportunity for you and Mr. Koops to have some sort of a transition?

A Oh, clearly there was. We did that.

Q And in the course of having that transition, did you have an occasion to talk to Mr. Koops about the masters that you had been and were supervising?

A Yes, I did.

Q Did you talk about Captain Hazelwood?

A Yes, I did.

Q Did you tell Mr. Koops anything about Captain Hazelwood?

A Well, I told him what I knew about Captain Hazelwood, that

[3598]

he was in rehabilitation and that he –

Q Let me stop you. You said rehabilitation. Did you tell him what kind of rehabilitation?

A I think I did, yes, for alcoholism. That was my understanding.

Q All right. And – and what else did you tell him?

A Well, I told him that what my plans were, I was going to try to visit the vessel and he may – he may want to consider that type of follow-up, and visit the vessel as much as I possibly could when Captain Hazelwood is on.

Q Now, after you told Mr. Koops about your understanding of what the treatment had been and – did you tell him when that treatment had occurred?

A I probably did, but I don't really recall.

Q After you told him that Captain Hazelwood was treated for problems relating to alcohol and you had this transition, then you went into the project EXCEL job; is that correct?

A That's correct. In fact, I was actually doing a little bit of that at the time.

Q Now, after that, did you ever have any occasion to see Captain Hazelwood?

A Yes, I did.

Q Where would you see him or where did you see him?

A I remember seeing him at least at – at our officers' conferences that we had.

[3599]

Q Did you take the trouble to make any observations about Captain Hazelwood and drinking?

A I did.

Q And what did you observe?

A I did not ever observe him drinking.

Q Drinking alcohol?

A Drinking alcohol.

MR. SANDERS: May I have just a moment, Your Honor? I don't have anything else, Your Honor.

THE COURT: You may cross-examine.

MR. O'NEILL: Thank you, judge.

CROSS EXAMINATION OF JOHN TOMPKINS (Live) BY MR. O'NEILL:

Q My name is Brian O'Neill, sir, we've never met before. And it is my custom – let me give you a copy of your deposition transcript, if I may approach. You picked up the story with regard to Captain Hazelwood in the spring of 1985, but you left out the first step in the story; didn't you?

MR. SANDERS: I object to that.

A I don't understand what you mean.

Q Well, would it be fair to say in February – in February of 1985, you knew that Captain Hazelwood was under some kind of investigation, and you either caused Captain Hazelwood to be notified that he was under investigation or that you notified

[3600]

himself that he was under investigation and that indeed the date was about February 11th of 1985?

A Yes, I – I knew that he had some – he was under investigation. I had no idea what the investigation was about.

Q And you caused him to be notified or you notified him yourself with regard to the investigation at or about February 11th of 1985?

A I was advised – requested by Mr. Ben Graves to let Captain Hazelwood know that he, Mr. Graves, was conducting an investigation, and I thought that's – and that Captain Hazelwood be aware that there may be some questions asked of other folks which he may hear about that associated with an investigation.

Q And Captain Hazelwood was given that information?

A Best of my knowledge, yes.

Q So as of about February 11th of 1985, Captain Hazelwood knew that his company was investigating him for something?

A Well, my understanding, it was some activity that took place in the past. I don't know, but that's – yeah, he knew some investigation was taking place.

Q And this is the same Mr. Ben Graves who appears in what we refer to as the Graves report?

A That's Ben Graves' signature, yes.

Q Did you know why he was under investigation?

[3601]

A No, I did not.

Q Did you ever acquaint yourself as to why he was under investigation?

A Well, because it was an issue that took place in the past, I understand, and nothing to do with my activities.

Q So would it be fair to say that you, his direct supervisor, knew he was under investigation by your company and you did nothing to acquaint yourself with regard to the facts of the investigation?

A That's true. I might add I – I asked that question and I recall that Mr. Graves suggested that I didn't really need to know, it had nothing to do with my activities, so I left it at that.

Q Now, I listened to your testimony as you started off today, and you testified that Captain Hazelwood told you that he was in treatment for alcoholism; do you recall testifying to that today?

MR. SANDERS: I object to that as a mischaracterization of his testimony.

THE COURT: The jury will decide whether it is or isn't a mischaracterization of his testimony, but you may inquire.

MR. O'NEILL: Thank you, Judge.

BY MR. O'NEILL:

Q That was your testimony today; wasn't it?

[3602]

A I think what I said was, what I recall, is that I got a phone call from Captain Hazelwood that he told me he was checking into a rehabilitation for alcoholism, as I recall it.

Q He was checking into a rehabilitation for alcoholism?

A That's my understanding.

Q And that's what he told you over the telephone?

A That's what I recall.

Q So at this point in time, you were on notice that he in February was under some kind of investigation, and now you were on notice that he had checked into a rehabilitation center for alcoholism?

A That's correct.

Q And you were his supervisor?

A That's correct.

Q Now, prior to 1985, you had not received any training in the supervision of rehabilitated alcoholics?

A No, I did not.

Q And when you received the call that Hazelwood was ready to come back to duty, you assumed that Hazelwood would be seen by the Exxon medical people before he came back to work?

A That's the normal procedure, as I knew it.

Q But you never spoke with anybody in the medical department to make sure that they indeed interviewed him, saw him, touched him?

A No, I was advised by the human resources group, who

[3603]

would be the direct contact with – with the medical department, not myself. Those are confidential issues and I did not get involved in the medical department.

Q And you didn't speak with anybody in the medical department about any special accommodations that might be made for Captain Hazelwood so that he could pursue an AA program or some other form of aftercare while he was at sea; did you?

A Not that I can recall.

Q And indeed, you as a supervisor made no provision for support or aftercare for Captain Hazelwood while he was at sea; did you?

A No, I did not. I queried as to what his plans were, as I

mentioned before, and –

Q This was at the meeting in August?

A That's correct.

Q I'm puzzled about the meeting in August. Your partner, was that Sheehy that met with him that same day?

A Captain Sheehy was the port captain for me, yes.

Q And where did Sheehy meet with him; do you know?

A To the best of my knowledge, if I recall, it was in the Windham Hotel.

Q Down in the cocktail lounge?

A I have no idea.

Q You don't know?

A Not that I can recall, that kind of comment.

[3604]

Q Now, what I'm puzzled about, this is Captain Hazelwood's trial testimony, we're going to go through his trial testimony for a minute, and I'm trying to figure out who said what to who.

He's describing the conversation and he's – and I'm interested in – I want to ask you a series of questions about whether these topics were discussed at this meeting with Mr. Tompkins. Very well, was AA discussed? No. Was aftercare discussed? No. Was the subject of your personal drinking discussed? No. Was the subject of drinking on board vessels or returning to vessels after having drunk discussed? No. Were you told not to drink – and then the testimony continues – with the exception of the parameters of the alcohol policy? No.

Were you told you were going to be monitored?

Well, in his inimitable fashion Mr. Tompkins kind of indicated to me that I was going to be watched. Did he tell you you were going to be watched? He didn't verbalize that, no. So he did not tell you that you were going to be watched? No. Now, Captain Hazelwood, as he testified here, said you didn't ask about AA, you didn't ask about aftercare, you didn't talk to him about his personal drinking. Is that consistent with your story, or do we have two different stories about the same event?

[3605]

A I don't think so, because what I – I did not talk to him about what he did in the past. I felt it was more important for us to look forward, and I also felt that I would close out that issue by just stating that –

that he's had his chance and that he's had his opportunity and now he needs to take care of himself.

Q So you didn't discuss AA or aftercare?

A So, I didn't – well, I did not discuss him drinking in the past. I did not discuss any reference to aftercare. I don't recall that. I do recall that I believe I discussed – asked him about what kind of monitoring he was – or what kind of support he was going to have or was he going to participate in any support efforts, whether I used AA – I think I did, but I can't a hundred percent recall.

Q So you don't recall?

A I don't recall what I said at that time.

Q Would it be fair to say that with regard to the issues of past drinking, AA, aftercare, personal drinking off the job, that those were the subjects that you did not directly discuss with him?

A I would say that that is fair to say, because I felt that they were in the past. And that by giving him the comment that he had – he has his chance, I felt that was all we needed to do.

Q But there wasn't a detailed discussion about his care, his

[3606]

progress with regard to rehabilitation, you just said, Joe, this is your last chance?

A Yeah, it was a little more than that, but I just – I did not get into an aftercare program, no, sir.

Q And at the time you said, Joe, this is your last chance, would it be fair to say that you, as his manager, were on notice, it was your understanding that he had been treated for alcoholism and that the company had conducted some kind of investigation with regard to the man?

A Could you repeat that again? I'm not quite sure exactly what you said.

Q At the time you said, Joe, this is your last chance, you, a management official with Exxon Shipping Company, were aware that he had undergone treatment for alcoholism, and that the company had conducted some kind of an investigation with regard to the man?

A Well, the purpose of my statement was that he had undergone, the best of my knowledge, treatment for alcoholism and that once he's had that opportunity, which was the policy we had at the time, then he could come back to work, assuming he was classified as fit, and he – best of my understanding he was, and then – but then he had no longer any chance. If he had any further problems, then he would be disciplined.

Q Any further problems, disciplined?

A Associated with alcohol, yes.

[3607]

Q Any association with alcohol on or off the job?

A I didn't get into differentiating between the two. I was primarily concerned about the general term on board the ship.

Q You knew that attending aftercare would be difficult for Captain Hazelwood because of the nature of his job; didn't you?

A Well, again, I didn't get involved with discussions, if I recall, concerning aftercare.

Q My question was, did you know that attending aftercare would be difficult because of the nature of his job?

A Well, certainly if – if he was to attend an AA meeting, he could only do that when he was in port, so I knew that.

Q With regard to Captain Hazelwood, you were of the view that Captain Hazelwood could not drink, period; isn't that right?

A Probably so, yes.

Q You did cogitate, come up with the idea of some kind of a monitoring plan; isn't that correct?

A My intent was to visit the vessel when he's on board as often as I could.

Q And you don't recall whether you, in fact, made a trip or two to his vessel before you turned the mantel over to Mr. Koops?

A I think I made one occasion, but I cannot be a hundred percent sure, but I think I did.

Q And with regard to implementing any monitoring

[3608]

plan with Captain Hazelwood, you didn't get the chance to implement the plan or formalize the plan; did you?

A I didn't get to use it very long because –

Q You were moving on to another assignment?

A – I was moving on to another job.

Q I think Mr. Koops is going to testify next so what happens there on out, I should ask – I should spare you your time and ask Mr. Koops questions; would that be a fair statement?

A That would probably be more appropriate.

Q I do, though, at the end of my outline, want to ask you about your meeting with Mr. Koops. And would it be fair to say that you didn't have any special meeting about Captain Hazelwood with Koops, but you had one meeting in which you discussed your ship's officers and the subject of Captain Hazelwood came up at that meeting?

A My recollection, we had a couple of opportunities to get together and the time that we got together concerning the personnel of the gulf coast fleet, we pretty much reviewed all of the senior officers, captain and chief engineers. At that time, I included the discussion with Captain Hazelwood or about Captain Hazelwood.

Q And when you discussed that with Mr. Koops, you put Mr. Koops on notice that Captain Hazelwood had gone through treatment for alcoholism?

A I – yes, I did.

* * *

[3611]

DIRECT EXAMINATION OF DWIGHT KOOPS (Live) BY MR. SANDERS:

Q Good morning, Mr. Koops. Mr. Koops, where are you now employed?

A I'm employed by Sea River Maritime.

Q And what is your job at Sea River Maritime today?

A I'm the ocean fleet manager.

Q All right. And where is your office located?

A In Benicia, California.

Q And as the ocean fleet manager, what are your duties and responsibilities?

A My primary duties are the safe and efficient operation of the ocean fleet vessels that Exxon owns, U.S. flagged, and of course supervisory responsibility for the people that man those vessels.

Q Does the ocean fleet include oil tankers?

A Yes, it does.

Q Does it include anything but oil tankers?

A Primarily oil tankers.

* * *

[3614]

Q Let's go straight to the transition period. Did you, in fact, have a discussion with Mr. Tompkins concerning Captain Hazelwood when you were in this transition period?

A Yes. During the overlap period, primarily September, we reviewed of course all the business of the fleet and we talked about each of the senior personnel, which of course included the masters and that included Captain Hazelwood.

Q All right. And in discussing Captain Hazelwood, did John Tompkins advise you that Captain Hazelwood had somewhat recently undergone treatment that included treatment for alcohol problems?

A Yes. When we discussed Captain Hazelwood, Mr. Tompkins told me that Captain Hazelwood had been through alcohol rehabilitation in the spring of '85.

Q All right. Now, at that time, did you ask Mr. Tompkins what Captain Hazelwood's diagnosis was?

A I did not.

Q Did you ask him what his treatment regimen was?

A I did not.

[3615]

Q Did you have any discussion with anybody in the medical department?

A No.

Q Did you have any access to an actual diagnosis?

A No.

Q What – am I correct in assuming that you take on this new job and you find out that one of the masters that you're going to directly supervise has recently been in some sort of treatment program or rehabilitation program for alcohol; is that good news or bad news for you?

A Well, it's bad news, but I make the assumption that when I hear alcohol rehabilitation, I assume that I have a captain that has a drinking problem, and that assumption leads me to the thought process that if he starts drinking again, things will probably go pretty bad pretty fast, and that's what I really needed to know.

Q All right. At the time, 1985, did you think you needed to know more than that?

A No, because I was really assuming the worst case scenario for the situation that Captain Hazelwood was in.

Q All right. And right or wrong, you assumed that he had an alcoholism problem that would manifest itself in some sort of loss of control; correct?

A That is correct.

* * *

[3616]

Q Well, now first – I've jumped a little ahead of you. Did you plan to watch Captain Hazelwood?

A Absolutely.

Q And what were you watching for?

A To see if there were any signs that essentially Joe fell off the wagon, if he started drinking again.

Q Okay. Now, having formed that intent or plan, did you – I take you back to where you were before I so rudely interrupted you, but what did you plan to do to set that in motion? How were you going to do this?

A As I was saying, I started to look at the network of people that I have in my organization and as I said, I had it then and I have it today, if I start with myself and I go down through my organization, which probably helps if – what my thought process was at that time, but I have line functional managers, which I guess people refer to them as port engineers and port

[3617]

captains, which in the primary reporting function to me, and then I have in the office personnel, people who handle personnel issues. I have agents who deal with the ships seven days a week, 24 hours a day, all sorts of questions and interface with them. I have contractors running around the ships constantly, particularly when they're in our ports and even riding the ships. We also have unannounced searches, we did them with dogs and did them with people on a fairly frequent basis. As part of the administrative load for managing the fleet, you have an awful lot of reports, performance reports that come in off the ships, and if you look at them very closely you can tell an awful lot about them. The cost reports, requisitions, performance of the vessel, and if you start to see things going a little bit screwy on them, then you start to become suspicious. So I had really a multifaceted organization that could reach out and stay close with the situation, I felt.

* * *

[3618]

Q Okay. Let me stop you there. What was this report that you got?

A The report that I'm speaking about, it had come from the port steward, which was Jim Shaw, and Bill Sheehy, which was my port captain at the time, said that he had heard from Jim Shaw that Captain Hazelwood was acting a little weird.

Q What did you think when you heard that?

A My immediate thought was that perhaps Joe's started drinking again, and of course Captain Sheehy and I had talked about it previously when I first came into the job, and so our thoughts ran pretty much parallel.

Q So you both had this thought or maybe even a fear that this translated into Joe's drinking?

A Absolutely.

Q Did you act on that?

A Yes.

Q What did you do?

A I asked Captain Sheehy – I had spoken to Jim Shaw and he became a little evasive. He didn't say alcohol, he became a little more evasive, so I said, Bill, I said, I really want you to go over and catch the Baton – the Yorktown in Baton Rouge which, if you know, is fairly close. I said, go over there unannounced, and that was the next port of arrival for the vessel, and I want you to spend as much time as possible on

[3619]

board the ship and see if things are okay. Bill, being a captain in the fleet, knows exactly what that meant. That meant to talk to a lot of people, to see Joe himself and spend as much time as possible. That's what Bill did and he came back to me, I recollect a phone call from Bill that told me that everything was in order based on his evaluation, and then he returned to the office. And we had some further conversations about the issue.

Q All right. In these further conversations, did you ask or suggest to him to do anything else?

A I asked Bill to talk to – on a low key basis, talk to Captain Hazelwood's friends and associates and –

Q Let me interrupt you just a second. Why would you ask – why would you ask a guy's friends to find out if the guy was – had fallen off the wagon?

A I knew – I knew Joe well enough, that there are enough people that care about Joe and people who do know Joe, I think I had a strong enough reading on the situation that people who do care enough and who do know Joe would certainly say something to – to Bill.

Q Did you know who his friends were?

A Yes, I knew who many of his close associates were.

Q Did you know those people?

A Yes.

Q In fact, were they employees of yours?

[3620]

A A lot of them were masters in the fleet and engineers.

Q Did Captain Sheehy make those kinds of contacts?

A He did.

Q Do you know specifically who he talked to or did you know at the time?

A He spoke to a number of people. When I spoke to Bill, and of course our offices physically were just a couple of doors away from each other, and we would speak from time to time about Joe Hazelwood and many indications I got from Bill was that Captain Hazelwood was fit, he was working out, he was in good shape. He did speak with one individual, specifically, that I found out after the grounding, that was Captain Ivan Mihajlovic.

Q Let's make sure we don't get things muddled up here. You asked him to talk to Captain Hazelwood's friends, and he did and reported back to you?

A Yes.

Q And later on, after the grounding occurred, some three, four years – well, let me back up. Strike all that. Do you know when this – when this report came from Mr. Shaw and when this visit Captain Sheehy made to the Yorktown at Baton Rouge, do you know when that was?

A The time frame, based on my best recollection, is '86, '87 time frame.

[3621]

Q Okay. And so therefore, the conversation you had with Captain Mihajlovic was some couple or three years later?

A Yes, I – in speaking with Captain Mihajlovic, would you like me to go into the details?

Q Wait a minute. I want to back up, though. But at the time that you asked Captain Sheehy to make these contacts, he had reported back to you the thoughts and observations of Captain Hazelwood's friends?

A That's correct.

Q But you didn't talk to Captain Mihajlovic at that time; correct?

A I did not.

Q You did talk to him later?

A Yes.

Q What did he tell you later?

A I was visiting Ivan's ship, the San Francisco down in Baytown, and that was July of '89. This is after the grounding where I'm looking after the gulf coast fleet, but – and also watching the west coast fleet. So I was visiting the San Francisco, and Ivan and I go back a number of years, and I knew Ivan when he was a chief mate.

It was my recommendation for him for a captain, so we had a close relationship and a great deal of respect for Ivan, and I know that Ivan is a close friend of Captain Hazelwood's; in fact, they live in the same area, and we talked about it

[3622]

before.

And we were talking about the grounding and – and there were allegations, of course, in the newspapers about alcohol and so forth, and as I was speaking to Ivan. I remember like it was yesterday. We were having lunch on the ship at a table, and I said to Ivan, I says, it is a shame, you know. And when he was – when Joe was with me for a year and a half in the gulf, I says, I had no indications; in fact, to the contrary. I said, it was just one indication that we followed up on, and Captain Sheehy had come back and said it was okay, but then I asked him to talk to friends.

And Ivan said, yes, he says, I was one of those guys. And he says – and you have to know Ivan to understand this, but he says, you know what I did, and Ivan, I think, has a very, very close and fond affection for Captain Hazelwood and very concerned about him and his family. Captain Mihajlovic's ship, the San Francisco went down to Chiriqui Grande in Panama, this is where we used to pick up crude on the Atlantic side. And he looked over and saw the Exxon Yorktown in anchor and Ivan got in a launch and went over to the Yorktown and went storming right up to Joe's quarters, is the way Ivan relates it to me, and literally tore the place apart. He was – he was looking for booze. Didn't find any, checked Joe, Joe looked okay, and I think Joe probably had his mouth open by now, and Ivan walked off the ship, got back on the launch and went back to his ship.

[3623]

Q Did Captain Mihajlovic tell you at that time that he had reported that to Captain Sheehy at the time that it occurred?

A I believe he said he mentioned it to Bill and that was part of his overall report to me, I would assume, when Bill reported back to me.

* * *

A No. As a matter of fact, it would probably be worthwhile to the testimony here, in speaking with Joe, Joe and I developed a – I got to know Joe probably more than most skippers in the gulf coast fleet at the time. I was the new kid on the block, I had come from engineering management and taking over gulf coast fleet, I was the new kid on the block. And Joe, of course, being Joe, was going to put me through my paces, but coming from New York, I was up to the challenge, so I took him on and we got to know each other pretty well. We were fairly direct with each other, as New Yorkers are, and so

[2624]

I – I asked him about a lot of things, procedures and policies. Being a little bit new to the game, I asked him some thoughts, and of course he always volunteered his thoughts about some of the policies that were in place. It was a good, frank relationship, and I liked Joe. Joe was well read. I liked his intellect. I liked his frankness. He was a good sounding board and so we –

Q Did you form any – from this relationship, did ou form any opinion as to how he was doing with respect to this problem for which he had been treated?

A Yeah, by talking the way we did, I got to know the man pretty well and I wouldn't – I wouldn't diminish the relationship by saying I was there to watch his eye/hand coordination, but obviously as I talked to him and got to know him a little bit better, I started to understand the man, I also understood his behavior. So it became pretty easy for me or a little bit easier with him to see any aberrations or any changes in the behavior for the next year and a half.

Q Did you see any?

A None. In fact, if anything, I counseled Joe on some of his performance characteristics that are reported in his performance report and he was working on those, and in my estimation, in the year and a half, I saw a great deal of improvement, at least an effort to improve in those areas.

Q You were kind of tough on him, though, weren't you, on the

[3625]

rankings?

A I was. Joe is a seaman and probably one of the finest that we had. His seamanship skills were very,

very good. Some of his dislike for some of the paperwork and such, I needed to see some more improvement. I didn't have a long enough running time on Joe. You don't like to make major movements in seriatim rankings unless you're sure. Worst you can do is move people out on the list, you want them to steer you out so I needed a little bit more running time on Joe. I had seen him a year, year and a half and you figure he's only on the vessel half that time, so before I made any major moves on Joe on the seriatim, I felt comfortable with where he was, which was the – the bottom third kind of in the upper part of the bottom third. And I could see if we stayed together probably if he continued his progress, moving him a little bit more.

Q Now, you have described for the Ladies and Gentlemen of the Jury the relationship that you had with Captain Hazelwood when you would visit the ship. Did you try to visit his ship often?

A Yes, I did. My style of management in running a fleet is to visit ships as much as possible. You need to smell and feel and touch, and I enjoy that part of the job. I especially enjoyed visiting Joe and obviously with this knowledge, I tried to spend more time with Joe than the others.

* * *

[3631]

Q Did you have a chance to observe him, though, at any of the conferences after he left your fleet?

[3632]

A I did.

Q Did you notice whether or not Captain Hazelwood was drinking at these conferences?

A Only he had a passion for Perrier and ice tea, as I remember, and those are the only two drinks I ever saw him drink.

Q Did you take particular note of that?

A Yes.

* * *

Q This is your deposition transcript, in case you need it. You have – you testified here today some knowledge with regard to alcoholism; isn't that a correct statement?

A Yes.

Q And you realize that alcoholics have to admit that they're alcoholics in order to move forward with their treatment?

A Yes.

Q And you understand that alcoholics are in fact never cured?

A Yes.

Q And you understand that the relapse rate for alcoholics is better than 50 percent?

A Yes.

Q And you testified a little bit about these officer conferences that you'd go to and see Captain Hazelwood.

[3633]

You're aware of the fact that individuals who have an alcohol dependency problem attempt to hide that fact; don't they?

A Yes.

Q It's called masking; isn't that right?

A That's correct.

Q And at some point in time, you were put on notice that Captain Hazelwood had gone through alcohol rehabilitation?

A Yes.

Q And you don't know or you didn't follow up and ask when he'd been in rehabilitation; did you?

A I was told that it was the spring of '85.

Q Did you know the details of his program?

A I did not.

Q Did you know the details of his aftercare program?

A I did not.

Q Did you know whether he was attending AA or not?

A No.

Q Did you know why he went into alcohol rehabilitation?

A No.

Q Did you ever speak to anybody in your human relations department, Dan Paul, who came in here testified he was the – the company officer charged with responsibility for this particular topic, did you ever talk with Dan Paul about the subject of Captain Hazelwood and alcohol rehabilitation?

A No, I did not.

[3634]

Q Now, you testified here today, you started off by saying it might help the testimony here, and then you launched into a discussion in which you said we were direct with each other, as New Yorkers are, it was a good, frank, relationship. Do you recall testifying to that today?

A Yes.

Q Now, did the two New Yorkers talk about, between each other, the captain's alcohol rehabilitation?

A We did not.

Q Did you talk about the subject of alcohol?

A No.

Q Did you talk about the subject of AA or aftercare?

A No.

* * *

[3638]

Q If you had had a report to you, I don't want to talk about the standards to which you bring to this situation, you testified here today if there was any indication that Captain Hazelwood had resumed drinking, you would have yanked him in a New York minute; do you recall that?

A Yes.

Q What if it was reported to you that he was ordering beer over a walkie-talkie at, for example, Portland Shipyard, would you have yanked him in a New York minute?

A Assuming that the facts that you cite are true, what you need to do and what I'd do and what I would always do is investigate the situation. I'd talk to the people involved,

[3639]

check the context in which that – that radio conversation or whatever you said it was took place. I'd look at the whole situation.

Q Let's discuss that a little bit. Talk to the people involved. You'd talk to, among other people, the suspect, because you're a direct and forthright individual, you'd say, I have a report that this incident happened, what's up; is that a good first step?

A Absolutely. You'd confront the individual directly.

Q Always confront the individual directly; isn't that right?

A Sir?

Q Always confront the individual directly?

A Well, as part of the investigation, I think that's an integral part of any question you have.

Q It's both good management and part of being a decent human being?

A That's correct.

Q Did you confront Captain Hazelwood about the Shaw incident directly?

A I did not.

Q Okay. Now, with regard to this hypothetical I've given you about the Portland Shipyard, let's assume that you got a report not only that beer was ordered over the walkie-talkie by, for example, Captain Hazelwood, but there were – and the beer was Henry Weinhards, but there was empty Henry

[3640]

Weinhard beer cans in one or two locations on the ship, heightened sense of awareness?

A Yes.

Q Go talk to the man?

A Part of the investigation.

Q Do you know, with regard to the Jim Shaw incident, whether other potential witnesses with regard to the situation as to Captain Hazelwood acting weird were interviewed? Do you know?

A I asked – I do not know specifically.

Q Now, Mr. Shaw's testified here by deposition and he says that he reported – and I don't recall to who in management, so I'm not going to say it was you or I'm not going to say it was your port captain, but Shaw says that the report consisted of Joe had fallen off of the wagon, Joe was drinking, was that ever reported to you?

A Captain Sheehy reported what I testified, and I'm afraid I'm misleading the jury in my eagerness to try and give you a response in that last question.

Captain Sheehy told me – when he came back he talked to a lot of people. Now, Captain Sheehy and I know each other very well and he knows what I require, as does everybody else in the fleet, and he knows exactly what I'm looking for, so the response, well, were other people talked to or interviewed, I feel quite certain that Captain Sheehy talked to a number of people on the ship like I asked him to.

[3641]

Q Let me ask you a question about that. Captain Sheehy's testified here. If Captain Sheehy did not investigate the people who were involved in the incident that Mr. Shaw related, witnesses, participants, would Captain Sheehy have been remiss in his duties?

A I don't know that he did that, but the answer to your –

Q Assume he didn't, would he have been remiss in his duties?

A The answer is yes.

Q That would have been a reckless act; wouldn't it?

A He would have been remiss in his duties.

* * *

[3644]

Q Now, when Captain Hazelwood was transferred to the west coast, you did not tell Borgen that he had to monitor Captain Hazelwood; did you?

A I did not.

Q And captain – Mr. Borgen did not indicate to you that he was going to monitor Captain Hazelwood for alcohol use; that's a correct statement; isn't it?

A That's a correct statement.

Q Now, with regard to your observations of Captain Hazelwood, you have testified here today that you got to know the man pretty well, I got to understand him; do you recall that?

A Yes.

Q You car-pooled with a fellow named Ellenwood?

A I did.

Q On a daily basis from October of 1985 to April of 1987; isn't that a correct statement?

[3645]

A Yes, I missed the days, but I car-pooled with the gentleman.

Q On a daily basis you? May have missed a day here or there, out of town?

A Yes.

Q You had much more contact with Ellenwood than you had Captain Hazelwood?

A On a day-to-day basis, yes.

Q And you were a friend of Ted Ellenwood?

A As I am a friend of Joe Hazelwood.

Q Captain Hazelwood. And it turned out that Ellenwood had an alcohol problem; isn't that right?

A In 1988, it was reported he turned himself in for a program.

Q You had daily contact with Ted Ellenwood and made no observations at all with regard to Ted Ellenwood's problems?

A Made no observations of Ted Ellenwood because there was no knowledge, prior knowledge that he may have had a problem, where as there was that knowledge that I had of Hazelwood.

Q You were on notice with regard to Captain Hazelwood?

A That is correct.

* * *

[3675]

Q You have a conversation with port Captain Sheehy, he tells you about a rumor that Joe is drinking again, or something like that, and he mentions a man named Shaw, a

[3676]

Jim Shaw; is that correct?

A That is correct.

Q And he asked you to look into it when you get the chance, or words to that effect?

A Words to that effect, yes.

Q All right. Now then, tell us, then, about from that point on how the search took place; that is, where did you find Captain Hazelwood and so forth?

A All right. I was on the San Francisco, once again, and we were at the loading buoy in Chiriqui Grande. Loading buoys, just one buoy, you tie up one line and they have a hose that comes around and they lift it up and put it on a manifold, very simple system. Captain Sheehy, Captain Hazelwood's ship had just took arrival and had anchored at Chiriqui Grande, it's a nice, like, bay. I know the pilots, we been running down there quite often, so I said could I get a launch there and go over and see Joe. Said no problem, you know, so they took me over there.

When I went over there, I talked to Joe. I said, hey Joe, you know, I heard about this rumor. This rumor's not good, you know, this company is very adamant about this and they're going to can you. And Joe, figuring it's just another rumor and here we go again and all that, said something, and people that know me know that I have occasional temper.

Q Occasional temper?

A Occasional, yeah.

[3677]

Q That's good. Occasional?

A Occasional. I'm not quite the beast you all heard before, but I went over there, I talked to him and I started to get – you know, this is serious, you could lose your job. And he said, hey, if you don't believe me, you're welcome to take a look in my room, which I did.

Q A look in your room, let's talk about that. On the – he was on the Yorktown, that's a smaller vessel than the Valdez; is that correct?

A That is correct.

Q On the Yorktown, was there a – by the way, something that may be not clear here, most of us, we go to work in the morning, we come home at night, we have a workplace and a place to come home and eat and sleep and have a drink or whatever we do, and when you're on board a vessel, your workplace and your home place is the same place; is it not?

A That is correct.

Q Now, on the Valdez, we've learned, there was a living room – or what do you call it, stateroom?

A They have a stateroom and they have your bedroom.

Q A bedroom?

A Yeah, and then an office.

Q Okay. So you have a little sitting room and a bedroom?

A It would be the office, and a sitting room would be on the Yorktown, for example. Then the bedroom is adjoined, but

[3678]

just off to the side, that's your bedroom.

Q So you have two rooms?

A Right.

Q You have what we'll call the office and what we'll call a bedroom?

A Exactly.

Q Now, did you search the office?

A Yes, I did.

Q Did you look in drawers?

A Yes, I did.

Q Did you look in refrigerators?

A Yes, I did.

Q All right. Did you then go into the bedroom?

A Yes, I did.

Q Did you search the bedroom?

A Yes, I did.

Q Did you find anything of alcoholic beverage at all?

A No, I did not.

Q How did Joe look?

A Kind of surprised.

Q Pardon me?

A I said he looked kind of surprised.

Q Otherwise – I mean, did he look like he might have been drinking?

A No, not at all.

[3679]

Q Anything like that?

A No.

Q Good shape?

A Good shape.

Q You think this was about the summer of 1986?

A That is correct.

Q Now, following this, did you make any report on your, what I'll call, investigation?

A I wouldn't call it investigation.

Q Well, on your search?

A On my search, all right. I went up – back to Baton Rouge, that was our regular run, Chiriqui Grande up to Baton Rouge, and Captain Sheehy happened to be up there again. I can't recall whether it was the very next trip or the trip after, but any way, it was in Baton Rouge. He came on and I said, you know, that's a lot of baloney and, you know, I just went on the ship there, and I don't know whether we're still friends or not, but there's nothing on here, there's nothing I've seen. I mean, he didn't know I was in port, we don't – can't keep in touch with each other, so it was totally by surprise. And that was it.

Q So you told him that this Shaw report, rumor, whatever you're talking about, was a bunch of baloney?

A In those words.

* * *

[3713]

DIRECT EXAMINATION OF HARVEY BORGEN (Live) BY MR. NEAL:

Q Mr. Borgen, how are you employed, sir?

A I'm employed by Sea River Maritime, Inc.

Q How long have you been employed by Sea River or Exxon Shipping Company or one of the Exxon entities?

A It'll be 31 years this month.

Q So you first became employed by Exxon in 1963?

A That's correct.

* * *

[3720]

Q Now, then, I want to direct your attention to a third thing. There's been something in the testimony here about so-called Henry's, or somebody said to be Captain Hazelwood ordering Henry's aboard a walkie-talkie – or through a walkie-talkie. You understand what I'm talking about?

A Yes, sir.

Q Did you happen to have a conversation with a Mr. Herb Leyendecker regarding this matter?

A Yes, I did.

Q Was that in person or by phone?

A By phone.

Q All right. Again, tell the Ladies and Gentlemen of the Jury and the Court in substance what Mr. Leyendecker said to you and what you said to him?

A Mr. Leyendecker said that while he was aboard the Exxon Valdez at the Portland Shipyard –

Q And by the way, the Valdez was in dry-dock at that time; correct?

[3721]

A Yes.

Q All right. Go ahead with the conversation.

A That he overheard on the walkie-talkie Captain Hazelwood ordering beer. Herb then, the next day, confronted Captain Hazelwood and said he had overheard ordering beer and we do not allow beer on our ships, and Captain Hazelwood said, no, it wasn't for the ship, I was ordering the beer for a crew party ashore, and reassured Herb at that time that that's what he was doing.

Q Did Mr. Leyendecker say anything to you about whether he asked Captain Hazelwood if he were drinking or not?

A Well, I asked Herb if in his observations of Captain Hazelwood – because he had been there, this was a second trip to the shipyard to visit, see how things were going, any indication in his eyes that Captain Hazelwood was drinking or appeared to be impaired in any way, shape or form, and Herb assured me that in his judgment, he was not.

Q Okay. Following this conversation, did you have occasion to meet or to talk to Mr. Paul Myers, your ship group coordinator regarding this?

A We did have a discussion after about this specific incident.

Q Do you remember the – that conversation?

A Well, I'm – I don't recall all the specifics of the conversation, but what I do recall telling Paul was as far as I

[3722]

was concerned, Herb's investigation of this particular incident was satisfied – satisfactory.

MR. NEAL: You may examine.

Excuse me just a moment, Your Honor. Hold on just a moment, Your Honor.

CROSS EXAMINATION OF HARVEY BORGEN BY MR. O'NEILL:

Q I am going to cover with you, because of the rules of the game that we play with, exactly the subjects that Exxon just covered with you; okay? Now, the first conversation that you just talked about was the 1987 conversation between Martineau and Sheehy regarding Captain Hazelwood's proposed transfer to the west coast, that's the first thing you talked about; right?

A Yes, sir.

Q Let's talk about that for a minute. You stated that you had known that Captain Hazelwood had been through alcohol rehabilitation?

A Correct.

Q And you learned that at a fleet conference sometime in '85 or '86?

A I want to say '86.

Q '86? And you don't specifically recall how you found out about it, but it was, in any event, a subject of conversation between you and somebody else at a fleet conference in 1986?

[3723]

A Well, it would have been – I would have heard it from someone, yes.

Q Okay. And then you had this conversation with your counterpart on the gulf coast, and he said he was not drinking and clean. Is that a correct statement?

A That's correct.

Q So it was important to both of you, I assume, that he was not drinking and that he was clean?

A Yes.

Q And then there was a joint decision made between you and Mr. Koops to reassign Captain Hazelwood?

A Yes, sir.

Q I want to talk briefly about that decision, and what you did or didn't do with regard to that particular decision; okay?

You didn't talk to the human resources department about the rehabilitation; did you?

A I did not.

Q You didn't talk to the medical department about the rehabilitation; did you?

A I did not.

Q You didn't talk to the human resources department or the medical department with regard to what a proper monitoring program might be for this captain in this situation; did you?

A I did not.

[3724]

Q You didn't go back and find out the details of his rehabilitation or the details, if any, of any aftercare program; did you?

A I did not. Other than the monitoring that Dwight Koops said that they had done.

Q And you didn't talk to the man in person about how he was doing, how he was doing with regard to his recovery or that subject, the man in person, I mean, Captain Hazelwood?

A No.

Q In any event, you were on notice that he had gone through an alcohol rehabilitation program?

A Yes.

Q Second conversation, the Doug Larsen conversation, your instructions to Mr. Larsen were to take a look at job performance and paperwork when the ship came in?

A Correct.

Q And that was the sum and substance of your direction to him?

A I also told him to observe him to see whether or not Captain Hazelwood appeared to have been drinking at all.

Q While – but – okay. Thank you. Thank you. This was while the ship, though, came into the harbor?

A And – yes, while it came into the harbor.

Q Okay. And I listened to your testimony, you didn't have him check the captain or you didn't tell him to check the

[3725]

captain when the captain came back from leave or came back from shore to get on the ship, you were talking about when the ship came in?

A And while it was in port.

Q Do you know, is this in Long Beach?

A Yes, sir.

Q Do you know of a place in Long Beach called the Yankee Clipper or the Yankee Sailor, somewhere near where the terminal is?

A I don't recall.

Q Do you know if in fact –

A But it's not – the ship is not at a terminal, it's actually at anchor.

Q Then they bring a launch in?

A The launch comes in.

Q And where the launch gets off, are you aware of a bar called the Yankee Clipper or Yankee Sailor, are you aware at all that your crew members get together there and have a couple of beers?

A No.

Q You're not aware of that?

A No.

Q And he reported to you that the paperwork was impeccable and that the captain was a team player and doing well?

A Yes, sir.

[3726]

Q But he never reported to you that he talked to the captain about his emotional health, emotional well-being, recovery, whether he was drinking or not drinking; did he?

A That's correct.

Q Now, I want to talk about the Henry's incident briefly and then we'll get you out of here; okay?

A Fine.

Q At the time of the Henry's incident, Steve Day worked for you or worked in the same area?

A He – yes, he did.

Q And –

A Not directly for me, though.

Q Sort of a different chain of command but co-located?

A Yes.

Q And Mr. Leyendecker was from what you guys call Mecca or Houston?

A Yes.

Q That is right?

A Yes.

Q He was there, too, in the Portland Shipyard?

A Correct. He's the repair manager.

Q And with regard to the report by Mr. Leyendecker to you, you testified today that Mr. Leyendecker reported to you that Mr. Leyendecker overheard Captain Hazelwood ordering beer?

A Correct.

[3727]

Q And was this done over the telephone?

A Walkie-talkie.

Q No, I mean not the ordering but the Leyendecker report to you, was that done over the telephone?

A Yes.

Q And then Mr. Leyendecker – was there a second call with Mr. Leyendecker?

A I believe it was only one.

Q One call, so Mr. Leyendecker said, I heard Captain Hazelwood ordering beer; I followed up, and the captain told me that it was being ordered for a crew party ashore?

A Correct.

Q And then counsel for Exxon asked, did Mr. Leyendecker report to you that he'd talked to Captain Hazelwood about drinking, and your answers were that he made an observation of Captain Hazelwood?

A Yes.

Q And I assume because of your answer to the question that Mr. Leyendecker did not report to you that he in fact talked to Captain Hazelwood about whether he was drinking again or not?

A I don't recall that.

Q So with regard to the Henry's incident, the sum and substance of your investigation as the west coast fleet manager was fielding the call from Mr. Leyendecker and passing on the substance of what Mr. Leyendecker told you, and then coming to

[3728]

the conclusion that this is enough, I'm going to move on to something else?

A Correct.

Q Now, was Mr. Steve Day – then there was a conversation with Myers, Myers came in and reported this to you, and then you told Mr. Myers that it had been taken care of?

A What I told Mr. Myers was that I knew about the incident and Herb had investigated that incident and I was satisfied with the investigation that he had undertaken.

Q And then that was – and then that's it, all of the conversations on the topic?

A Yes, sir.

* * *

[3730]

DIRECT EXAMINATION OF DOUG LARSEN

(Live)

BY MR. NEAL:

* * *

[3733]

A Mr. Borgen advised me that the – one of the alternate positions of master of the Exxon Valdez was open, was being replaced by Mister – Captain Hazelwood. He would be coming out working on the west coast, coming out from the gulf coast. Further to that, he advised me that Captain Hazelwood had a – effectively, a substance abuse problem in the past, and it was indicated it was alcohol related, and that he requested me to monitor him while he was – while his vessel came into port, to

[3734]

notify him if there was any problems, behavioral cues, his paperwork was out of sync, if his arrivals were off, his performance was other than the normal expected of the position, if I noted if he had been drinking on any occasion, along those lines, again, just generically any problems.

Q You understood what you were supposed to do?

A Yes, sir.

Q All right. Following that conversation, did you undertake to perform the task of monitoring Captain Hazelwood as requested by Mr. Borgen?

A I did.

Q How would – what did you do to fulfill that role?

A Follow through with all aspects of his request. I first met Captain Hazelwood when he was – met with him when he joined the west coast. I don't know if he was already on the ship or he was about to join the ship. I had a lunch – a lunch with him at a shoreside facility in Long Beach. I met with him and another captain from another ship, who was going on a paid leave or leaving, and we had lunch. That was a Saturday, I believe, Saturday afternoon.

I had lunch with him, I had a beer, I think one of the other captains had a beer, possibly. Captain Hazelwood had Perrier. As follow up, as an example, I notified Mr. Borgen of the lunch, welcome to the west coast, and just told him that we had lunch and he wasn't drinking, he was having Perrier.

[3735]

During subsequent meetings, during that roughly one and a half year period, the Valdez called into port roughly a dozen times.

Q Roughly how many times?

A A dozen. Roughly on a one month cycle, the Valdez went to Panama and stopped in Long Beach on the northbound trip for ballast, and coming from a foreign port, customs clearance needed to be taken care of, immigration work for the crew leaving, being repatriated, crew that were joining and what have you, had a close interface with Captain Hazelwood preceding the actual arrival of the vessel, both in exchange of telexes, communications, discussions on the MARSET radio about the upcoming port call, attending to the – advising us of what port requirements he was going to need, repairs, stores, fuel, et cetera. Boarded the vessel, either myself or the agent who reported to me, his name was Ron Kelly, the two of us went – one or the other of us would attend to the entry of the vessel seven days a week, 24 hours a day, didn't matter what time it was, one in the morning or whatever.

Q Speak up just a little bit.

A I'm sorry. It could have been any time of the day. We boarded the ship with the customs and immigration personnel. Proceeded to the bridge and spent roughly one to two hours on board the ship in the master's office and stateroom area. During that time, I had – I was in close proximity, the

[3736]

occasions that I boarded, personally boarded the vessel for customs entry. I had – I was within inches or a foot of Captain Hazelwood. Never had any odor of alcoholic beverage on him at all, completely control of his vessel, always on time, paperwork was absolutely impeccable, the best I've ever seen, very well organized, very well laid out, quick turn around, quick entries, although I think Harvey Borgen mentioned, it's a real team – teamwork between all the – the agent, the repair gangs, and everybody else that was attending the ship and the ship's personnel, trying to get the ship in, attend to the various aspects that were going on, he managed his ship very well in port.

Q Did you – so there are a number of occasions, then, when you spent a good bit of time with Captain Hazelwood in close contact?

A That's correct.

Q And this is when the vessel was coming into port?

A That is correct.

Q Would the vessel be in port at times several – several days at a time?

A Typically the ship would come and spend between 12, 12 hours, unless there was extended repairs. On occasion I believe the ship was in port up to maybe a week.

Q A week?

A Correct.

[3737]

Q On any of those occasions you were with Captain Hazelwood, did you see any sign of any untoward conduct, any sign of drinking, any sign of anything like that?

A Absolutely not.

Q Did you report your observations to Mr. Borgen?

A I did.

* * *

[3741]

Q And are you familiar with a bar called the Yankee Whaler or the Yankee Clipper at or near where the launch comes in?

A I'm aware of it.

Q And are you aware that on occasion, crew members when they're departing from a tour of duty would get together there and have a couple of beers?

A (Shakes head from side to side).

Q You're not aware of that at all?

A Yankee Whaler, Clipper, is in a line of restaurants and boutiques called the San Pedro

Ports of Call, and crew members do get off with other visitors and tourists, and they will go through the area, do some shopping, stop, have lunch or dinner, stop for beer or whatever. I'm sure they did, I'm sure. There's no general meeting spot for crew, if that's the question, no. That I didn't know.

Q Here you were the monitor and you didn't know that?

A That's correct.

Q Did you ever ask Chuck Kimtis the chief engineer on the Valdez if he ever drank with Captain Hazelwood at the Yankee Whaler or the Yankee Clipper?

[3742]

A No, I did not.

Q How about Nate Carr?

A No, I did not.

Q How about Pat Enright?

A No, I did not.

Q How about Katherine Haven?

A No, not Katherine Haven.

Q How about Carlos Hogan?

A No.

Q So as the monitor you were unaware that these crew members and the captain would go over to the Yankee Whaler and have a couple of beers?

A I was unaware of that.

Q He wasn't hiding the fact that he had a couple of beers with anybody, and indeed he's testified he openly did it; you weren't aware of that?

A I didn't follow Captain Hazelwood around if he came ashore, no, I did not.

Q Now, was Kevin Dick or Bob Sturgis, were they assigned to the Valdez when you had this '87 to '89 duty?

A I don't recollect. It's possible they did.

Q Did you ever ask them whether they drank with Captain Hazelwood?

A No, I did not.

Q How about Mr. Kunkel, did you ever ask Mr. Kunkel if

[3743]

he drank with Captain Hazelwood?

A No, sir.

Q Did you ever receive any training in monitoring people who'd been through alcohol rehabilitation?

A I have had certain background training at the Merchant Marine Academy, as far as general awareness of substance abuse problems. Further to that, when I first became employed with Exxon, was in the marine with Exxon Company U.S.A., at the time we had a one week orientation when I first came on board for anyone that was coming aboard in a sailing capacity. During that orientation they had an overview of company policy and what was allowed, what was not allowed, and beyond that, there was a – one – had a one week management course that we had with officers, engineers and deck officers to discuss in part, not specifically for that, but part of that was to deal with identifying and how to handle problematic situations.

Q So you have had training?

A Some. Videos on board the vessels, general awareness more than anything else.

Q So you're aware that with regard to alcoholics who have been through rehabilitation, there's a high rate of relapse?

A I was unaware that Captain Hazelwood had been through rehabilitation.

Q My question for you is, are you aware of the fact that alcoholics who have been through rehabilitation have high

[3744]

rates of relapse?

A Yes.

Q And you're aware that alcoholics learn to mask, and that's the technical term used, mask both their drinking and the effects of their drinking?

A I assume so, yes.

Q And now I want to come back to what you said in response to my question two or three questions back. You said I was unaware of the fact that Captain Hazelwood had been through rehabilitation. So you were the monitor and nobody told you that Captain Hazelwood had been through alcohol rehabilitation?

A I might –

Q Is that a correct statement?

A – take exception in stating that I was the, quote, unquote, monitor.

Q You weren't the monitor –

MR. NEAL: Let him finish.

MR. O'NEILL: Go ahead. Are you finished?

THE WITNESS: What was the question again, if you want to rephrase it.

MR. O'NEILL: I'm happy to rephrase the question. Could you go back and read what he was saying right before counsel's objection?

(The last question and answer were read back)

BY MR. O'NEILL:

[3745]

Q Your statement was, I take exception to stating that I was the, quote, unquote, monitor. She just read that back; did you hear that?

A Okay.

Q You were not the monitor; were you?

A Words in my mouth, I was asked by Mr. Borgen, given the backdrop that Captain Hazelwood had a problem, didn't go into detail to it, other than just to tell me there was a problem associated with alcohol, and to keep a close surveillance, report anything concerning his performance, if there was any relapse or if there was a problem, whether it was drinking or the performance of bringing the ship in and out of port.

Q So you didn't consider yourself to be the monitor; did you, or a monitor, and you weren't trained to be a monitor for somebody who had been through alcohol rehabilitation; were you?

A That's kind of a vague question. I don't know if I can answer that question.

Q Then don't.

A I was asked to monitor, oversee, to report, and I did that.

* * *

[3765]

DIRECT EXAMINATION OF JAMES ROUSE (Live) BY MR. LYNCH:

Q Mr. Rouse, you're employed by Exxon?

A Yes, sir, I am.

Q How long have you been with Exxon?

A Joined Exxon 32 years ago this week.

Q And what is your current job, sir?

A I am the manager of Exxon's public affairs department.

Q As of March 23, 1989, what was your job title?

A I was the manager of the human resources department.

* * *

[3777]

Q Now, how, in your opinion, did telling the employee that if he went out to rehab he would get his job back or be assured of employment, and I guess future status on the job wouldn't be jeopardized, how did that contribute to the safety of coworkers and the public?

A Well, the view was that if you did not offer them the opportunity to come back to their job, if in fact you penalized them for coming forward and saying they had a problem, then they wouldn't come forward, then you got a situation where you have somebody with a serious problem that you don't know about, and that has a very, very deep concerning for us from a safety standpoint.

* * *

[3778]

Q Okay. And with reference to the status of the policy as of January 1, 1985, could you just give us a general description of how you went about determining where this policy fit in the industry generally?

A Well, obviously we had input from our medical department, and I'm aware of the fact that they reached out to other medical departments and other companies to see how they were doing. I'm personally involved in several groups, a group called the Business Round Table Employer Relations Committee, a business round table made up of perhaps a hundred CEOs of major companies in the country. I was on a committee called Employee Relations, and we frequently talked about substance abuse policies, problems and that sort of thing. I was chairman of that committee in 1986. I'm in an organization of – Labor Policy Association, and it does research on labor and personnel policy issues, had many discussions about drug and alcohol policies so I was, I think, generally familiar – my view would be I was generally familiar with drug and alcohol policies of other companies, as well as advice from medical experts and others in the field.

Q Now, a Dr. Masters has come into this court and he

[3779]

testified that in the mid '80s, there was a recognized standard that employees who went out to rehab, if they held a job in a safety-sensitive position, that the employer should get directly involved in supervising aftercare.

In your research as of 1985, was it a standard in industry that employers get involved in aftercare of employees who held jobs in safety-sensitive positions?

A I would say not. I would say that this is – you're almost saying shouldn't we be monitoring what they do on their personal time, which – should we be monitoring their personal lives, and I don't view that as a responsibility of the company. The responsibility of the company is to ensure that their job performance is not deteriorating because they have those kind of problems, and if it becomes a job performance issue, then yes, I think it would involve the company. I respectfully disagree with the doctor's view on what was state of the art at that time.

Q Well, could you address what you did to learn what others thought about this? In other words, were these practices being followed in other companies?

A My – my view would be that they were not, in the companies that I'm familiar with.

Q And that included the 150 plus companies that participated in the business round table?

A Yes, sir, that's correct.

[3780]

Q And were you making an effort to determine what the state of the art was?

A Yes, sir. We did from time to time run surveys to see what the state of the art was.

* * *

[3780]

Q Now, if you followed what apparently is Mr. O'Neill or Dr. Masters' advice, you would say when an employee came back from rehab, well, you have to come in and check in with us that you've been going to see your doctor, that you've been going to AA meetings. Did you ever consider doing that?

A At that point in time, no, sir.

Q Did you know of companies in your industry who were doing it?

A No, sir. I don't think any of them were.

Q Do you know of any professional advice you received to

[3781]

do that?

A No, sir. In fact, I think we probably received professional advice that was the opposite, from our law department, for example, who would have probably counseled us and did counsel us that that could result in charges of discrimination.

* * *

[3781]

Q Did you consider – did you make studies to determine what the proper way to handle the employee who had returned from rehabilitation was, as of the time in 1985, about midway through the period of time that we're talking about?

A Our view was when they returned from rehabilitation, we should put them back on the job that they came from, using good solid management judgment, and then use our normal supervisory oversight of their job performance.

Q Did you have experience in Exxon, that is to say, did the corporate experience give you assurance that that method and procedure was adequate to identify problems with an employee who resumed or possibly resumed the use of alcohol or any other substance after returning to work?

A At that point in time, as the senior human resources official in Exxon U.S.A., I was very comfortable that we had a policy that did what it needed to do to balance the rights of those individuals, as well as do the most we could to protect the safety of the public.

Q And you've heard some questions this morning about

[3782]

whether people were trained, and I think the question was put to Mr. Larsen a few minutes ago, were you trained to monitor a person who had returned from rehab? Did you have procedures to train managers at Exxon to deal with substance abuse problems, whether they be alcohol or other substances, of employees who were working in Exxon premises?

A Yes, sir, I think we did. We put all of our young supervisors, as they'd become supervisors through a program. I think Mr. Larsen called it management one, indeed today we call it leadership one. It's an 11 day course on supervision, how you coach employees, how you monitor their performance, how you counsel employees, how you help those employees develop and improve on the job and to that extent, I would have to say that our supervisors were well versed in examining employee behavior.

Q Now that supervision, does it include, that 11 day course, does it include the issue of monitoring for substance abuse, knowing – knowing what to watch for?

A There is a segment in that course that speaks to substance abuse in the workplace.

* * *

[3783]

Q Now, as of 1985, you overall – and referring to all the sources that you consulted, were you satisfied that the Exxon drug – excuse me, Exxon alcohol policies that then existed was consistent with the standard of the industry in other companies like Exxon that had – that included safety-sensitive jobs?

A I would say yes, and I suppose I should say that we just were not relying on that – on that policy at that point in time in 1985. For example, in – in 1984, we initiated an employee health advisory program, which was a free service that employees could come to to receive counseling if they had marital problems or family problems or problems with substance abuse.

We had very broad awareness training on – on drugs and alcohol in the work place. In fact, in 1984, we initiated that and I personally took a fellow to our management committee, which is our very senior managers, call them the three or four star generals, using a military term, and we started with a drug awareness program with them, and then we began to cascade that out throughout the organization. So the point I'm trying to make is as we did these studies and understood what companies were doing, then of course we brought our policies along, as well.

* * *

[3802]

Q Okay. And did you reach the conclusion that continuing that part of the Exxon alcohol policy into the now Exxon drug and alcohol policy was in the interest of safety?

A Yes, sir.

Q What was the basis for that conclusion?

A Well, we just felt like returning those people to the job was the correct thing to do. We felt that if we did not return them to the job, if it appeared that they were going to lose their jobs, they would go underground and, therefore, we would have a problem that we didn't even know about and that we felt was a greater risk, greater safety risk than having

[3803]

the employee in the job with appropriate supervisory monitoring.

* * *

[3805]

Q Was it required by this policy or intended by this policy that supervisors should determine whether employees in their off duty time were consuming alcohol?

A No, sir, they were – the policy did not intend that supervisors would do that.

Q Let's assume that the supervisor believes that the employee has been through a rehabilitation program for alcoholism.

A Yes.

Q Was it – did this policy contemplate that the supervisor

[3806]

should determine whether the employee is going to a bar or a restaurant in his off duty time and having a glass of wine or a glass of beer?

A No, sir, it did not.

Q Okay. Why not?

A Because we felt that the supervisor should monitor the individual's job performance and if there was a problem with substance abuse, that would be reflected in that job performance.

* * *

[3820]

A In 1987, indeed we did in our drug and alcohol training.

Q And if you had an employee who was suspected of having an alcohol or drug problem, at least this manual says what we can do is observe changes and confront the employee with our observations; isn't that what the manual says?

A As of 1987, that's correct, sir.

Q So in 1988, if we had a drinking incident on the west coast, say San Francisco, or at the Portland Shipyard, and there were observations that caused something to be brought to our attention, we should have confronted the individual; isn't that right?

A We should have investigated the circumstances and, if appropriate, confronted the individual. If the allegations were untrue, I sure wouldn't confront him, wouldn't have anything to confront him for.

Q And your manual says that if an employee is found violating the company policy, he or she cannot avoid disciplinary action by requesting treatment?

A That's correct.

Q And that makes good sense; doesn't it?

A I think it does.

Q If you're caught, you're caught?

A I think that's correct.

* * *

[3823]

Q Thank you. Now, you came in here and you talk in your direct testimony, at the beginning part of your direct testimony very, very carefully and your words were very, very careful. You said that when somebody comes out of rehabilitation, it was the norm to return them to the same job?

A Yes, sir, that is what I said.

Q And I'm interested in the second half of that statement.

A Okay.

Q The half you didn't say.

A All right.

Q Let's take a look, if we could, at the half you didn't say. Page 212, lines 4 through line 23.

MR. LYNCH: His deposition?

MR. O'NEILL: Yes.

(Portion of Video of James Rouse played as follows)

BY VIDEO EXAMINER:

Q Mr. Rouse, previously we discussed the issue of an individual coming back from drug or alcohol rehabilitation and what would happen to that person. In or around 1985 when a person came back from alcohol rehabilitation, did that person enjoy job security but not

[3824]

necessarily the job that that person once had? We'll, start out with an Exxon U.S.A. employee.

A Regarding Exxon U.S.A., 1985, we would have been under the 1977 policy on alcoholism. And, as I've previously testified, I think our norm would have been to put them back into their previous assignment. We would have put them back in their previous assignment.

Q Okay.

A Since the policy were silent on that, if a manager for some reason had certain concerns, I'm sure he was not obligated to put him back in that assignment, necessarily.

(Portion of Video of James Rouse concluded)

MR. O'NEILL: Let's take a look at it again in another part of the deposition on page 213, lines 11 through 21.

(Portion of Video of James Rouse played as follows)

BY VIDEO EXAMINER:

Q Does that mean that in 1985, people returning from an alcohol rehab program were subject to extra scrutiny with respect to the job they – they went back to?

A No. As I've testified all along, the norm would be to put them back on the – on the existing position. But if the person looked like they were not having a very good recovery or there were safety concerns, there's nothing that obligated that manager to put him straight back in that job. There's to be some management judgment in that. (End of video).

[3825]

MR. O'NEILL: And on page 214 of your deposition transcript, lines nine through 14

(Portion of Video of James Rouse played as follows)

BY VIDEO EXAMINER:

Q Meaning that the manager, based solely on safety concerns, could determine in 1985 not to put that individual back into the position he or she once held?

A I think I'll just repeat the same answer I've been giving. I'll give it one more time, which is, the norm was to put them back in the job. That would not prevent management judgment which would do something different than that.

(Portion of Video of James Rouse concluded)

BY MR. O'NEILL:

Q So there was no requirement they go back to the same job?

A I have testified here this morning that was the norm and, as I said in my deposition, very clearly, management has the right to manage. We train our supervisors and our managers very carefully, and we do not take their ability to make individual decisions away from them with our drug and alcohol policy.

Q Now, I'm going to use Defendants' Exhibit 3683.

MR. O'NEILL: Offer 3683.

(Exhibit 3683 offered)

BY MR. O'NEILL:

Q Defendants' Exhibit 3683 appears to be some charts.

[3826]

Have you ever seen these chart?

A Yes, I do. This was a draft of a management committee review that we were planning in November of – a copy of that review I believe on November 21st, 1986, which was part of the presentation we later used to get approval for the '87 policy I've mentioned earlier.

Q And you asked the question, what are other companies doing in this area?

A Yes, sir, that was one of the things we discussed with our managers.

Q And other companies test for cause, among other situations for employees that occupy high risk positions?

A Yes, sir, that's correct.

Q And your policy –

MR. LYNCH: Brian, page?

MR. O'NEILL: Here.

BY MR. O'NEILL:

Q At the time, policy violations call for disciplinary action and cannot be avoided by a request for rehabilitation?

A Yes, sir. The context that's in, let's make sure we get these things in appropriate context, was if an employee drove a pickup truck into a tree and then rolled out of the smoking wreckage and said, I've got a problem, our policy is that you can't avoid discipline by asking for rehabilitation at that point in time.

* * *

[3829]

THE COURT: Defendants 3617 is admitted.

(Exhibit 3617 received)

BY MR. O'NEILL:

Q This is a memo, and I'll put a copy in front of you, that you're copied on. Do you see that memo?

A Yes, sir, I do.

Q At least in 1988, this document indicates on chart seven that post rehabilitation testing was not addressed in your current policy and was commonly done in the industry; do you see that?

A Yes, I do.

Q And is that what the – is that a fair restatement of what the piece of paper says?

A I would testify that – that that is what the paper says. I would not necessarily agree with what the paper said.

Q Comes outs of your company; doesn't it?

A It was a draft put together by one of my subordinates, that's correct. A draft, I should emphasize, a draft.

Q And on the next page, the statement is made by

[3830]

somebody who works for Exxon U.S.A., that Exxon is in the minority of companies which do not specify abatement rehabilitation following first positive test; is that a correct statement?

A Yes, that's correct, that's what that draft says.

Q You didn't want Exxon to be out on the leading edge with regard to any alcohol policies; did you?

A I wanted Exxon to have a policy we could implement and I didn't want to be enjoined by the Court, so I wound up with an empty bag and had no policy to protect the safety of the public.

Q Now, I am puzzled by what this page is in the document.

A This was simply a rundown of our pre-employment drug testing results for the year.

Q By race?

A 1987, by race, that's correct.

Q Now, this document has at the end of it, some assessment of the competitive situation with regard to post rehab testing and you compare yourself to two oil companies, Shell and Amoco; do you see that?

A Yes, sir, I do.

Q Post rehab testing Exxon, no; Shell, post rehab; Amoco, post rehab. Do you see that?

A Yes, sir, I do.

* * *

[3832]

Q And you know that the nature of alcoholism is such that it goes abstinence relapse, abstinence relapse, that's a correct statement; isn't it? You know that; don't you?

A Well, I really – I do and I don't, and let me testify to what I do know.

Q Let's take a look at your deposition transcript.

A Well, let me testify what I do know, because I know exactly what I said in my deposition. I said early on I was of the impression that employees who went to rehabilitation tended to be cured when they came out of there, and if they stuck with their aftercare, then there was not a problem.

I have subsequently learned that the relapse rate was a great deal higher than I probably realized that it was and, in fact, I was shocked, as some people in this courtroom might be shocked, in a substance like cocaine it's as high as 90 percent and, frankly, I did not know that.

Q Couldn't tell whether you agreed with me or not?

A I told you what I testified to in my deposition. Or what I recall testifying in my deposition.

Q Let's go to page 48 of your deposition.

A Okay.

Q The questions on page 47. Would this be the case, for

example, the alcohol and breath everyone – well, if an individual reported for work with alcohol on his or her breath and it was the first time, would that person – was the policy that that person regardless of the number of times it happened be sent for treatment?

That's a crazy question, but your answer was, again, that would depend on the circumstances. If you look into the subject of alcoholism, you find the nature of alcoholism is abstinence relapse, abstinence relapse, abstinence relapse, and somebody can be having a very successful recovery and still have a situation where they have a relapse. And that's the answer that you gave.

A Absolutely in that context, that's right. We were talking about a period much more recent than the one that you seemed to be talking about.

Q Now, do you have an understanding that over 50 percent of alcoholics have relapses?

A I – that's not a number that I'm familiar with. I would have said it would have been something less than that, but you may be correct. I just don't have the data committed to memory.

Q Go to page 67 of your deposition testimony.

A Okay.

Q Take a look and read along with me.

A Sure.

[3834]

Q The question on line 18 is, your testimony is that your understanding is it's well over half; answer, that's correct.

A Excuse me, sir, you said what page we're on?

Q 67.

A Mine only goes to 58.

Q I'm sorry. Here's 67.

A Okay. Thank you.

Q And if you would, why don't you read to the jury line 18 to line 20.

A Line 18 says, question, your testimony is that your understanding is it's well over half?

That's correct.

What I was understanding between – was that your understanding between 1977 and 1987. And I'm saying are you asking me to give you the date at which I really became familiar with the illness, and I can't do that because I don't know when that was. It's been an evolutionary process, much like I just said, and I've learned a lot about that process as we worked through it.

Q Are you ignorant now? You're more knowledgeable now than you were in 1985?

A No question about that, sir.

Q Did you know what relapse rates were in 1985?

A No, I did not.

Q Should you, because of your position at Exxon U.S.A., have

[3835]

known that information? You were writing an alcohol policy; weren't you?

A No, sir, I don't necessarily think I needed to be familiar with relapse rates at that point in time.

Q You were writing alcohol policies for the company in 1983, '84 and '85, and you don't think you should have been familiar with relapse rates?

A I didn't write a policy in '83. I didn't write one in '84, and I didn't write one in '85.

Q Did you approve them?

A And I did not approve them. I was involved in writing one, as I testified in 1986, which was put out to our employees in the year 1987.

Q And it wasn't necessary to know about relapse rates?

A We were dealing with our medical department, and certainly the medical department was familiar with that and I would have depended on them to provide me that advice if they thought it was a significant issue.

Q Apparently it wasn't, was it, because they didn't provide you with that advice?

A They did not provide me with that data.

Q So it's their fault?

A I'm not saying it's anybody's fault. I'm just saying they didn't provide me with that data.

Q Would you agree with the proposition that at least the

[3836]

society outside of Exxon Corporation, and Exxon Shipping Corporation, that a supertanker captain presents more of a risk to the public than, for example, a secretary or a clerk?

A Yes, sir, I'd agree with that.

Q With regard to Exxon Shipping Company, you don't know what kind of training was provided to Exxon Shipping Company supervisors with regard to monitoring employees who had been through alcohol rehabilitation?

A Sir, you're going to have to put that in a time context. You talking about '77, '87.

Q '85, '86.

A '85, '86. We did drug awareness training in 1984 and '85, and Exxon supervisors were allowed to participate in that training.

Q Did Exxon Shipping Company ever seek your advice on how to go about monitoring an alcohol or drug abuser who had been through rehab and come back to work?

A I don't recall if they ever sought my advice on that.

Q Proper investigation of a report of alcohol use would include interviewing the suspect, interviewing the accuser, and interviewing people that were aboard the vessel and documentation?

A I testified in my deposition that I personally would have documented and investigated an occurrence in that manner. Certainly it's up to the individual manager on how they do

[3837]

that. That was just my personal view of what I would have done.

Q Makes good common sense and it is an honest way to deal with people?

A I would say that I would have done that, yes, sir.

Q You testified that with regard to these discussions over alcohol policies, you were trying to balance the rights of the employee against the public safety?

A Yes, sir.

Q And putting somebody who had gone through alcohol rehabilitation in charge of a supertanker presents a risk to the public; doesn't it?

A It would depend on why they went through alcohol rehabilitation. I have a fellow, people I'm aware of that went through alcohol rehabilitation because their son was going through and they wanted to go through it so they could experience it with them. So first question I'd ask in that case is what were the circumstances of the individual going.

Q Let me reask the question.

A All right, sir.

Q And I want to get your position. Putting somebody who has gone through alcohol rehabilitation because of problems with alcohol in charge of a supertanker presents a potential risk to the public; yes or no?

A I would say there would be some risk to the public.

[3838]

Q And if you had a supertanker accident, a supertanker grounding, a supertanker mishap, the risks can be catastrophic; can't it?

A No question about that.

Q I'm going to try to summarize your direct testimony, and you can come along with me, if you would, but you're aware that Captain Hazelwood, it was reported to him that he was under investigation in February of 1985 by Mr. Tompkins?

A That is my understanding.

Q And that Mr. Pierce had a conversation with him as a result of an anonymous phone call after the captain already knew he was under investigation, you're aware of that; aren't you?

A That is my understanding.

Q And the captain went through an alcohol rehabilitation program, you're aware of that?

A I am.

Q And the captain held a safety-sensitive position?

A That's your description, but, yes, I'll accept that.

Q And the company's policy with regard to taking care of this captain was such that the only thing you were going to look at was job related performance, you weren't going to look at off duty drinking, whether he was drinking again, that's the company's policy; isn't that right?

A Our policy was to monitor the individual based on their job performance, as I testified, that's correct, sir.

[3839]

Q So if you had Captain Hazelwood who had gone through alcohol rehabilitation and he was drinking again, so long as he didn't drink on company property or come back to ship drunk, his drinking again was hunky dory with regard to company policy?

A Well, I'm sorry, I don't understand what you mean by hunky dory.

Q Wasn't it a violation of company policy for the captain to be drinking again even though he went through alcohol rehabilitation?

A It was not a violation of company policy for him to consume alcohol on his own time and as long as it didn't interfere with his job performance, that's right.

Q And the policies did not require anything with regard to making sure that he was not relapsing, there was nothing in the policy that said, we got to follow up with regard to the general subject of relapse, off duty, personal life, problems, drinking, that kind of thing, except with a strict area of job performance?

A Well, I would not accept your – your definition as you've laid that out. I would say that in a normal supervisory employee relationship, that that supervisor be working with that employee frequently, would have a good understanding of how they were getting along, how they felt, how they were performing their job and they would see a deterioration if that

[3840]

was a problem.

Q We'll get to that in just a minute.

A All right.

Q A relapse – so the company policies would allow – the company policies would allow a relapsed alcoholic to be in charge of a supertanker, so long as nobody knew, so long as his relapsed nature didn't affect his job performance?

A Are you speaking of Captain Hazelwood?

Q No, I'm talking generally, a relapsed alcoholic can work, who has gone through treatment can work for Exxon Corporation and drive a supertanker, according to Exxon Corporation's policies?

A That's correct, sir, with appropriate monitoring.

Q So your policies, knowing the risk to the public, of the catastrophic results of a supertanker accident, allow a relapsed alcoholic to command a supertanker?

A Yes, sir, that's possible under our policy.

Q And you write your policies, you can change your policies, the management committee can change your policies, that's all a correct statement; isn't it?

A Yes, sir, it is.

* * *

[3935]

First, Your Honor, we have very brief videotape of

Mr. Graves again.

(Portion of Video of Ben Graves played as follows)

[3936]

BY VIDEO EXAMINER:

Q Do you recall any conversations with Frank Iarossi where you told him that it was your understanding that alcoholism was considered a disability under federal law and as a result, Captain Hazelwood had to be assigned back to sea aboard a vessel?

A That conversation did not take place.

Q If Frank Iarossi said it did take place; he's wrong?

A One of us is wrong, I don't recall it. I remember Frank specifically asking me to check on the company policy, and I do not recall any conversation or me doing anything about any federal investigation of federal statutes.

Q And in your mind, a shoreside assignment for Captain Hazelwood would not have violated company policy nor federal regulation?

A No, I don't think so. Neither would his seagoing assignment.

* * *

[4417]

DIRECT EXAMINATION OF LES R. MEREDITH BY MR. SCHROER:

Q Mr. Meredith, what do you do for a living?

A I'm a commercial fishermen in the Upper Cook Inlet.

Q Do you have any other jobs?

A I also teach high school biology at Noterdale High School in Lynchwood, Washington.

Q How long are you, sir?

A I'm 53.

Q Do you have a family?

A Yes, sir. My wife Colleen and two daughters. Michelle is 24 and Lori is 21.

Q How long have you been a commercial fisherman?

A I started commercial fishing in 1972.

Q Was that in Alaska?

A No, sir, that was in Washington state.

Q When did you first become a commercial fisherman in Alaska?

A I purchased a limited entry permit in the winter of 1982

[4418]

and was able to fish it for the first time in 1983.

Q Let's take just a minute to talk about your purchase of that. A limited entry permit, could you just tell the jury what that is generally?

A It is a document that gives us the right to fish in a designated area within the State of Alaska and there are a limited number of those permits.

Q And apart from buying a permit, do you need other things in order to be able to fish commercially?

A To be a drift gillnetter, you need a boat, and at the same time, I purchased a boat and the equipment that go along with it.

Q And I take it you need some nets and other equipment to go along with that?

A That is correct.

Q How big an investment did you have to make to become a fisherman in Upper Cook Inlet?

A Somewhere between 100 and 105 thousand dollars into the operation.

* * *

[4433]

Q Did you have crew lined up to work with you in 1989?

A In '89 in anticipation of a big year, I hired an additional crew member that year.

Q So for your 1989 fishing, it was going to be you as the skipper and your daughter and then another crew person?

A That is correct.

Q When did you get up to Alaska?

A Again, I'm not sure of the exact date, but I do know that I was here before the first scheduled opening. We came in in Alaska daylight, which could have been anytime, but it was in late June and we were here before the first scheduled opening.

Q Tell the jury what happened after that.

A We sat and waited on a daily basis for an announcement as to whether there would or would not be a fishery in Upper Cook Inlet for the 1989 season.

Q How did you get information on that subject?

A It was made available to us from the cannery office on a daily basis.

Q Does the Fish & Game Department down in Soldotna, Kenai have a tape recording that you could call on a daily basis to get information?

A Yes, and that's where the cannery was getting it and we

could get it also over the radio. There is a program called Fisherman's Corner that runs every afternoon and tells what's happening, as far as if there is going to be openings or strength of the run.

Q When did you finally get fishing?

A We didn't.

Q Well, did a time come when you learned you weren't going to be able to fish at all?

A To the best of my recollection, I think it was on the 16th of July there was a statement made by the Alaska Department of Fish & Game that there would be no drift gillnet fishery in Upper Cook Inlet in 1989.

Q So you caught no fish at all in 1989?

A That is correct.

Q I take it that was not good for your business?

A Not at all.

Q Just a very narrow question on a couple of things. If you didn't fish at all that year, were you able to save any money that you otherwise would have spent on your fishing business?

A We changed the oil twice a season, and the engine was hardly run at all, so that didn't occur. And I usually go through anywhere from eight to a thousand dollars worth of diesel fuel, and I didn't burn that, but other than that, everything else was basically the same.

* * *

[4436]

DIRECT EXAMINATION OF OLIVER N. HOLM BY MR. O'NEILL:

Q Sir, what do you do for a living?

A I'm a commercial fisherman.

Q What do you fish for?

A I fish for herring, salmon, some halibut and crab in the Kodiak Island area.

Q Where do you live?

A Kodiak, Alaska.

* * *

[4445]

Q Now I want to talk about the 1989 Kodiak herring season. Did the oil spill impact your herring season?

A Yes, it did.

Q And in what way?

A There were a number of areas where I usually fished that were closed because of the presence of oil before we got a chance to fish in them. We did get to fish in some areas, but many of the areas we couldn't fish in.

Q With regard to the areas that you were able to fish in, was there any extra crowding, extra boats, as a result of there being closures in other places?

A Yes, there was. All the boats got crowded down into an increasingly number of smaller areas that were open.

Q Did that result in less fish for you?

A Yes, it did.

Q Did you see oil in your fishing grounds in 1989?

A Yes, I did, in numerous places. The ones that stick vividly is in Marmot Bay. We ran through oil for about six miles, and the west side of Kodiak from out late cape to Uyak Bay, 40 miles of sheen and mousse patties in the middle of May.

Q Now I want to talk briefly about salmon fishing and the Exxon Valdez oil spill. Did the Exxon Valdez oil spill impact your family salmon fishing in 1989?

A Yes, it did. Neither my wife or myself or any of our

[4446]

family members were able to fish in 1989 for salmon.

Q So Kodiak salmon was closed in 1989?

A Clearly all of it. One setnet area on the south end was open.

Q And that isn't your wife's setnet?

A No, she was fishing the northwest Kodiak district. That was closed.

Q How about seining?

A It was closed for the entire year, with one minor exception.

* * *

[4481]

DIRECT EXAMINATION OF KENNETH P. PARKER

BY MR. O'NEILL:

* * *

[4483]

Q And if you could go through your job history after that for us, and bring us up to date, what kind of things did you do, what jobs did you have?

A Well, I started off in a temporary position, and worked that for just a few months, then I was promoted into a permanent full-time position, and I worked in that position for two years, then I was promoted into the research project leader for Bristol Bay at a research position. I was involved in the season management activities, assessment of run strength to the Bristol Bay sockeye fisheries. I ran field camps and collected data and had to analyze the data and determine the size of the runs. I was also responsible for post season compilation of catch and escapement for Bristol Bay, and another responsibility to generate the annual preseason forecast for the Bristol Bay salmon fisheries.

Q Then what did you do?

A Subsequent to my six years in Bristol Bay research, I moved into deputy director position in Juneau for the Division of Commercial Fisheries, and held that position for six years, and then I was later promoted into the director position for the division, and I retained that for six years, and

[4484]

then I retired in 19 – in October 31st, 1990.

Q You were both a deputy director and the director of Commercial Fisheries for who?

A For the State of Alaska.

Q And that's the Alaska Department of Fish & Game?

A Yes, that's correct.

Q Have you ever done any service with regard to the North Pacific Fisheries Commission?

A Yes, I served on the North Pacific Fisheries Commission as a – you mean North Pacific Fisheries Management Council?

Q Yes.

A I served as the alternate commissioner.

Q In your years as the director and deputy director of Fish & Game, did you have any responsibility for implementation of Fish & Game's regulatory management's programs?

A Yes, as both deputy and director I was responsible for the inseason management program throughout the state on all species that the State of Alaska had regulatory authority for. The responsibility is kind of cyclic in nature. In season we would spend a lot of time out in the fisheries. Preseason we would be involved in planning activities. In the winter, we would be working with the Alaska Board of Fisheries to develop a regulatory framework that would be used to manage these fisheries.

* * *

[4490]

Q What fisheries, and everybody knows this but nobody has been asked this, what fisheries were impacted by the 1989 Exxon Valdez oil spill?

A Well, there was a number of fisheries in the central region and westward region that were impacted. We have some exhibits that list those. You might want to –

Q Well, let's go through the maps, if we could. I'm going to bring up Plaintiffs' Exhibit 303, and what is Plaintiffs' Exhibit 303?

A This is an illustration of the Prince William Sound management area with the 11 districts within the management area indicated, and of course we did have a number of fishery closures within Prince William Sound. The major portion of the Montague district was closed, the entire southwestern district was closed. The Eshamy district was closed, and portions of the northern district were closed, and the entire district was closed for 11 days during the peak of the run later on in the summer.

Q And why was the district closed, why were these portions of the district closed?

A Due to problems with oil from the Exxon Valdez. Now, I've been referring to just salmon fisheries.

Q How about herring fisheries?

[4491]

A There were closures on our spring herring fisheries and they take place in various locations throughout the Sound, but basically all the herring fisheries, there are four, they were closed. The sac-roe fishery, it's a fishery on the herring eggs. They harvest the herring so you can extract the egg. We have fisheries on roe on kelp, both in pounds, which are net enclosures that float in the water, and then we have the wild kelp fisheries where divers go out into the fisheries where kelp has the eggs deposited on the blades, and then we also have a gillnet fishery that harvests sac-roe. So we have both gillnet and purse seine harvesting sac-roe.

Q With regard to the four different types of herring that were harvested in Prince William Sound, were all four of those types closed?

A Yes, they were.

Q Who would eat fish eggs on kelp?

A I do, after it's been processed.

Q I might pass on that.

I'd like to, if I could, go to Plaintiff's Exhibit 305.

What is Plaintiff's Exhibit 305?

A This illustrates the Kodiak area management. The Kodiak management area with the district surrounding the Kodiak Island including the mainland district along the Alaska Peninsula.

Q Were there closures in Kodiak as a result of the 1989 Exxon Valdez oil spill?

[4492]

A Yes, there was.

Q And generally, where were they?

A Well, there was major closures in the sac-roe fishery in the spring. I think most of the management areas, management districts were closed. There was some openings. The salmon fishery was pretty much limited to a setnet fishery in the Alitak Bay region. There was some short openings for the seiners in Karluk, this area, but for the most part, the rest of the island was closed to the salmon fisheries.

Q And why were the fisheries closed?

A It was due to the presence of oil.

Q I'm going to bring up Plaintiffs' Exhibit PX 304. What is PX 304?

A This is a map, a chart of the Upper Cook Inlet management area showing the central district along in through here, and then the northern district of Upper Cook Inlet.

Q In 1989 were there any fishing closures in the Upper Cook Inlet salmon district?

A Yes. In the salmon fishery we ended up having to close down the drift fishery that is prosecuted in the upper subdistrict of the central district, and we had a 12 hour closure on the east side setnet beach south of the Kasilof River right in this area here.

Q I'm going to bring up Plaintiffs' Exhibit 306, PX 306, and ask you what it is?

[4493]

A This is a chart again of the Chignik management area showing the districts within that management area, Perryville, western, central, and eastern, and then the Chignik Bay district in here, and this is the – this pointer doesn't want to cooperate, anyway. It also shows Chignik Lake right here and Black Lake, which are the major sockeye producers for that area.

Q Were there oil spill related closures with regard to the Chignik fishery?

A Yes, there was. I believe without looking at the detailed documents, most of it was on the outside and restricted fishing on the outside coast.

Q What is Plaintiffs' Exhibit 304-A, when it comes on the screen?

A This shows the Lower Cook Inlet management area. Again, here is Anchorage – I mean Homer, for reference, and this is the dividing line here between Lower Cook Inlet and the Upper Cook Inlet management area that we saw before, and the management area includes the eastern outer districts, the Barren Island and southern districts and Kamishak districts.

Q Were there any oil impacts with regard to the Lower Cook Inlet management area?

A Yes, there was closures in the outer and eastern districts, and within the Kamishak district.

Q I'd like to, if we could, go to Prince William Sound and

talk for a minute about the timing of the spill versus the opening of the 1989 herring season. Could you tell us about that?

A You know, the spill of course occurred in late April, and our herring fisheries –

Q Late March?

A I'm sorry, late March, and our herring fisheries in Prince William Sound are run anywhere from early April through late April. So we were, of course, facing the beginning of our herring fisheries almost immediately after the spill had begun.

Q Did the herring fisheries open?

A No. We summarily closed all of them.

Q Now, I want to talk generally about something called the zero tolerance policy and a memorandum of understanding concerning the zero tolerance policy, and I'm going to place in front of you Plaintiffs' Exhibits 274 and 279, which are in evidence. What was the zero tolerance policy?

A Well, the zero tolerance was a term that was coined during the early development of this memorandum of understanding, and it related to how the department was going to manage the fisheries in view of the oil potentially interfering with it, the normal prosecution of fisheries. The final product, out of discussions at the area level and at headquarters and at throughout the state with our managers and people in the industry, was that we developed this memorandum of

[4495]

understanding which is an agreement essentially between two state agencies, the DEC and the Alaska Department of Fish & Game, and it basically lines out who is going to be responsible for what kind of actions and how we're going to proceed. It was a document that also provided information to the industry on what to expect from the state.

Q What was the problem that presented itself? Why did you need to have a memorandum of understanding? As a practical matter, what issue are we addressing?

A Well, we had a tremendous problem facing management with the presence of the oil, and there was no way, in some situations, that we could prosecute a normal fishery, so something had to be done. We needed guidance out there for our area managers to follow so that they would know when to close, you know, how to close, how to proceed.

Q Now is that referred to as the zero tolerance policy? Did it stay a zero tolerance policy?

A No, not really. It was a name that caught on and it's often referred to as the zero tolerance, but actually the important point is that this document spelled out when the department would close fisheries, would react to oil, and within the document we have the terminology, appreciable likelihood, and that is used in the document to kind of guide when the departments would take action. When we perceived that there is a likelihood that gear will be fouled, fish harvested

[4496]

adulterated by the oil, or the conduct of an orderly fishery could not take place, basically what we're saying is if we perceive a problem, a likelihood to measure a likelihood of something happening, we would have to react to close these fisheries down, and that was the basically the concept in the MOU.

Q So if there was an intersection between oil and fish, and that created a likelihood of a problem with oiled fish or oiled gear, then the department had to take some regulatory action?

A That's correct.

Q In the development of this policy, was Exxon Corporation or their representatives invited to participate in that development?

A Yeah, there was a number of meetings that occurred in the Cordova area, and it's my understanding that they were invited to participate in those proceedings.

Q And Exxon has stated in it's opening here that it agrees generally with the zero tolerance policy. Were there any criticisms of the zero tolerance policy by Exxon to you as the director of the fisheries?

A No, not that I can recall.

Q Now, we talked generally with the closures using the maps. I am now going to ask you some more detailed questions about the closures using Plaintiffs' Exhibit 283, it's PX 283. What is – let's get it so we can read it.

[4497]

What is PX 283?

A This is a listing of the specific closures that occurred as a result of the 1989 season from the spill.

Q Would you generally go over the first page of PX 283?

A Certainly. This lists the closures that took place in Prince William Sound, and the first one is the pacific herring fisheries, and we did close the gillnet and purse seine sac-roe fisheries along with the pound, wild roe on kelp April 3.

The next fishery was the shrimp fishery. It was in progress at the time. We closed that down April 3rd, and we had also a trawl shrimp fishery we closed April 9th. And this lists also the closures that occurred in '90, in 1990, and we had a small spot shrimp harvest that usually occurs around Knight and Eleanors, and we closed that for the 1990 season. We had blackfish, I mean sablefish fishery that closed April 1st, and it did reopen later with the halibut opening. Dungeness crab we closed April 30th for the season. King crab we also closed October 1st, and groundfish and closed April 30th, and re-opened along with the halibut opening in mid June. We had miscellaneous shellfish we closed on April 24th, and we basically didn't issue any permits in that fishery. And the pink, chum and sockeye fisheries we closed, as I indicated before, the Eshamy district, portions of the northern district, and all the northern district for 11 days.

We closed the southwestern district and parts of the

[4498]

Montague Island district. In 1990 we had some area right around Eshamy Bay that were closed for just a few days and then re-opened, and there was portions on the LaTouche Island around Eleanor and Ingot that were closed to fishing for that season.

Q Would you do the same drill with regard to page two of Plaintiffs' 283?

A Certainly. This lists the Upper Cook Inlet fishery, and of course we have the sockeye salmon fishery.

Q Sir, could you just hold on for a minute? Sorry to interrupt you. Let me get this so we can read it.

MR. LYNCH: Thank you.

BY MR. O'NEILL:

Q Start at the top again.

A Have the Upper Cook Inlet fishery, and that's the sockeye fishery I was referring to before. We closed the central district drift fleet and a portion of the beach on the south of the Kasilof River for a 12 hour period. The rest of the central district drift fishery was closed.

In Lower Cook Inlet, we had a shrimp fishery that was closed April 30 and opened it July 7th. We had miscellaneous shellfish fishery that closed on the 24th of April, and the outer and eastern districts, and the groundfish fishery that we also closed in the outer and eastern districts, and they were closed April 30th. The fishery did reopen for all species except sablefish on June 12th in conjunction with

[4499]

the halibut opening.

Smelt remained closed with groundfish in the outer and eastern districts beginning April 30th. Pacific herring we had the sac-roe fishing in the outer and eastern districts closed April 15th prior to the regular opening date. Pink salmon fishery we had the same fishery in Kamishak Bay that opened and closed by emergency order. We did have some areas that remained open in the Kamishak district, and the Tutka Bay subdistrict north of a particular point, probably get into this when you get into Lower Cook Inlet. They were closed to seining on July 10th.

Q What do we have on the third page of Plaintiffs' Exhibit 283?

A This is the same general information for the Kodiak fisheries. We have the pacific herring fisheries, and approximately 34 of the 56 management units were closed for the duration of the sac-roe season.

Q I'm going to try to pull it up again.

A That's better. The sockeye and pink fishery. As we indicated, the setnet fishery in the Alitak district was open, but that was pretty much it. The other fisheries were very limited. We did have a two-day seine opening in the Karluk Lagoon on the west side of Kodiak Island in mid September, but the rest of the Kodiak management area was closed to commercial salmon fishing.

[4500]

Chignik is indicated here and it's a sockeye fishery and the fishery – the outer portions, the eastern were closed due to the presence of oil, and we did have some closures in the Chignik Bay district for a little bit of time and the fishery was restricted to the inner parts of Chignik Bay.

Q And with regard to all of the closures in PX 283, why did these closures occur?

A They were implemented in response to our MOU that spelled out, you know, how we would handle the presence of oil in our salmon fisheries, and well, all of our fisheries, and how we would react.

Q And that MOU was a result of the Exxon Valdez oil spill?

A Yes.

Q Did you visit Prince William Sound after the spill?

A Yes, I did.

Q And when was that?

A That was one week after the beginning of the spill.

Q And tell me about it?

A Well, I flew into work with our managers and assess what was going on, and see for myself firsthand the magnitude of the problem, and begin activities to design research activities that we would implement to assess the spill's impact on our fisheries.

Q What did you see?

A Well, I flew over Prince William Sound and inspected

[4501]

the Exxon Valdez on Bligh Reef, and then I flew towards the southwest corner over the spill area. Pretty much spread all the way to the outlet of Prince William Sound in that corner. We don't have a map. Maybe put up that map of Prince William Sound.

Q Sure. I'm going to put up on the screen Plaintiffs' Exhibit 303. Now, using the map, tell us what you saw?

A Well, I flew into Cordova, then took a light airplane to survey the situation. We flew up here to Bligh Reef and around the Exxon Valdez, and I observed oil moving throughout this area and down through here. We flew in a southwesterly fashion through this area (indicating) and through these – I observed the oil existing through these passes, and we flew over to the AFK, the AFK hatchery that's located on San Juan Island, and observed the booms and the activities there, and then we swang back up here and took a look at this area by Eshamy, and then back to Cordova.

Q Where are the principal salmon spawning streams in Prince William Sound?

A Well, we have 1100 spawning streams within Prince William Sound, and they are pretty much spread throughout the periphery of the Sound and the larger islands, and you know, fairly well distributed.

Q Distributed throughout the Sound?

A Yes.

* * *

[4513]

Q Did the oil spill in 1989 have any impact on the management of the Prince William Sound fishery?

A Well, the – probably the most major impact was the elimination of the ability to fish in the southwestern district – well, essentially, the southwestern corner of Prince William Sound, where all these fish are migrating into Prince William Sound. The Montague district and the southwestern district are down in that corner, along with the Eshamy district. They were closed for the season. Even up in the northern part of Prince William Sound, or where the northern district is, a portion of that was closed to protect it from potential oil/fish interaction. So essentially this upper part was the portion that was open, and, furthermore, during the peak of the season, from I believe it is the end of July to about the end of the first week of August, this whole district was closed due to an oil incident.

So, to back up here, this part was closed, so the managers were forced into a situation where they had to rely on how the escapements were developing in these areas to assess the run. They didn't have the ability to put that fleet out there and

[4514]

see what the catch per unit effort might have been during an opening.

In normal years, in normal years, this district, southwestern district –

Q We'll bring it back up for you.

A – accounts for over half of the commercial salmon, pink salmon catch in the purse seine fishery, over half. So that opportunity was gone.

* * *

[4684]

DIRECT EXAMINATION OF DR. RICHARD KOCAN BY MR. JAMIN:

Q Dr. Kosan, how are you employed?

A I'm on the faculty of the University of Washington School of Fishery.

Q And in connection with your appointment, do you teach?

A Yes, I do.

Q What do you teach?

A The course I'm specifically responsible for is aquatic toxicology, and I also lecture in other people's courses.

Q And in connection with the aquatic toxicology course, do you deal with issues of genetic toxicology?

A Yes, I do.

* * *

[4702]

Q All right. Sir, given – given these numbers, when would you expect herring that were embryonic, that would have been the subject of spawning in 1989, to first start coming back as spawning fish themselves?

A Traditionally you would expect to see the first ones entering at three years old, so that would be in 1992.

Q Then would a substantially larger group come in in 1993?

A 1993, a much larger group would enter the population, and that's the first year you would expect to see them actively spawning or participating in the spawning with the rest of the population.

* * *

[4734]

Q Now, do we have some pictures from your own larvae from your own study with respect to the Exxon Valdez?

A Yes, we do.

Q Let me pull up 481.

A Okay. Here are represented three larvae. The anterior, or middle of the body toward the head, were exposed in my laboratory to Exxon Valdez crude.

The center larvae, that's a normal individual, the jaws are

[4735]

normal, the eyes are where they belong. The yolk sac, which is this little gadget right here and carries all the nutrients this little fish will live off of for about the first ten days to two weeks of its life. It's normal, all the muscle structure in the body, you can see all the segments appear normal.

Now, at the very top of the screen you see the yolk sac is very much smaller, the yolk is smaller, there is a lot of space in that sac. And in the bottom one, the pericardial region, that means the region around the heart, just below that second dot is filled with fluid, and this is a condition called pericardial edema, or fluid filled sac around the heart.

These are some conditions I found in the larvae that I worked with. Go ahead.

Q Let me show you the next one you asked me to have available, 479.

A This is a close up to give you a better view of the head and how the development occurs. The larvae at the top is a newly hatched normal larvae. Its jaws are developed in such a way that they will meet each other when they close. The spine is straight, the yolk sac is relatively normal, no problems.

The larvae to the left, you see the upper jaw is mostly missing because the eye is hanging or protruding below the level of where the upper jaw should be, and the entire jaw line, as you can see, extends clear back behind the eye,

[4736]

which is abnormal if you compare it to the fish on the right-hand side. And just behind the head there is a kink in the spine.

Subtle differences, but still differences that are going to affect the survival of these individuals.

Q Call up the next one you asked that I show you, sir.

A This individual goes without explanation. I think it's fairly obvious there is no way this individual is going to hatch.

Now, in the higher concentrations that I used in the laboratory studies, 100 percent of the larvae that hatched were this type of configuration. They were just totally deformed and totally incapable of survival on their own.

Q Next I have 480.

A This is again another individual. You see the yolk sac is very small. The yolk sac there is much smaller than it should be. The tail is obviously deformed and the upper jaw is truncated; that is, it has grown out as far as it should so it properly meets with the lower jaw. And the gill region just behind the lower jaw is obviously swollen and deformed, it would be right there, the entire body structure of this animal is not right, as you saw in the picture.

Q Let me show you 485.

A This shows herring larva that obviously has a bent spine, the yolk is fairly normal, proper sides and location. There is no problems anterior to the yolk sac, but the eyes are protruding from the side of the head and the lenses are protruding from the eyeballs. Obviously there is a gross deformity and no chance of survival.

Q Next one.

A This fella is upside down, it has no lower jaw, and you can see there is no lower portion to the face, which would be facing up in this case. That's where the lower jaw should be. The top of the head is here, where that unusual bump is, and the eyes are hanging down into what would be the roof of the mouth.

Q Finally 487, sir.

A This one has a grossly deformed spine and it has no facial features, no mouth, no eyes, no ears. They have overlaid ear bones, not capable of surviving on its own.

Q Now, sir, in your research was there a relationship in the sorts of deformities which we've seen and the concentration of Exxon Valdez oil to which the eggs were exposed?

A Yes, there was a relationships between the two.

* * *

[4741]

Q Sir, do the concentrations that you chose to use in the lab reflect the sorts of concentrations that might have been found in the areas where herring spawned, were deposited in 1989?

A The concentrations that occur in the field situation following an oil spill are quite variable, and they range from pure oil to no oil, so – and they also depend on how much mixing has occurred and how recently after the spill it has occurred, and a number of factors. It's possible that these concentrations were present in the field in oiled locations following the spill, but a direct comparison between the field and the laboratory is not really possible because you can't exactly replicate all the conditions that occur in the field in a laboratory situation.

The experiment was designed to demonstrate that in the presence of oil there was an adverse effect on these embryos.

Q Let's go right on to the field, then. Was there research done in the field which reflects the effects of the oil on the herring and which overlaps what you did in the lab?

A Yes. There were field studies conducted from 1989 through 1992 in the field in Prince William Sound.

Q Did you participate in some of those?

[4742]

A I participated in studies from 1991 and 1992, but had access to the data that had been developed prior to that time.

Q Can you explain to us what the mode of research was in the field?

A The field studies involved – in 1989, they involved the collection of herring embryos from sites that had been oiled and from sites that had not been oiled, and these embryos were brought to the laboratory, and in the laboratory they were incubated in seawater and allowed to hatch. And then the same types of abnormalities – or the same types of observations were made to determine whether or not there were abnormalities or mortalities occurring in these larvae that had hatched from oil or – on the oiled or presumably unoiled embryos.

Q Let's look at 514. Does that reflect some of the evidence from the field, sir?

A Yes. This graph represents three years of field data collected by other members of the Trustee team working just prior to and up to the time I became involved in the study, and – that's what they represent.

Q What does – does it show certain areas that were oiled and certain areas that were not oiled?

A Yes, it does. There are three bars represented for each year. If you see along the bottom of the years, 1989, '90, 1991 are represented. The blue bar, or the bar on the left for each of these years is from Fairmount Bay. It's in the north

[4743]

end of the Sound and was reported to have been not directly hit by the oil plume. That's Fairmount Bay.

Now, the other two bars represent Rocky Bay, which is on the north end of Montague Island and is a herring spawning area and was reported variably to be oiled or lightly oiled by different investigators. And the third bar represents Naked Island, which was completely surrounded by the trajectory of the spill in 1989 and was also a spawning area for herring at that time.

And what this graph shows for 1989 is that the two oiled areas, the two bars on the right, produced significantly more physical embryos with more physical deformities than did the site that had embryos from the unoiled site. So embryos from an unoiled site had more normal and less abnormal larvae than did the embryos that were collected from the two oiled sites.

Now, in 1990 all of the physical deformities or physical deformities in all of the sites was very dramatically reduced the year following the spill. But, again, if you look at 1990, you'll see the same trend, and that is that the Fairmount Bay, or the blue bar, represents the very smallest number of abnormal larvae, and the two oiled sites, or the two bars on the right, represent larger numbers. And in this case, the difference is – I'd say it's about a hundred percent doubling, or a hundred percent increase between Fairmount Bay and Naked Island.

* * *

[4755]

Q What did you find?

A On the basis of that study we found that those female herring that were collected from oiled sites produced fewer live larvae at hatching then did the females collected from unoiled sites. I don't know if I got that backwards.

Q You can say it again and clear it up.

A In case I got it wrong, fewer of the eggs hatched from the females that were collected from oiled sites than from females that were collected at unoiled sites. The unoiled females were more successful than those from the oiled sites.

Q Now, up until now, sir, we've shown some pictures of herring from the lab. I'll show you 503 and ask you to tell us what that is.

A These are three herring that were obtained from Prince William Sound or were hatched from hatchery spawned eggs in Prince William Sound in 1989. The top larvae is a newly hatched normal larvae. The larvae on the left and on the lower right and lower left are both abnormal. They have bent spines, eyes, deformed snouts of a variety of different types of damage. These were collected – the larvae on the top was derived from eggs that had been collected from an unoiled site and the two at the bottom were collected from oiled sites.

Q Let me show you next what's been marked 504.

A This is again a similar representation. There are three larvae here with varying degrees of abnormalities, again all

[4756]

collected from Prince William Sound and used to demonstrate that the types of abnormalities that you've seen in the laboratory are similar to those that we found in the Sound in 1989.

Q Now, sir, having made the comparisons that you did between your laboratory work, field work that you did and the field work that others did, do you have any conclusions to present to the jury about the relation between Exxon Valdez crude oil and herring following the spill?

A Yes.

Q Have you collected those in 494?

A Sure. The conclusions that I came to following the studies I did with Exxon Valdez oil were that if herring embryos are exposed to crude oil in the laboratory, that you can get, and you do get, premature hatching of the embryos, of the larvae. You also get an increased number of abnormal larvae, and this is dependent on the concentration of oil that's present. You get lower weights in even the normal appearing larvae that had been exposed to oil relative to those that had not been exposed to oil, and there is increased cytogenetic or heretical damage in the exposed individuals compared to the unexposed.

* * *

[4760]

Q So the most severe effect from the spill focuses on this '89 year class, and that's the class that is returning for spawning in '93 and '94?

A That's correct.

Q Now, were the opinions that you've shared so far with the jury today formed prior to your having been retained by Plaintiffs in this case?

A Yes. Those were based on data that was available at the time, were formed prior to being retained.

Q And that was when you were with the Trustees?

A That's correct.

Q Based upon the field work and lab work you and others had done with herring, did you form an opinion in 1992 that the herring returning in 1993 would be more susceptible to disease than normal because they were exposed to Exxon Valdez oil?

A Yes. The conclusions of the synthesis committee that met following the completion of all the studies, was, as I recall, I'll try to paraphrase it, that all year classes that were present in 1989 had been affected to some degree by exposure to oil, and that all of them would very likely have been – have suffered some form of damage to their immune system. And I believe we predicated an increase in disease frequency following that.

[4761]

Q And was your prediction realized, sir?

A Well, in 1993 there was appearance of large numbers of lesions in Prince William Sound herring, in the spawners, and these lesions at the time appeared to be related to the presence of a virus known as VHS, or viral hemorrhagic septicemia.

Q Let me break that down. First, what is a virus?

A It's a submicroscopic organism that invades or requires a living cell for its own existence, and it lives in and depends on that cell for its reproduction. Some viruses are not known to cause any problems and others are known to be quite severe pathogens.

* * *

[4936]

DIRECT EXAMINATION OF DR. PHILLIP MUNDY BY MR. JAMIN:

Q Sir, are you currently employed as a consultant?

A Yes, I am.

Q And are the two principal issues you're focusing on now the recovery of Columbia River basin salmon and the effect of the Exxon oil spill on salmon?

A That's correct.

Q And in the former capacity with respect to Columbia River basin salmon, are you working with the United States Fish & Wildlife Service, the Bonneville Power Authority, the Yakima Indian Nation and the Nez Perce Tribe of Native Americans?

A Yes.

[4937]

Q And with respect to the second issue, are you working with the NRDA Trustees, and specifically the Alaska Department of Fish & Game?

A Yes, I am.

Q Apart from your work for the Trustees, have you done research in Alaska fisheries?

A Yes, I have.

Q And has that been every year since 1976, sir?

A That's right.

Q Let's take a moment to look at your education. Did you receive a bachelor of science in zoology from the University of Maryland?

A Yes.

Q And a master of science from the University of Alabama Tuscaloosa?

A Yes.

Q And a Ph.D. from the University of Washington in Seattle?

A That's right.

Q And was your thesis on the timing and management of the Bristol Bay salmon fishery?

A That's right.

* * *

[4980]

Q And is it your opinion that the Exxon Valdez oil spill in 1989 was a significant contributing factor to the very low population levels of both hatchery and natural pink salmon in Prince William Sound in 1992 and 1993?

A Yes.

Q And have you prepared a chart with your calculations on the effect of the spill on pink salmon in Prince William Sound after the spill?

A Yes.

Q I'm going to show you a portion of what's been marked Exhibit 318, and let's focus, if we may, sir, on the first line, which I'll try and get the right portion on the machine. We want to save a little bit of the excitement here. Thank you.

MR. COOPER: Always happy to see your excitement.

BY MR. JAMIN:

Q In 1990, sir, can you explain to us what that first line reflects?

A Looks like –

Q You can't use – you're on the overhead. Yeah.

A This number here is a number that I discussed with you earlier. This is from the fish and shellfish study 28. This

[4981]

is the Geiger number produced for harvest – I mean, adjusted for harvest. They have applied a harvest rate to the number that he calculated, lost – to figure out what portion of those fish lost would have been taken by the harvest. Same is true in 1991. But the numbers in 1992 and 1993 are different numbers.

Q In what way, sir?

A Well, these numbers up here, '91 represent partial impacts of the oil spill. They estimated what we were able to measure in the time available with the resources available. These numbers down here (indicating) are deviations, negative deviations from the forecast. Each year Fish & Game makes a forecast of how much the fleet can expect to harvest so the fleet can prepare for the abundance that it's going to encounter out there. And these harvest forecasts are based on the number of fry that they have in the spring of the preceding year.

That's – as I told you, some of the people were going out to actually check on those fry at the time of the Exxon Valdez oil spill. That's why we had people out in the field at that time.

So they forecast the harvest that's going to be available based on the abundance of fry in the preceding year and also the weather data. And forecasters who work with Fish & Game, they are not Fish & Game people. That forecast is

[4982]

based on other things as well, but this particular forecast that we see for 1992 and 1993, the method is based on fry and weather data.

And this number is the difference between what Fish & Game expected to come back in 1992 and 1993 as harvest, that's the harvest portion of it, and what actually showed up. And you can see while the numbers for '90 and '91 are small numbers, these two numbers are really big numbers, because the forecast was totally high, was extremely high in 1992 and 1993. They expected a lot more fish to come back in 1992 and 1993 than actually showed up.

Q Now, let's go back to the 1990 fish. How would this group have been affected by the oil?

A The 1990 estimate is based on reductions in growth from the '88 brood year. Now, you just – on pink salmon, you just subtract two to get the brood year. So in 1990, 1988 would have been the brood year, so that was the young fish trying to get out of the Sound at the time of the Exxon Valdez oil spill. They swam right into it.

And so – and these were the reductions in growth that were measured by the federal studies and the state studies on wild fish and hatchery fish, translated into survivals and projected forward into adult harvest.

Q And the 1991 fish, sir?

A 1991 numbers is a small number because it's based only

[4983]

on the embryo mortalities, the egg deaths in the oiled streams just for the southwestern district. Streams that were oiled, okay? So it's only a portion of a district and based only on the egg mortality factor, not on any other impact that the oil may have had on the 1989 brood year.

Q With respect to 1992 and 1993, were these sorts of deviations between the expected harvests from ADF&G and the actual returns seen in other areas of the state, sir?

A No. That's one of the reasons that these negative deviations were so unexpected and are such a cause of serious concern for me and for other salmon population biologists. The other big pink producing areas of the state, such as southeastern Alaska and Kodiak, which grow up in the same areas in the Gulf of Alaska and experience the same type of offshore marine mortality, are having record years. They are producing lots and lots of pink salmon and the survivals are very good.

These forecasts were quite low, and that was completely unexpected.

Q Sir, do you have an opinion as to whether the sorts of problems that we've seen in 1992 and 1993 with the pink salmon in Prince William Sound can be expected to continue in 1994 and 1995?

A Yes. I think the factors that we've seen, particularly the concerns about the problems with the ecosystem, the problems with the other species and the fact that these

[4984]

forecasts are so lower – I mean, these runs are so low relative to the forecasts, these forecast errors are huge. Until we see a positive deviation or a run that comes in on the forecast, I don't see anything that leaves me of the opinion that these factors are changed, and, if anything, they may be accelerating.

* * *

[5040]

Q Did Mr. Spies write at the top: As the oil moves through Prince William Sound and out into the Gulf of Alaska, the slicks were also swept into the mouths of streams where salmon breed and where the salmon fry were soon to emerge from the gravel and find their way to saltwater?

A Yes.

Q Did he write: 75 percent of the wild pink salmon in the Sound spawn at the mouth of streams?

A Yes.

Q Did he say that: There was no apparent change in the use of this habitat by fish in the summer of 1989 and many salmon deposited their eggs in the intertidal portion of oiled streams?

A Yes.

Q Did he say: In the autumn of 1989 egg mortality in oiled streams averaged about 15 percent compared to about 9 percent in unoiled streams?

A Yes.

Q Did he go onto say that: Since 1989, egg mortality in the oiled areas has generally increased?

A Yes.

Q Did he go on to say that: In 1991 and 1992, approximately 40 to 50 percent of the salmon eggs in oiled streams did not survive as compared to an 18 to 30 percent mortality in unoiled streams?

[5041]

A Yes.

Q Did he go onto say that: In 1993, though the rates of egg mortality had dropped to an average of less than 25 percent in oiled streams and less than 15 percent in unoiled streams, the differences still persisted?

A Yes.

Q Did he say: Although the differences between salmon egg mortality and oiled and unoiled streams over the first two years were likely attributable to the effects of oil scientists did not expect these differences to persist as long as four years after the spill. At first they thought oil was directly affecting survival of the pink salmon eggs, but as the amount of oil on the shorelines decreased, other explanations began to seem more plausible. Perhaps there was a genetic effect which young that carried over into adulthood and was inherited by the next generation?

A Yes.

Q Did he say: In 1993 the story took another turn.

Returning adult pink salmon were captured as they entered oiled and unoiled streams, their eggs spawned in the laboratory and raised under controlled conditions. This experiment showed that the differences in egg mortality between pink salmon from the oiled and unoiled streams when both were raised in the laboratory were as great as the differences seen in the wild, essentially eliminating environmental factors from

[5042]

consideration?

A Yes.

Q Did he go onto say that: It now appears there is an inheritable difference in egg mortality for fish from oiled versus unoiled streams?

A Yes.

* * *

[5045]

DIRECT EXAMINATION OF JAMES CRUTCHFIELD BY MR. O'NEILL:

Q Just so we know where we're going, you're a fishery economist?

A More broadly, a natural resource economist with a heavy concentration in fisheries.

* * *

[5073]

Q Now I want to ask you a couple questions about the exhibit. The actual price of salmon beginning in 1984, in fact through 1988 for Cook Inlet reds, rose?

A Yes, it was increasing steadily in that period.

Q And then between 1988 and 1999 (sic), over the time of the oil spill, we get a precipitous drop?

A That's correct.

* * *

[5083]

Q Have you formed an opinion, sir, as to whether the 1989 Exxon Valdez oil spill had an impact one way or another on the price paid to fishermen?

A I have. I think it did have such an effect.

Q And what was the effect?

A The effect was to lower prices paid to fishermen in response to a situation which the traders viewed with real alarm and uncertainty and which gave them the incentive to use the spill as a very strong bargaining weapon in negotiating prices for the coming years' pack. This was an ideal weapon to use to get the price down. Fishermen had no other place to go with their fish, and the spill had a very

[5084]

strong influence on the bargaining process exactly as it had in the Braer case and others.

* * *

[5165]

Q Thanks. You talked for a minute about the Japanese buyers with him and with me. Would you explain to the jury the role that the oil spill fills in the negotiations between the Japanese buyers and the Alaska fish processors?

A Yes. I believe strongly that the spill, which did constitute the major out-of-market impact that could possibly have been expected on the salmon market as a whole, had the effect of tilting the bargaining process very, very strongly in favor offer the buyer. He had a weapon in his hand, the market was uncertain. There was no way of knowing whether or not the kind of consumer reaction that had resulted from widespread knowledge of the spill would result in a situation in which they might be caught with some very expensive inventory that would prove to be unsellable or sellable only at reduced prices.

These dealers operate on relatively narrow margins, processor and the trader above him. They cannot, in holding inventory, bear the full risk of that degree of uncertainty. This was the reaction we found in the Glacier Bay case, was the reaction we found in the Braer case and the Shell case.

Q And in point of fact, with regard to sockeye prices in Alaska fisheries, what happened?

[5166]

A We got a sharp decline in prices, ex-vessel prices to fishermen.

Q And that happened in the Bristol Bay sockeye fishery?

A Yes, it did.

Q And it happened, indeed, in every major Alaska sockeye salmon fishery?

A It did.

Q And with regard to the one that we've been talking about, specifically the Upper Cook Inlet sockeye man fishery –

A Yes.

Q – does this depict in fact the average ex-vessel prices of sockeye salmon in Upper Cook Inlet, Plaintiffs' Exhibit 739?

A Yes, it does.

Q From 1983 through 1988, the price had gone up continuously; hadn't it?

A Yes.

Q What happened in 1989?

A In 1989 it plunged very sharply.

* * *

[5171]

DIRECT EXAMINATION OF ROBERT MENDELSOHN BY MR. O'NEILL:

Q Sir, what do you do for a living?

A I'm a professor at the Yale School of forestry and

Environmental Studies.

Q You're a professor of what?

A I'm a professor of natural resource economics.

* * *

[5181]

Q Did you reach a conclusion about the impact of the Exxon Valdez oil spill on salmon and herring prices?

A Yes.

Q What conclusions did you reach?

A I've concluded that the Exxon Valdez spill damaged the reputation or damaged the image of high quality fish coming out of the Alaska seafood market, and this resulted in lower prices for those fish from 1989 through 1991.

[5182]

Q And that included red, pink, chum and kings?

A That's correct. The salmon that I've concluded have been damaged would be the red, sockeye, the king, the chinook, the – not the coho, the pink and the –

Q Chums?

A The chums, yes, thank you.

Q And with regard to silvers, you were unable to reach a conclusion on silvers?

A That's right. In my opinion, the evidence was mixed with respect to silver, and to be conservative, I've assumed that there's no effect there.

Q How about herring?

A It – it's clear that there's effects in the herring roe market and roe on kelp market, both.

Q Those effects are the result of the Exxon Valdez oil spill?

A That's correct, that the Exxon Valdez oil spill has affected those markets, has limited the premium that used to be associated with those products and has resulted in lower prices.

Q How did you go about studying the effect of the Exxon Valdez oil spill on the price of Alaskan seafood?

A Well, the first step was to look at exactly what the prices did over time, so that was my first line of attack.

Q And what prices did you use?

A Well, the question that – that's on hand is what's

[5183]

happened to the price that the fishermen have received, so rather than going to later prices, prices that are further down in the market chain, I examined exactly the prices the fishermen were getting, the ex-vessel prices.

Q I have pulled a boo-boo, but we had some preadmits for today that I should have done before the doctor – I'm going to put you over in suspended animation, if I could for a second, and do the preadmits, because it'll save some time with your testimony.

MR. O'NEILL: For the record, plaintiffs would offer the following exhibits: Exhibits – Plaintiffs' Exhibits 518, 519, 520, 522, 523, 524, 3645, 3647. Exhibit 430, 530, 531. Exhibits 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 454, 455, 456, 457, 458, 459, 460, 780, 781, 783, 784, 786, 789, 790, 792, 793, 6004, 6005, 6006, 6007. (Exhibits 518, 519, 520, 522, 523, 524, 3645, 3647, 430, 530, 531, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 454, 455, 456, 457, 458, 459, 460, 780, 781, 783, 784, 786, 789, 790, 792, 793, 6004, 6005, 6006, 6007 offered.)

THE COURT: Are there objections to any of these exhibits?

MR. COOPER: Your Honor, at least insofar as those exhibits concern this witness, those are agreed upon as preadmitted.

[5184]

THE COURT: The exhibits just announced by Mr. O'Neill are admitted.

(Exhibits 518, 519, 520, 522, 523, 524, 3645, 3647, 430, 530, 531, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 454, 455, 456, 457, 458, 459, 460, 780, 781, 783, 784, 786, 789, 790, 792, 793, 6004, 6005, 6006, 6007 received.)

MR. O'NEILL: Thank you, Judge.

BY MR. O'NEILL:

Q Let's – if we could take a look at Exhibit 440, what does Exhibit 440 show us?

A Well, as you can see from looking at this exhibit, the prices of – the ex-vessel prices of sockeye have gone through a number of fluctuations. The most important factor is that for a long time prices have been in an upward trend through the '80s, but suddenly in '89 they've taken a precipitous drop, and that drop has continued through '91.

Q Now, these prices on Exhibit 440 are the actual ex-vessel prices for those years?

A Yeah, this is what the fishermen were actually paid. This is their annual payment, the average salary for the year.

Q For the sake of clarity, could you draw a red circle, if you can get that thing up there, around the '88/'89 time period?

A Well, this is '88, which was a peak year, and this is '89,

[5185]

after the spill. So these are year end prices.

Q Now, I want to take a look, if we could briefly, at what happens – that's for sockeye, red salmon?

A Yes.

Q Let's take a look at pink salmon and see what happens with regard to pink salmon, and we're going to look at Exhibit 441 with regard to pink salmon, and what do we see on Exhibit 441?

A Well, the same kind of pattern. The prices rose in the late'80s, but then following '88 again being a peak year, and then following that there was an abrupt reduction in prices in '89. The price reduction was continued again through '91.

Q So in 1988, the pink salmon price was above – or about eighty cents a pound, and by 1991 it's below 20 cents a pound?

A That's correct.

Q What do we see with regard to king salmon prices?

A Again, you can see that in the '80s there was an increase in prices, and then when we reached '88, there's again a peak, and then again, following it back, there's an abrupt decline and the prices at this point just stay at that level.

Q And on Exhibit 790, we have chum salmon.

A And, again, you see the same pattern that in the '80s, the prices were rising rapidly. They reached a peak in '88 and abruptly fell in '89 and then again slightly more in '91.

Q Now, I'm going to put up silver, because as we proceed we're going to talk about silvers, but just to remind

[5186]

everybody, you could not come to a good conclusion on silvers?

A That's correct. On coho, I was unable to conclude that the oil spill was in fact the culprit for this.

Q And what –

A Again you see the same kind of effect, that the prices rise to '88, reached a peak and then fall abruptly in '89 and stay down in '89.

Q Let's take, if we could, a look also at the two predevelopment herring products, sac-roe herring and herring roe spawned on kelp, and we're going to take a look at Exhibit 458, which deals with sac-roe herring, and tell me what we see with regard to sac-roe hearing?

A Sac-roe herring, you can see this is a shorter time line. This is slightly different than the salmon. We didn't have data going as far back, so this is entirely the '80s, and what you can see in general, the prices were rising, again they reached a peak in '88 and then abruptly fell in '89 and stayed low.

Q And herring roe spawned on kelp, which is Exhibit 457, what do we see there?

A Again, you see the same pattern that prices were rising through the '80s, reached a peak again in '88 and then fell abruptly in '89, and in this case, the prices then recovered somewhat.

* * *

[5191]

Q I'm going to leave this board up, but I'm going to pull up on the TV Exhibit 444, which is in evidence. Do I have – I've got a board. I'll use a board. Changed my mind. I'll put up the board. And what is this Exhibit 444?

A Now, what the exhibit shows – this is a very important exhibit. What this exhibit shows is what the model predicts would happen and what actually did happen, and if you look at the data points from 1964 through 1988, the orange line shows you what the model predicts would happen. As you can see, the orange line actually tracks actual prices fairly closely, so the model, normal market factors are explaining a lot of the variation that you observe in the actual prices, up through 1988.

In 1989 through '91, we used the relationships that the model has predicted from all those previous years and we

[5192]

predict what those prices would have been if the spill had not occurred; that is, just looking at the market factors alone, what would the prices have looked like, and what this model predicts is that the prices would have in fact increased over this time period. And if you look at '81, '90, '91, they would have actually slightly increased over the 1988 price. In fact, if you look at actual prices, actual prices took a sharp drop.

In my opinion, the difference between these two is the taint effect. It's the effect the oil spill had on sockeye prices.

Q I've going to parse that out into three parts. The first is up to 1988. Let's just talk for a minute about up to 1988.

Up to 1988, the orange line is what the model predicts and the black line is the actual price, and you get a good fit?

A Yes.

Q And is the fit that you get here significant to somebody in your business?

A Yes. It's saying that this model is – the market factors included in this model actually are capturing a lot of the variation that you observed happening in the marketplace up until 1988, through 1988.

Q Okay. The model predicts that the prices would continue on the same general incline that they had been on since 1983, for 1989, 1990 and '91. That's a correct statement; isn't it?

A That's correct.

[5193]

Q But in fact, there is a crash, which we've already talked about, in red salmon or sockeye prices?

A That's correct.

Q So that tells you that something's rotten in Denmark or Alaska?

A Something other than normal market factors has happened, and it happened in '89. That's what it tells you.

Q And you've heard Dr. Crutchfield's testimony about the history of these kinds of things. Is this kind of effect in your view consistent with an environmental disaster like the Exxon Valdez oil spill would have on the price of a product like red salmon?

A Absolutely.

Q Is it your opinion that the drop in price between the predicted value and the actual value that the Exxon Valdez oil spill was the major contributing factor to that price drop?

A That is my opinion.

MR. O'NEILL: Can we take a break now, Judge?

THE COURT: We'll take our recess at this time, ladies and gentlemen. We'll be in recess for 15 minutes.

(Jury out at 9:58.)

(Recess from 9:58 a.m. to 10:16 a.m.)

(Jury in at 10:16.)

MR. O'NEILL: Thank you, Judge.

BY MR. O'NEILL:

[5194]

Q Now, we were talking about Plaintiffs' 444 when we took our break, and you used an expression in describing this here, the effect, the red effect, you called it the taint effect?

A That's correct.

Q Would you explain that to us?

A What that – what this graph shows, what that red area shows, is that if you look at all the market factors, prices should have increased, but in fact they did not. And the question is what could have caused that, and it's pretty clear from past evidence that from very small spills, even very small spills have a subtle affect on prices. So we have experience with the Glacier Bay spill, we have some experience with the spill in the Shetland Islands, we have some experience with the Torrey Canyon spill. In all those cases we have some evidence that following the spill there was a price effect, and the price effect – I'm calling it taint.

And in the case of sockeye, my theory is that the reason why you see such a big taint is that this is a very high premium product. This is the fillet mignon of fish. This is one of the top products and top types of seafood in Japan. And when you find out – when there's a threat in the consumers' minds, risks, small risks, even that perhaps there's something wrong with this fish, it dramatically affects that premium and that premium gets wiped out. And that red area is the taint effect, the effect of that premium being eliminated.

[5195]

Q The premium was eliminated, in your opinion, as a result of the Exxon Valdez oil spill?

A Exactly.

Q You mentioned the Torrey Canyon spill. That's a new spill here in the room. It isn't for the world, but it is for this room. When and where did the Torrey Canyon spill occur?

A I think it was in the '70s. It occurred off the coast of France, close to England, and the evidence that people had was, following that spill, the prices for catch, French catch, actually fell even in places where there was no spill, no effect, no direct effect, people observed for the year following that spill that the prices had in fact fallen.

* * *

[5203]

Q Now, Exhibit 430 is an exhibit that we used with Dr. Crutchfield, but it shows a precipitous decline in sockeye salmon throughout Alaska, including Bristol Bay, southeast, plus the four oil spilled areas?

A That's correct.

Q Is the fact that there was a precipitous decline in Bristol Bay and southeast consistent or inconsistent with what you've done here?

A Well, my model is – actually examines Alaska-wide prices, and from what little we can understand of the consumer market in Japan, consumers there do not know where the salmon come from. They don't know which area the salmon come from. They just know that this is sockeye, and so whatever has happened to the sockeye market, it's going to happen to every one of these areas.

Q So if there's an impact in Prince William Sound, Kodiak, Chignik and Upper Cook Inlet on sockeye, the market perceives that as an Alaska-wide impact?

A That's correct.

* * *

[5207]

Q And with regard to sac-roe herring, you took a look at the factors listed in Exhibit 783, and with regard to roe spawned on kelp, you took a look – I'm sorry, the sac-roe, you took a look at the factors listed in Exhibit 459, and with regard to roe spawned on kelp factors, you took a look at the factors listed in Exhibit 783; is that a correct statement?

A Yes.

Q Let's see what the results are. I've placed in front of the jury Exhibit 456, which I'll bring up on the screen. And what does the exhibit show?

A The exhibit shows exactly the same patterns as we just saw for the – or for salmon; that is, prior to 1988. The model does have a reasonable job of capturing the small change in prices that you see, that growth in prices that you see in the sac-roe herring market, and then following that,

[5208]

predicting what the prices would have been, the market actually predicts that the prices would have pretty much stayed at that level.

It would have stayed near the level you observed in 1988 and in fact actual prices declined very dramatically from there.

Q We get high prices before the spill and a crash in prices after the spill?

A That's what the observed prices do, but that's not what the model predicted would have happened.

Q The model predicted the prices would have remained fairly stable?

A That's right. There would have been a slight decline in prices in 1989, but then they would have bounced back.

Q The red reflects the damage to the fisherman price?

A That's right, that red area reflects the size of the taint effect.

* * *

[5256]

DIRECT EXAMINATION OF ROGER LOHRER BY MR. O'NEILL:

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Q And, Mr. Lohrer, what do you do for a living?

A I'm the owner of Dock Street Brokers.

Q What does Dock Street Brokers do?

A We're the brokers for commercial fishing vessels and limited entry permits.

Q What does a broker do?

A A broker, basically we act as a clearinghouse for buyers and sellers of permits, bring the buyers and sellers together.

Q So if I wanted to sell my permit, you're like a real estate guy for permits?

A Exactly.

Q And I could come to you and – and you'd help me sell it, or if I wanted to buy a permit, I could come to you and you'd help me buy it?

A Yes, that's correct.

Q Do you have any experience in the Alaska fishing industry, sir?

A Yes. That is our primary area of operation.

Q Have you yourself worked in the fishing industry?

A Yes, I have. I ran tenders in Alaska for approximately 15 years.

Q And in what areas in Alaska?

A Chignik, Kodiak and Southeast Alaska.

Q And when you say you ran a tender, a tender is the guy who goes out and picks up the fish from the fishermen?

A That's right, and then delivers the fish back to the cannery.

Q How long have you been in the broker business?

A This will be our 17th years.

Q And during those 17 years, have you bought and sold permits?

A Not personally, but yes, I have arranged sales.

Q You have arranged sales of the permits?

A Yes, that's correct.

Q And of boats?

A Yes.

Q And in what areas do you buy and sell permits?

A In every area in the state of Alaska, as well as Washington and down the coast.

Q And how many employees does Dock Street Brokers have?

A During our normal selling season, which is October through June, we have four full-time employees.

Q And have you sold limited entry permits for Upper Cook Inlet, drift and setnet gear types?

A Yes, we have.

Q And Prince William Sound, various gear types in Prince William Sound?

A Yes.

Q Kodiak?

A Yes.

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Q Chignik?

A Yes.

Q Salmon and herring?

A Yes.

Q Since 1990, 1991, has there been a change with regard to the frequency of sales and the prices for permits in Prince William Sound, Upper Cook Inlet, Lower Cook Inlet, Kodiak and Chignik?

A Yes, there has.

Q And would you tell us about it?

A Since 1991, particularly after the release fish report 27, we've seen a drastic drop in both the value of the permits, that would be the selling price, as well as the number of the permits we sell. And we also see it taking a lot longer for us to find buyers for permits in those areas.

Q And so the permit prices have dropped?

A Yes, that's correct.

Q And it's harder to sell a permit out of those areas?

A Yes. In some of the areas, there's almost no market whatsoever.

Q And you said that that happened after fish study 27, or the announcement of fish study 27?

A Yes. We first started seeing it in the fall of '91 and then that fall and then the following spring and winter, so we saw the drop really hit us.

[5260]

Q And you've worked in this area and talked to these people?

A Yes, on a daily basis.

Q And in sales negotiations for Prince William Sound salmon permits, what reasons have buyers cited for not higher prices?

A The main thing we're hearing from the fishermen is they're concerned about the long-term and short-term effects of the oil spill and whether or not there's going to be sufficient runs or whether or not they're even going to have the opportunity to fish at all.

Q And how about Kodiak?

A In Kodiak, yes, we're seeing the same general concerns from the fishermen.

Q And with regard to Kodiak salmon seine prices, for example, what's happened to Kodiak salmon seine prices?

A In 1991, we were seeing prices in the range of 125,000 to $140,000, and those prices now are down around 40 to $50,000.

Q And with regard to the sales negotiations for Kodiak salmon seine permits, what reasons do permit buyers cite for not paying higher prices?

A The main concern is the long-term effects of the oil spill on the fisheries.

Q With regard to Prince William Sound herring permits, what's happened with Prince William Sound herring permits?

A We've seen a really radical drop there. Those permits prior to '91 were almost impossible to find. In 1991, '92,

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those permits were selling for approximately $150,000, if you could find one to sell. And this year they're trading for approximately $50,000 right now.

Q What reasons do buyers cite for not being – for attempting to drive the price down with regard to Prince William Sound herring permits?

A Again, it's the effects on the oil spill on the herring, the fact that we're seeing diseased herring or herring with lesions on them, and lower quotas and just the runs appear to be in danger.

Q Okay. With regard to the numbers of permit sales, the activity in permits –

A In all permits or just Prince William Sound herring seine?

Q Let's take Prince William Sound salmon permits.

A That's probably the most drastic reduction on any permits that we've seen in the state. Those permits, we've sold them for as much as $250,000. This year, I believe we had three sales, one I'm just completing when I go back to my office tomorrow. It is at 33,000. The other sales that we had this year were in the range of 50 to $65,000, if you could find a buyer.

Q With regard to the number of – the sales activity that you've seen with regard to the various permits that we've talked about, compare, if you would, the sales activity in, for example, 1991 with the sales activity in 1993.

[5262]

A Well, not having the number offhand, I can give you an approximation. I would say that they are probably 25 percent of the total that they were prior to the –

Q So people are buying fewer permits?

A And paying less, yes.

Q And does it take more time to sell a permit now?

A Yes. Typically, Prince William Sound salmon seine, for example, if you could get one listing, you know, in October, we would generally have those sold within a month or two, sometimes within a day or two. Now we've had permits listed in Prince William Sound for both herring and salmon that have been listed for over a year without any offers at all.

Q So people just won't buy them?

A That's right. They're getting down to the point now where I think most of these buyers are speculators that are just hoping that, you know, something may happen or there may be an improvement, but they're buying them and hanging on to them rather than even fishing them.

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[5277]

DIRECT EXAMINATION OF ROSALEEN MOORE
BY MR. SARKO:

Q Good afternoon, Ms. Moore. My name is Lynn Sarko. I'm one of the plaintiff attorneys. Could you tell us how long you've lived in Alaska?

A I was born in Anchorage and I've lived in Alaska my entire life.

Q What do you now do?

A I'm having a little trouble hearing. Must be a fan or something.

Q What do you now do?

A I'm a commercial fisherman and I also own a boatyard and

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storage facility with my husband and a boat brokerage in Homer.

Q I understand that you actually have quite a background in commercial fishing?

A I've fished in Alaska all my life. My parents owned setnet sites in Cook Inlet since 1939. I imagine I picked my first fish when I was learning to walk. I've – I personally have – is that okay?

I've personally fished Cook Inlet setnet, Cook Inlet drift, False Pass drift, Bristol Bay drift, Prince William Sound herring. My husband has fished in three of the major seine fisheries, two of the gillnet fisheries and crab fisheries of Alaska, and my children fish also.

Q Wow. I want to get into just briefly some of your background. You're a past board member of CFAB; correct?

A Yes, that is correct.

Q That's a new term. Can you explain to the jury what CFAB is?

A CFAB is Alaska Commercial Fisheries and Agricultural Bank. It is a private cooperative. It was funded by the State of Alaska to loan and then has leveraged money outside of the state to loan to commercial fishermen and the agricultural industry in Alaska.

Q Do I also understand that you're a board member of United Fishermen of Alaska?

A I've been a board member several times of the United

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Fishermen of Alaska and I am presently a member.

Q And what is that?

A It is a united – it basically handles political action in the state, and board members are made up throughout the state from different areas and different fisheries groups and kind of a watchdog of politics of Alaska fisheries.

Q During your time in commercial fishing, have you personally sold and bought various vessels and permits?

A My husband and I personally, since 1966, sold and owned 17 different vessels. We also have sold our own permits in many of the areas and transferred to different areas.

Q I'd like to get into your line of work. You are a commercial permit broker; correct?

A Yes, I am.

Q And the name of your business is?

A Northern Enterprises.

Q And how long has that business been – how long have you been involved in this?

A I started the brokerage business in 1981.

Q And is the business with your husband?

A He does very little in the brokerage business. It's really my own.

Q Let me just quickly get to the subject at hand. You've sold limited entry permits and I would just like to review in what areas.

[5280]

A The areas that our business sells permits in is Prince William Sound, Cook Inlet, Kodiak, Alaska Peninsula and Bristol Bay. We do some work in Southeast, but geographically since we're located here, north, we do very little. The other ones are where our primary business is and Cook Inlet is our real primary – I mean, it's where we sell the most.

Q The jury has heard the mention of fish study number 27. Since 1991 when that came out, have you seen a change in the price of permits that you've been involved with in your business that have been bought and sold since the release of that study?

A Well, the information on the study started coming out in the fall of '91 and the actual study came out just after the first of the year in '92. When that word came out and started getting onto the street, basically, that Cook Inlet would have very little fishing in '94, '95 and '96, permit prices started to drop drastically. I personally had some concerns and gave a call to a biologist about it that fall.

Q And the permit buyers and sellers that you dealt with raised this as a concern?

A Repeat the last –

Q The permit buyers and sellers that you were involved with spoke about this to you?

A Yes, they did. I probably deal – we store 500 boats. Half of those are from Cook Inlet, so on a daily basis and a

[5281]

yearly basis, I must talk to thousands of fishermen, and in the Cook Inlet area, probably, you know, couple hundred in a year. And they were very concerned about what their future held for them and would they be able to make a living in the fishing industry.

Q Let me move on to Prince William Sound. Did – what happened to permit prices in Prince William Sound?

A Permit prices in Prince William Sound actually started to decline right at the oil spill. The one area that dipped immediately and started going down and just furtherly, especially, the seine permit eroded. The drift permit went, too, down and kind of went across the board for a while and now it's went down even more.

Q What types of concerns did Prince William Sound buyers voice to you?

A Well, the first few years, or right after the oil spill, I had many complaints that they couldn't even get loans and to even buy anything. So that started the first erosion, and they just don't know what the long-term effects are of the oil. The herring fishery has been closed for two years due to lesions on the fish. The salmon fishery last year, guys did not even break even. I know of only one person that had any substantial pounds, and he was the only one practically fishing in the Sound. And he stayed over there and scratched it out, but the rest could not even make their payments. Our son-in-law did

[5282]

not even go because of it.

Q These were concerns that were being raised to you?

A These were concerns. They talk about it daily. They just – what are we going to do, you know.

Q You mentioned the term lending and I'd just like to briefly touch on that. Do you have dealings with the State of Alaska Department of Investments in connection with the financing and purchasing of limited entry permits?

A Yes, we do. They financed the primary amounts of permits in Alaska to state residents.

Q And you briefly discussed what CFAB was?

A Yes.

Q Are you familiar with those lending requirements?

A I'm real familiar with it. We do loan preparation, along with the sales of permits.

Q And have you observed the lending requirements change since January of '92?

A Yes, I have. After the report came out, fish study 27, the State of Alaska issued a directive that they were drastically going to reduce the amount of money they loaned into the Cook Inlet and Prince William Sound fisheries. Before they would loan 90 percent of the appraised value of the fishery, and 80 percent if you had additional collateral.

After the directive came out, it was 50 percent. You had to come up with 50 percent of the cash in order to buy a permit

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in those areas.

Q And in connection with those lending requirement changes, the effects that you've mentioned have been voiced as to what was the effect on the fisheries?

A Yeah, fisheries families basically no longer could – even if they had some confidence, which they don't, no longer would have the capital to enter into the fisheries and they're very concerned about it, and the lending institutions did not want to have anymore loans on the books that weren't well financed and had a lot of collateral because they knew they were going to have enough trouble with the ones they already had on the books.

Q Let me just quickly go over some of the various permit areas. Starting with Cook Inlet, can you tell me what you've observed happening there in prices, the market, how quickly the permits have sold and whether there is a market?

A Well, prior to about '91, it – I think Roger and I probably both had to stay awake nights to see who was going to get the sales. It was an absolute frenzy. If I got a permit on the table or on the desk from somebody, I'd probably have it sold in 24 hours to 48 hours and we were looking for permits constantly because we had a large list of buyers. After that, we have a large list of sellers and very few buyers.

Q And the prices have plunged?

A The price in 1980 – 1990, excuse me, one was over $200,000

[5284]

and I had people standing in line to buy them. And the last permit we closed for Cook Inlet was 58,000 and that was a month ago.

Q Let me ask –

A That was for Cook Inlet drift.

Q Let me ask you about Prince William Sound salmon permits. There's been a change there also?

A There's been a drastic change. Right at the oil spill, I had several contracts of prices around $300,000 for Prince William Sound salmon seine, and we recently closed a permit, I think it was April 30th, for 34,500. On the same day, CFAB auctioned a permit off that bought basically the same price, and so did the State of Alaska. And those were foreclosed permits and the one I sold was involved in a bankruptcy.

Q And there, similarly, has been a change in the number of people who wanted to buy permits to now, the few people who want to buy permits?

A The numbers are drastic and also the make-up is drastic. I just don't have very many. I used to have pages of people that wanted to buy permits in any area of Alaska and now it's – you can advertise a permit in almost any of these areas for months and not get anybody to come up to it. They're all looking for bargains, and if they do put their name down, they say, well, if the Sound permit reaches 25, give me a call, if Cook Inlet reaches 45, give me a call. They just aren't interested and

[5285]

they are – I guess they're investment seekers, they're not really fishermen anymore.

Q When you say – just to be clear, when you say these areas are having trouble selling permits, these are the oiled areas?

A That's right. It's Prince William Sound, Cook Inlet, Kodiak. It is not the Alaska Peninsula and it is not Bristol Bay.

Q Let me take you to Prince William Sound herring. Is there a similar problem with selling those permits?

A Yeah. Prince William Sound herring sold for $250,000 and now there's nobody that wanted one. I heard of one that sold for 70, but I did not personally handle that in our office, and there's just no – you know, who wants to buy into a fishery you're not going to fish?

Q And, lastly, are you seeing the same problems in Kodiak salmon permits?

A I have permits listed for Kodiak for 40,000 and I can't sell them. There are no buyers.

Q And there's been a drop in those –

A The high was $180,000.

* * *

[5363]

DIRECT EXAMINATION OF HANS JAHNS

BY MR. SANDERS:

* * *

[5363]

Q Doctor, I want to go into your background to some extent in a moment, but first I want to ask you, as of right now, you're serving as a consultant to Exxon; correct?

A Yes.

Q And how long have you been in that capacity?

A Since the first – since early January 1993.

Q And prior to January of 1993, you were an Exxon employee, an Exxon scientist, for a period of 30 years; is that correct?

A Yes.

* * *

[5447]

Q As I understood your direct testimony, we've got roughly 25 percent evaporating, roughly 40 percent, and you've refined it now either on the shores or near the shores?

A Yes.

[5448]

Q Or coming into the shores in Prince William Sound, and 35 percent has gotten out of the Sound?

A Right.

Q Translate for me in gallons what that 40 percent would represent, sir, given the amount that, in your mind, left the Exxon Valdez.

A A little over four million gallons.

Q About four million gallons?

A A little over, yes.

Q Now, of the 35 percent that left the Sound, do we know that some ended up along the beaches in the Kenai Peninsula and in the – in the area down here, sir?

A Yes.

Q And is that because of the general flow of the currents along this southern portion of the northern Gulf of Alaska?

A Yes. The Alaska coastal current will take it that way.

Q And do we know that some of the oil came into Cook Inlet and lodged in areas that I'm pointing to right now, on the north shore here?

A I'm not specific on shoreline segments, but generally, yes.

Q All right. And do we know that some of the oil went over into – besides the Cook Inlet, went into the Shelikof Strait area and lodged itself on the Alaska Peninsula?

A On some segments there, yes.

[5449]

Q And do we know that some of that oil went and lodged itself on Shuyak Island and Afognak Island and Kodiak Island?

A Yes.

Q And that that oil went all the way down passed Chignik on the Alaska Peninsula?

A It went passed Chignik, yes, what was floating, and floated even farther, ended up in the Pacific Ocean.

Q All right. Now, that's a portion of that 35 percent that we talked about –

A Yes.

Q – that had been sort of freed from Prince William Sound in 1989?

A Right.

Q Can you tell me now what percentage of that 35 percent ended up on those beaches, sir?

A No. I don't have – haven't made an estimate of that.

Q Haven't made that calculation?

A No.

Q And Exxon didn't ask you to make that calculation; did it?

* * *

[7002]

THE COURT: Good morning, ladies and gentlemen. This is the continuation of trial in case A89-0095, civil, in re the Exxon Valdez. We are ready to commence Phase III of this trial and I have some further preliminary instructions for you.

We will now begin Phase III of the trial in the case arising from the Exxon Valdez oil spill. In Phase I of this case you found that Joseph Hazelwood and the Exxon defendants were guilty of reckless conduct which resulted in the grounding of the Exxon Valdez on March 24th, 1989. In Phase II-A of the trial you awarded sums of money for actual damages to various commercial fishermen to compensate them for the losses legally caused by the Exxon Valdez oil spill.

In this Phase III of the trial you will decide the amount of punitive damages, if any, that should be awarded against the Exxon defendants and/or Joseph Hazelwood. In this third phase of the trial the claims of all who suffered actual damages caused by the oil spill have been consolidated into a single proceeding for purposes of determining whether punitive damages should be awarded against the defendants and, if so, the amount of such damages.

This includes claims of persons who are suing for their actual damages in the state courts because of these – because of this consolidation of claims. There will be no other claims for punitive damages in any other court with the exception of the claims that you resolved in Phase II-A. You will not be asked to decide the true amount of the actual damages, if any, to which other claimants are entitled.

In a few cases the parties have agreed to the amount of actual damages sustained by certain claimants. As to other claimants, the parties have entered into a stipulation which states the approximate amount of the actual damages claimed by other persons who contend that they were injured as a legal result of the oil spill. This information will be provided to give you an idea of the amounts of additional actual damages claimed by other plaintiffs, although those claims are disputed in whole or in part by the defendants.

The purposes for which punitive damages are awarded are, one, to punish a wrongdoer for extraordinary misconduct, and, two, to warn others against doing the same. The amount of any award of punitive damages should be fixed using calm discretion and sound reason. You must not be influenced by sympathy for or dislike of any party in the case.

Punitive damages are not favored in the law and are never awarded as a right, no matter how egregious the defendants' conduct. This does not mean, however, that the plaintiffs' burden of proof of punitive damages is any different from this of Phase I. You must decide whether or not plaintiffs have established by a preponderance of the evidence that, one, an award of punitive damages should be made in this case, and, two, if so, in what amount.

* * *

[7013]

MR. O'NEILL: Thank you, Judge.

May it please the Court, Counsel, Ladies and Gentlemen of the jury. What is the appropriate punishment for reckless conduct by one of the largest institutions in the world? That's why we're here, the conduct that we're talking about you have found to be reckless, and I'm going to take about three minutes and revisit Phase I, but I'm going to do it very briefly.

The Phase I jury instruction that you were given at the time described a defendant who was conscious of a particular grave danger. He disregarded the risk, or it disregarded the risk, and the conduct in ignoring the danger or risk was a gross deviation from the level of care. That's good old jury instruction 28, to revisit what happened, and in response to that instruction and other instructions which you read as a whole, you returned this special verdict in which you found the conduct was reckless, and this is why we're here. If you would have said no, no, no, we wouldn't be here, so this is a session that you convened.

[7014]

This conduct, this reckless conduct, was a finding by you that Exxon Corporation deviated, grossly deviated, from the standard of care that we expect of it and all others like it. So we're back here in Phase III to decide on the amount of punishment.

Now, briefly, the punishable conduct spanned five years, from 1985 to 1989, and it included within Exxon Shipping Company almost everybody in Exxon Shipping Company. We had the West Coast fleet manager, Gulf Coast fleet manager, we had Frank Iarossi, we had everybody up and down the chain of command at Exxon that had complicity in what happened, so it wasn't a lark. And with regard to Exxon Corporation and the defense of what happened, we had complicity again from the top to the bottom.

We had the people who run Exxon Corporation, the most powerful people in the world involved in telling Congress what did and didn't happen, and they were involved in coming in here and telling you what did or didn't happen. And the Exxon Corporation medical department were involved in what happened, the head of the medical department. So Exxon Corporation and Exxon Shipping Company, up and down the chain of command, participated in this conduct.

And with regard to their position on what happened in Phase I, they told you that it was okay for recovering alcoholics to drink again. They told you that relapsed alcoholics can pilot

[7015]

supertankers. They told you that alcohol had nothing to do with the grounding and they told you that Captain Hazelwood was the most closely monitored man in the fleet. And that it wasn't told to you – none of those things were true, but that wasn't told to you by low level Exxon employees, that was the position of Exxon in this courtroom in Phase I, and none of those things were true.

Now, that's about all I want to say about the conduct. We'll revisit the conduct in the closing, but I do want to talk a little bit about the risk taking, because the risk taking, the risk that they took with the public, just wasn't right. This was Mr. Rouse's testimony right at the end of Phase I: So your policies, knowing the risk to the public, of the catastrophic results of a supertanker accident, allow a relapsed alcoholic to command a supertanker? Yes, sir, that's possible under our policy.

This is a foolish, callous risk, it is; doesn't accord with anybody's common sense, and Mr. Rouse was from Exxon Corporation, not from Exxon Shipping Company.

Now, another risk that they took, so we can put the conduct into some kind of context, was with spill sizes in Prince William Sound, and this is Mr. Stevens who testified before the Congress: My own view is that that occurrence, 200,000 barrels in Prince William Sound, was viewed, quote, so highly unlikely that the consequences of it which have occurred pretty much

[7016]

well – which have occurred pretty well as much as envisioned were viewed as acceptable by today's retrospective that may be incomprehensible, Mr. Chairman, well, it is incomprehensible, but this is a risk taken with specifically Prince William Sound, and it was a conscious knowing risk that they took with the Sound, if there was a big spill, oil was going to hit the beaches, a knowing conscious risk.

Now, there were other risks that were taken, but I'm not going to go into all of those, but I do want to highlight the testimony of two Exxon chief executive officers, Frank Iarossi, the president of the shipping company, and Mr. Raymond, who at the time was the president of Exxon Corporation. Now, Mr. Raymond is with us today and is going to testify, but Mr. Iarossi was aware of the risk associated with the transportation of crude oil, we understood the risks in the business, yes; we understand the responsibilities, yes, sir. And Mr. Raymond was aware that with regard to managing this risk, and it is a big risk, that the selection of the master and the evaluation of the master was a good way to manage the risk.

So there were chances taken with the public with the alcohol policy, with the selection of the master, with the knowledge that if there was a big spill in the Sound, oil was going to hit the beaches. These were all risks that they took.

[7017]

Now, the risk that they took were with people that didn't have a choice. If you're a fisherman in Prince William Sound or a landowner in Prince William Sound or a Native subsistence harvestor in Prince William Sound, you didn't have any input into these risks, these were risks that were taken by other defenseless people at Exxon Corporation, and knowing that these risks consisted you have found that they acted recklessly.

Now, they also took risks with regard to the enforcement of rules and laws, the fatigue rules and laws. They took risk with regard to ice, they took risk with regard to their attitudes towards the treatment of employees, they took risks with regard to widespread people problems throughout the institution, and they chose those risks.

I mean, this is a collection of smart, well-educated, talented people who should know better, but in any event the verdict – we don't need it again, the verdict is such that the conduct requires punishment and the conduct requires punishment in this case even more so because of the nature of the individuals involved. These are people who ought to know better, and they will show you in this next phase that they do know better.

Now, Exxon is one of the biggest institutions in the world and is given a privileged status in society. And why do I say it's given a privileged status? If 50 or a hundred of us got together and went out and got involved in an activity, in a lot

[7018]

of instances the law condemns that, it's a mob, conspiracy, but the law recognizes that there are advantages in allowing people to act together. And we have corporations, and a corporation is a sanction from society that says we're going to allow you to pull people in together and operate together, but that is a gift from society, and Exxon is allowed to operate as a corporation in a lot of countries. It has a tremendous size, a hundred thousand employees, and in Alaska it's allowed to extract the people's oil. This isn't Exxon's oil, it's the people's oil, it comes primarily from public lands. That's a gift to it.

The Exxon executives, mostly the Exxon employees, acquire some wealth while they work with Exxon Corporation, and they are given this in exchange for two things. They provide a service to society, a very valuable service. They provide us with our oil and gas, they do, but the second half of that is, if we're going to allow you to become wealthy and rich and operate in a corporate form and take our oil out of the ground, we want you to be responsible, we want you to be careful, we want you to be caring. And in this case, that trust, that deal with regard to Exxon Corporation and oil and size and wealth, was broken.

Now, as His Honor said, the purpose of punitive damages is to punish the wrongdoer and deter others, and the size of the award has to be looked at in terms of punishment and

[7019]

deterrence, and I'll talk more about that in the closing when I know more about what His Honor's instructions are going to be in the closing. But right now punishment and deterrence, and this is okay, but it isn't okay. What is punishment for a poor man could be nothing for a rich man, and in legal terms they call that the rule of proportionality.

Punishment for a poor man can be nothing for a rich man, so we have to – and the primary proof that you're going to see in Phase III, we're going to see two, but the primary proof is going to be with Exxon's size wealth.

Now, I'm going to go over for a minute in some detail how we talk about corporate wealth and I'm going to show you the exhibits, and when we put our numbers guy on, he's going to go through it, and when Mr. Raymond takes the stand, we'll go through it, and then I'll go through it in the closing.

And you say why is the dummy going to go through it four times. It's to avoid jury question triple Z. Little jury humor.

THE COURT: Too early in the morning.

MR. O'NEILL: Pat Lynch and I had to sit and wait for the questions, if you wonder where these come from, from sitting at our office.

But it is important, and corporations publish year-end reports and annual statements, and this is one of the exhibits, and you're going to get these for a number of years in exactly

[7020]

this form, color, nice. They are required by law to publish them.

The Securities and Exchange Commission and the 1934 Security and Exchange Act required that they file things with the Securities and Exchange Commission. There are requirements that they publish financial data to their shareholders and the investing public. These are put together by accounting firms, the big six or seven accounting firms, and the company – and they are very serious documents and they contain information that is as accurate as – a company with the size of Exxon Corporation with its accountants can make.

They include at the beginning sort of a pitch on how well investors do in Exxon Corporation and highlights for the year, and then there is a letter to the shareholders, which is sort of the top guy's view of what happened last year, and then there is sort of a – I guess sort of a fluff – sections of fluff pieces on the different departments, and when you get back to the different colored pages, and I think they are different colored because of time deadlines and putting them together, they go through extreme detail all of the financial aspects of the corporation.

There is an appendix to this that has further financial information in it. They are done on a yearly basis. These year-end reports, annual statements, they are done on a yearly basis, and we will have a Mr. Sam Rhodes' testimony about these

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at some length.

We will also put on some summaries of them, and Mr. Rhodes will tie these reports to the summaries, so you'll know exactly where the numbers come from, and I'd like to take a look at one of the key summaries for a minute and he's going to go through it, and Mr. Raymond is going to go through it, but I'm going to go through it so we know what we're talking about.

This is Exhibit 6302-A, which will be preadmitted and which will be in evidence, and what we have done is we have taken from the year-end statements some of the key indicators and we laid them down by year from 1988 to 1993, so if you were to go to this book and look at assets and trace them through on a year-by-year basis, you'd build this chart.

Now I'm going to bore you with a little Economics 101 and go through these categories. Assets are essentially what the company owns. Revenue is the gross amount of money that it generates through whatever it does. After-tax net income is what it has left after it spends everything for the year. Cash flow includes after-tax net income plus other things that the company has money to spend on. So if the company has $10.55 billion in cash flow, it can take some of that money and reinvest it back into the company, $5 billion, and still have a five billion after-tax net. Makes sense. This is property, plant and equipment, this is what it spends on that.

The cash dividend, and this is in billions, is what it paid

to its stockholders in cash dividends that year, all of them. This is the stock price that it sold at the end of the year, this is the one number that is not in the year-end statements. You've got to go and look in the Wall Street Journal on the last trading day of the year and see what that is. The outstanding number of shares is in here.

Market capitalization is the stock price times the outstanding number of shares. That is what is the investing public – what numbers to place on the company.

Earnings per share are the earnings of the company per share. This is in regular dollars. Dividends per share, what they paid out on a dividend of one stock, and the equity of the company is what its books and records show is the value. So you have essentially two valuations. You have a market capitalization valuation; that is, what is stock payers willing to pay and what kind of equity does the company have on its books and records. These are a variety of different indexes that one could look at in judging the size wealth of Exxon Corporation. Of note to our purpose here, is that every year they have had a three, four, five billion after-tax net.

In 1989 the after-tax net was down a little bit, but it's down for a couple reasons. The spill is one, but they also did a lot of investing in the future in 1989. 1989 was a building year. But you can see with regard to assets, revenue, after-tax net, cash flow, investments in the company, cash

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dividends, their stock price, the number of outstanding shares remains constant. Market capitalization, earnings per share, dividends per share and equity, that Exxon Corporation is substantially better off today than they were in 1989, they are. And indeed on the dividends that they pay to their shareholders, they paid $2.15 in 1988. The year of the spill the shareholders got a higher dividend, $2.30, and increased the next year to $2.47.

Now, nobody is going to question these numbers. Exxon will provide different ways of looking at them, and I'm going to talk about those in a couple minutes, but these are the numbers and this company is so healthy that a spill like the Valdez spill is, with regard to their regularly published numbers to the public, a hiccup.

And I'm going to come back to this probably later today and at the end of the week, but as an aside, this week is going to go fast. Even with the jury view we may be finished with Phase III by Friday, just for juror planning. May take until Monday, you know, we've normally had these closing on Monday, may take it until Monday, but it's going to go fast, and our case will probably be over at the end of today or tomorrow.

We face some of the same problems in Phase III as we did in Phase I. We're outside of Exxon and we're attempting to look inside Exxon numerically and add it, and we don't have a lot of Exxon people available to us when we want them.

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But post-spill Exxon Corporation thrived, its officers got bonuses and indeed Mr. Raymond and Mr. Rawl the year of the spill got bonuses. The numbers for the bonuses, and I'll talk with Mr. Raymond about them, are found in these proxy statements, and the proxy statements are sent out once a year before the annual meeting, and the Security and Exchange Commission requires that they tell the shareholders how much the executives are getting. And if I was a shareholder, I'd want to know. That information is in the proxy statements, and it's sort of obtuse, but I figure the best person to ask about it will be Mr. Raymond, so I'm going to ask Mr. Raymond about it when he takes the stand for the defendants.

But in point of fact, in 1989, the year of the spill, Mr. Raymond's salary was $909,000. He got 27,000 EBUS, employee bonus units, with a potential of 206,000, and he was awarded 180 stock options that were worth $300,000. The values of Mr. Raymond's unexercised stock options is about $10 million. Mr. Rawl got bonuses the year of the spill. So the two guys that were running the company the year of the spill were given bonuses.

We are going to play videotape depositions for you today in which I ask, was anybody fired as a result of this. Now, the only two people that had adverse personnel actions taken, at least according to what they told me when I took their depositions, and I asked all the appropriate people, the head

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guys, was that Hazelwood was fired and Cousins was demoted. So with regard to all these people, the West Coast fleet manager, the Gulf Coast fleet manager, the president of Exxon Shipping Company, the people in charge of the policies and monitoring, there was no adverse personnel action taken with regard to any of them. It was a "look at the two bottom guys and let's dump on the two bottom guys" kind of attitude, so the company thrived. The two top officers got bonuses, it thrived, and the people who made gross errors are still employed at Sea River Maritime.

Now, what is Exxon going to say in response to all of this. I'm going to put on mine for one day, what are they going to do for three days, they are going to make some points, they are going to say they lightered the vessel, and they are going to bring in Captain Deppe, who lightered the vessel, and Captain Deppe did a good job in lightering the vessel, and by lightering the vessel Captain Deppe cut the size way back. The risk was much, much bigger.

Captain Deppe will tell you, and it is not particularly important, but the lightered oil was saved and resold, so Exxon made some money off it, but the fact that they lightered the vessel was something they had to do. You have a vessel that's on the ground spilling oil, it's something you got to do. They did a good job, but they did it because that's what the law requires, and common sense. They are going to say they paid

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enough and that's why Mr. Rawl is here – excuse me, Mr. Raymond, and Mr. Raymond is going to say we paid enough and that ought to be the end of it; we paid $2.7 billion, with regard to 2 billion in the cleanup and the monies you awarded in Phase II and such, and that ought to be the end of it.

And we're going to show you a videotape of Mr. Rawl when he was the chairman of the board about the impact of paying a billion dollars, and Mr. Rawl will say.

For the first three minutes you'll say, why are the plaintiffs playing the videotape, this is sort of boring, what's the point. The point is when we get to the end of the videotape, Mr. Rawl will tell you that a billion dollars to Exxon in the context of this spill means almost nothing, and that his time – the reason they settled their cases with the federal and state government for a billion dollars was because his time was being diverted, and a billion dollars isn't a heck of a lot, and I want you to watch that videotape carefully because that's the import of that videotape.

We will show you Jack Clark, who is sitting back in the audience, and Mr. Clark will tell you that the costs associated with the spill didn't have any impact on the company. It's a short three or four minute videotape, but he will tell you that. But we saw, and we'll see again with regard to these key financial indicators, that Exxon Corporation today is better off than it was the year of the spill.

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Now, I want to take an aside here for a second and talk for a minute about Captain Hazelwood. I'm not going to spend a lot of time on Captain Hazelwood. In the closing I'm going to ask you to award punitive damages against Captain Hazelwood because I think it's important that the point be made, but I'm going to ask you for a dollar against Captain Hazelwood. And why is that? Because Captain Hazelwood is not better off today, he isn't, than he was in 1989. Captain Hazelwood has lost his job, he's no longer financially secure. There is a year or two in here, and I don't recall when it is, where Captain Hazelwood's income, his revenue was zero. And in point of fact with what has happened to Captain Hazelwood and his position in the history books with Captain Hazelwood, enough is enough.

But that isn't the same with Exxon Corporation and with regard to Exxon Corporation. They have thrived during the year of the spill and since the year of the spill and so have their executives and everybody who was involved in the events leading up to the spill who works for Exxon Corporation.

In addition, and I'm going to give you a concept here, let's assume for the sake of discussion that the spill was totally innocent, accidental, a storm came up, blew the vessel out of the traffic separation scheme and onto the rocks, .8 miles over and on to the rocks. Let's assume that. So there is no reckless conduct, none, nobody contends there was reckless conduct. In fact, the captain of the vessel

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heroically saved much of the oil, and it was a classic textbook save, because of weather there was nothing we can do about it.

Let's assume that for the sake of discussion. What would that company have to pay with regard to cleanup, compensation, victims, lightering and those things, $2.7 billion. An innocent spiller of oil. You know that Robert Fulghum book, All I Ever Wanted to Know I learned in Kindergarten? A spiller has to clean up the mess.

While they have paid $2.7 billion, they have not paid one cent because of recklessness. The items that they are going to talk about are compensatory damages, and the spiller of oil has to pay compensatory damages because it's strictly liable under the Pap's Act and other statutes. They paid restitution to the state and government for oiling state and federal lands, they are going to pay the fishermen, they are going to pay the cleanup. All of that is required by law for an ordinary accidental spiller, has nothing to do with the punishment of reckless conduct. They have paid $125 million fine, but they have paid that $125 million fine for negligence in the context of the criminal proceeding, so they haven't paid a cent because of their reckless behavior.

Now, do we have that Steven's quote. The consequences of the spill which have occurred pretty well as much as envisioned were viewed by them as acceptable.

This $2.7 billion was a cost of doing business. This was

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the cost of doing business, but in any event, despite it being a cost of doing business, and the fact that an innocent spiller who have had to pay $2.7 billion and that they haven't been punished for their reckless behavior, the balance sheet shows that the $2.7 billion had little, if any, impact on them, and the Rawl video will show you that in the context of $1 billion.

So you say to yourself two minutes in, boring video. Watch it until the end because it gets really, really interesting.

Exxon is also going to say we cleaned it up, and they did clean it up, and they spent $2 billion working on the cleanup, and my comments are that on the cleanup was a mixed bag. A lot of it was done very well. They did spend $2 billion on it; they got only 10 to 15 percent of the spilled oil. Everybody agrees with that. Mr. Johns testified they'd gotten to 15 percent. But that gets back to kindergarten, you clean up your own mess, and the laws require that of an innocent spiller, and they understand the risks of the cleanup.

They took the chance essentially on purpose, and they are going to say, and this is the last point I want to talk about, that they changed their policies, and Mr. Elmer, who is the new president of Exxon Shipping Company, now sea river maritime, is going to testify about that for an hour, hour-and-a-half and he's going to say something totally different.

This is going to be interesting because it's totally

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different than what you heard in Phase I. In Phase I everything they did was right. You're going to find out when Mr. Elmer testifies that indeed they did have fatigue problems, they have added additional mates, they did have problems with regard to alcohol policies, they did have problems with regard to ice policies, they did have problems with regard to the bridge manual, they had a variety of problems, and that the problems were institutional, deep-seated institutional problems.

And Mr. Elmer is going to come and tell you about the fact that we have changed all these things, and the pitch is going to be we've changed, so don't punish us. But that's no different than any kid caught, and their paper policies, and oil companies tend to act only by reaction.

The other things about these changes, and you're going to see this and it's very interesting, most of the changes are made in response to the law, and the Congress and the State of Alaska and the states of California, Oregon and Washington, as a result of this passed a variety of laws to force them to change their behavior. And they could have done all these things before, and the fact that they had to go through this to do what you and I would have expected of them in the first place – so as Clint Eastwood would say, we have a very serious attitude problem here.

And then the last thing they are going to do is come in and

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say we're not that big, and this is going to be done by saying you can't look at Exxon Corporation as a whole, but you need to look at various activities within Exxon Corporation in assessing how much to punish us, and they are going to talk about U.S. activities versus foreign activities, they are going to talk about oil and gas versus chemicals and try to dice the cake a bunch of different ways.

And my comments on that are Exxon is run as a consolidated company and the balance sheets are consolidated balance sheets, first answer. Second answer has to do with how they manage their money, and this is from the 1991 Exxon annual report. The company's global operating activities have provided cash flows of about 10 to 12 billion annually in recent years. Cash flow is centrally coordinated in order to efficiently move funds from units generating cash to units where the funds are needed to finance new investments or meet operating requirements. The company is run as a whole.

Now, this is from the 1991 Exxon book here, page 4. And the last answer to it is there is a stipulation that bears on it that was read to you in Phase I in which the parties agreed for a variety of reasons that we're dealing with the Exxon defendants, essentially one institution, and on the verdict form when you get the verdict form in Phase III, you will not see upstream and downstream or U.S. or foreign or oil and gas; you'll see the Exxon defendants.

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But when it gets right down to it with regard to punishment and whether they have been punished enough, it's best to look at what they say in their annual reports, and 1991 was one I happened to make some highlights up from, but it's a year or two after the spill. Net income of 5.67 billion, best in Exxon's history; earnings per share, 4.45, highest ever; return on shareholders equity 16.5 percent; total shareholder return for 1991 was 23 percent. How would you like to manage your money like that?

Capital and exploration spending, what they invested in the future, 8.8 billion, and there are other similar passages, but Exxon has thrived during and since the spill because it is as big and powerful as it is.

So how do we assess punitive damages on a company like Exxon Corporation in any meaningful way? Good question, sort of the 64 dollar question.

Let's take what we know. The Rawl videotape will show you what a billion dollars means to the company. The fact that Exxon has paid $2.7 billion in response to the spill, combined with how well they have done since the spill, shows you that $2.7 billion is not punishment. And I would submit in light of their conduct in Phase I, that $2.7 billion didn't get the message across, but in light of the balance sheet, we know that 2.7 billion sets the bottom of what we're going to look at.

Where do you go from there? If I was to submit to you as a

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proposition, let's just take from 1989 to the present day the amount that Exxon stock has appreciated on the market, not take the value of the stock, but just the amount from 1989 to the end of 1993, what is the amount that the stock – don't look at the answer yet, you're cheating – the amount that the stock as appreciated on the market, does that strike you as conceptually a fair number?

The number is $20 billion. Exxon's stock, because it has gone from $44 a share before the spill to – it was $63 year-end, now it's about 60, has appreciated about $20 billion since the spill, and it has appreciated $20 billion since the spill, and at the same time Exxon has paid to its shareholders $17 billion in dividends. So we have on the bottom range 2.7, which they have spent, which we know has no affect on them, and it's your job to search out a number that has meaning to Exxon Corporation.

Since 1989 Exxon stock as appreciated 20 billion after taxes, and at the same time they have been able to pay out to their shareholders $16 billion in dividends. For a transnational corporation, and Exxon is a transnational corporation, 80 percent of its business is outside the U.S. 26th biggest institution in the world, with an operating budget that would be the envy of many countries, nations, a fine must be high enough to challenge the view that the risks of recklessness are worth an occasional spill, and that the

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well-being of local fishermen, Natives, Native corporations, landowners, are but a footnote in their annual reports.

Now I want to talk, if I could, a little bit about the structure of the case. This is going to be more informative about how we're going to proceed. It will take about a week. We will end at the end of today or very early tomorrow. We are going to put on Sam Rhodes, who is a CPA, and some videotape depositions and read some documents. The claimants in Phase III include more than the fishermen than you saw in II-A, and His Honor alluded to that.

There is a Phase IV that has a variety of claimants in it, whose claims you couldn't try on a global basis, people are more individualized claims, and shrimpers, halibut, those kind of people, they also include landowners whose land was oiled, and present very unique problems, and other people also. So there is a Phase IV claimants, they are part of Phase III, and you will get read a stipulation that will detail all these claimants.

There is a proceeding in the state court that deals with the Native corporations and municipalities, and they are trying compensatory damages in Phase II of the state court right now. Their claims are in this court for Phase III, and people who have valid claims who haven't sued them out yet, right now I can't imagine who that would be, but they are technically in the Phase III.

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His Honor said anybody in the world who has a valid claim against Exxon is in Phase III so one jury and one judge can take one overview of punishment of this thing one time, and that's the structure and that's why we have a Phase III and a punitive damages class.

So for the purposes of Phase III, if you're in another court system or you're in Phase IV or you're still gearing up your lawsuit, or whatever it is, they are all your responsibilities. I mean, they are all in this one phase together, so that's structurally something that you need to know.

I can't think of anything else structurally you need to know.

The jury view will take place on the first good day we can get this week. If there is no jury view because the weather is bad and the helicopters have trouble getting over Portage Pass, Mr. Otto Harrison will put on some evidence for the defendants, and we will put on Rick Steiner. The jury view is dependent upon weather and we will interrupt the proceedings on the first day we can where it appears the helicopters can do, get you over to the Sound and we can get back, so you're on jury view call I guess is the best way to put it.

There are going to be in this short period of time some fakes, some stutter stepping, with regard to punishment. I'm going to come back to punishment and then I'm going to sit

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down, but I want to remind you of the obvious. The conduct was reckless, you found it was reckless, it hurt a lot of people, it was done by people who ought to know better, and the money that they paid out to date they would have had to pay out, one, if they would have been innocent, there has been no punishment for reckless conduct, there had been none, and at most it was a hiccup on their financial statements.

The third thing is, and His Honor said it, and that is half of it is to punish them, and they are to be punished, but the other half of it is to set an example for others, and that setting an example for others, half of the purpose of punitive damages is part of your charge, and it is a charge with regard to corporate responsibility, it's a charge with regard to the environment, it's a charge with regard to oil spill prevention.

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MR. SANDERS: May it please the Court, Counsel, Ladies and Gentlemen of the jury. You wonder how he knows so well what we're going to say? Because we tell him, we're required

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to give him what the witnesses are, and he calls me up on the phone and says what are you going to say and I tell him, and he tells me what he's going to say.

Now, in spite of his argument this morning, I do not intend to go behind your verdict in Phase I or reopen those issues. You found that we were reckless, we respect your verdict, we have taken it to heart even though you disagreed with us, but I cannot ignore his suggestion a while ago that the people at Exxon were intentionally risking an oil spill of 250,000 barrels in Prince William Sound as extraordinary misconduct.

There is not a person in this courtroom that actually believes that people at Exxon knew that was going to happen or intended for it to happen. That would be stupid. That would be sheer insanity. Let me give you an example that you'll remember from Phase I kind of risk taking, to use Mr. O'Neill's phrase, that occurred in this case.

Prior to 1989, prior to the spill, we knowingly took the risk that in calling for a captain to come forward and declare himself as having an alcohol problem and guaranteeing that person return to a job, that we had the risk that that problem could recur after he returned to duty. Now, that's not a risk that we knowingly took because we wanted to take a risk or because we didn't care, the one thing that he said that I agree with. It is not a lark. It was not a lark we took that risk because at that time, knowing what we knew and studying what we

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could study and knowing what everybody else was doing, we thought that was a lesser risk than having an unknown or undetected and untreated person with an alcohol problem sailing around on our ships, and we thought it was better to say come forward and get treatment instead of having the risk of an unknown ticking time bomb out there.

After the spill, after what happened in 1989, we completely changed that. The world has completely changed a lot of things since 1989. The new policy, and Mr. Raymond is going to testify about this, takes away any discretion or decision-making in the medical department or at the operational level that in hindsight was too hard a call to make, too hard a call to make. So now, under the new policy, which was changed in 1989, a person who has had an alcohol problem or has had alcohol treatment can no longer hold a job that is a safety sensitive job; that is, a person who has had alcohol treatment in the past cannot even be a captain or a tanker driver, truck driver, any safety sensitive job.

Now, we still have that other risk, make no mistake about it. There is still a risk, that other risk that there is somebody out there who will develop an alcohol problem, who won't come forward because he or she will fear I'll lose my job if I come forward to get treatment. We still have that risk. Now, of course we did a lot of things, more than we can do in 1989 or '85 to minimize that risk, but you cannot totally eliminate it.

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There are two sides of a very tough question. You remember that from Phase I, that's a far cry from a 250,000 barrel potential oil spill in Prince William Sound, the kind of risk counsel is talking to you about. That is not what this Phase III is about.

Mr. O'Neill has spent a lot of time on something else I don't think this phase is about. Now, these financial statements, I don't want to belittle his efforts, he's done quite well and he's proud of it, and I think I'll understand more when he finishes than when he started, but that all misses the point of Phase III. It is true that we are a large corporation and it is true that this corporation has been very successful. If you listen to Mr. O'Neill's theory and turn it around the other way, if after the oil spill we had done very badly, if we had not worked hard to overcome this, if we had failed and if we hadn't made money and our stock hadn't gone up or been bought and we were in bad shape financially and we couldn't have cleaned up, we couldn't have made changes, then he wouldn't be asking for any money here.

Nah, nah, it is true that we have worked hard, that we have been successful. It is also true that of every dollar that comes in, five cents of that goes to profit. It is also true that the range of numbers that he showed you towards the end of his argument, 15, 17, $20 billion is more than we have invested

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in oil in the United States of America.

And I'm not talking about just buying leases. He talked about a gift we got that we get this oil, it's the people's oil, we pay for that, exploration, leases, refining, marketing, service stations, buying the land where the service stations are. All of that together in the United States of America is not $17 billion. It all misses the point because it skips over the issues that Phase III is about. It skips over the reasons for punitive damages.

As the Court has told you and you will hear in the instructions today and later, your job in Phase III is not simply to determine how much Exxon has in order for you to select how much to take away from its owners, the shareholders. No, the critical issues in Phase III involve the conduct you've determined, the harm that resulted, the question of whether future punishment is necessary to deter and whether Exxon and others have gotten the message in the interest of deterrence.

Now, I do applaud plaintiffs' decision to ask one dollar from Captain Hazelwood, and I strongly agree with their reasoning.

Phase III is based merely on their ability to pay? That is not the law. Do not be misled by that and do not accept their invitation to jump ahead and brush over the issues for Phase III.

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Now, one other thing I want to say about the final information and I'll move along. He told you on a number of times during this opening statement that Mr. Rawl said that a billion dollars would have no impact on the corporation in 1989. That is not true. Mr. Rawl said it wouldn't bring us down. That's what he said. Don't be mislead.

So the case is not about the kind of risk taking that he's talking about, because that's not what the proof was, and it's not about looking at how big we are. If that's what it's about, we lose, we are big, and I'm not going to be up here to make apologies for the hard work that was done in order to do better since 1989. No, the issue framed for you in Phase III that the Court told you about this morning is not that you go from Phase I to a direct entitlement to money for the plaintiffs in Phase III. No, that's not issue.

The Court told you the issue. It was to determine whether, whether, punitive damages should be awarded, and, if so, the amount of such damages. So the real issues to decide in this case, this phase, are the ones plaintiffs' counsel has been raising from the very first day of trial, and we have finally come to the appropriate time to answer his charges that you're going to remember now when I repeat them from the very first day that this trial started on May 2nd.

You will recall it being repeated a number of times, Exxon is in denial, Exxon is not sorry, Exxon has not gotten the

message. We are here to place the truth before you about these accusations. We're not going to come with speeches; we are going to come to you with facts. We will demonstrate to you that these accusations are not true.

Why is it relevant now and why is it appropriate to deal with these issues? Because the issues in this phase are whether punitive damages ought to be awarded in order to punish Exxon further for extraordinary misconduct and to deter Exxon and others from repeating the conduct you found reckless in Phase I. And in making this important decision, your common sense and the law the Court has given you will tell you that you should consider whether Exxon has owned up to its responsibilities. We did; whether it is sorry for its mistakes, we are; and whether or not only has it gotten the message, but has it acted in response to that message, and we have.

So I want to talk to you about these matters and about your decision on the question of punitive damages. The first place I would like to start is the guidance you have from the law that governs our case, the law that you received from the Court.

You remember back in Phase I and this morning the Court telling you that punitive damages are not favored in the law, why is that and what guidance and perspective does that give you? Part of the reason I suggest to you is that in civil

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cases, such as the kind we have before you, the only punishment permitted by law is money in the form of punitive damages.

Now, these damages are assessed against defendants and they are awarded to plaintiffs. Now, Mr. O'Neill didn't mention that a while ago when he talked to you. These damages cannot come from anywhere else and they cannot go to anyone else but the plaintiffs. By their very nature and under the Court's charge, they are over and above the damages actually sustained by the plaintiffs. So the money does not go into some public fund or trust, it goes to those who have already been paid their actual damages.

In this case you have spent a lot of time, care and effort deciding how much money you should pay the fishermen plaintiffs to make them whole from the damages caused by the spill. You worked very, very hard. Now – and you have decided their actual damages.

Now, these fully compensated plaintiffs and others suggest to you that you should give them more, and not hundreds of millions, as you decided in Phase II, but thousands of millions, billions, and at whose expense, the guys that got the bonuses, some faceless, bloodless creation that you cannot see, but you're urged to hit it hard so whatever it is will be taught a lesson? Not on your life.

The people that own Exxon are the shareholders, the people and the institutions who own Exxon stock, and as the proof will

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show you, they number over 600,000 people who are identified as shareholders and then many more who own Exxon shares through pension plans, mutual funds, retirement plans and through brokerage accounts. Those shareholders will be hurt, and it's therefore inevitable that innocent people will be hurt by an award of damages.

Now, to pay actual damages, the law says it is perfectly proper as between an injured party and shareholders that actual damages should be paid. But that's less true in the case of punitive damages because you have fully compensated plaintiffs, like the ones here in this courtroom, being enriched at the expense of a lot of innocent people. That is a good common sense reason that the law does not favor punitive damages.

Now, the court also has given you other guidance in telling you the two purposes of punitive damages. One of those is punishment, and the one thing that I would mention about punishment, any punishment should fit the conduct and the harm, no less, but no more. And deterrence, and I think this is perhaps the most legitimate aim at justice in our society, punishment should be inflicted if it is necessary to deter similar conduct in the future, these defendants or others, in the same situation.

So our case in Phase III is going to focus on these three issues, punishment and deterrence, and you can see again now why I told you is the time to consider Mr. O'Neill's three

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allegations.

Now, in doing this we're not going to tug at your heart strings or curry with you. We are going to keep in our minds what I trust has been in yours in your trial, and best stated by that great old phrase, actions speak louder than words. We are sincerely sorry and we said so. We said so in March of 1989. We're not going to call a bunch of witnesses here to tell you we are simply sorry. It's much better and a lot more helpful to you to show you what we did rather than to keep telling you we're sorry.

In essence, we're going to prove four things to you: One, we accepted responsibility for the spill; two, we made a commitment to clean up the spill; three, we made a commitment to restore the Sound; and, four, we made a commitment to see that it does not happen again.

Now I want to talk to you a minute or two about punishment before we talk about deterrence, and I want to talk to you about the punishment that has already occurred, and I want you to remember as we go through this, if you will, please, that what Mr. O'Neill says about what would have been paid anyway if this ship had been blown off is not true.

What is the punishment in this case? Well, first you decided in Phase I that we were reckless. We came to you, we presented our case to you. They presented their case to you and you found that we were reckless. We have accepted that, we

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respect that decision. That hurts, that's punishment. And I'm not going to stand here and try to reduce either the scope or reach of your decision in Phase I or the import of it.

Now, there is another punishment that's been going on and that has been in the core public opinion. Since March 24, 1989, this corporation, Exxon, was criticized around the world for this oil spill. Its officers and Exxon employees have felt the sting of public censure for over five years. Some was fair and properly aimed, some was not, but it all came, nevertheless, and it all hurt and it hurts perhaps more because we knew we had made mistakes, not intentionally, but no one did say then or can say now that the criticism was deserved.

Now, Mr. O'Neill said we came to you in Phase I and said everything was all right. We started right from the very beginning telling you we made mistakes. This corporation will never forget this disaster or punishment. The Prince William Sound oil spill is a part of the corporate fabric, a part of the corporate life that will never go away. It's a lasting punishment.

What's the other punishments? Well, right after the spill we advanced to the federal and state government $15 billion to study the effects of the spill. Indeed much of what you heard in the plaintiffs' case about the science was funded by that

$15 billion. We also had a grand jury investigation by the state and federal government and a whole lot of publicity about

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it, and at the end of that there was a guilty plea by Exxon after we had cooperated in the investigations, including the NTSB investigations, which was a guilty plea by Exxon, which resulted in the largest environmental fine in history, and there was a settlement with the federal and state governments through which Exxon is to pay 900,000,000 and a billion dollars over the period of ten years, and another hundred million to the State of Alaska and for restoration of the Sound. So I'll ask you to consider that, and punishment that will continue for as long as the corporation exists in light of our conduct as you determined it and the harm which we have paid.

That brings me to deterrence and the answer to questions are we sorry, are we in denial, have we gotten the message. We will demonstrate to you in a number of ways we got it. We didn't run, we didn't hide, didn't even duck. We immediately took responsibility. We said to the country – well, let me show you this. You remember hearing about the Glacier Bay. You remember Dr. Crutchfield was testifying and there was some exchange where Dr. Crutchfield was saying I'm having trouble finding out who was responsible for that spill, and the court said, yeah, we had trouble with that too.

That didn't happen here, did it? Exxon told the country it is our ship, it is our oil, it is our responsibility. Then we immediately followed up those words with deeds. We took over responsibility for the cleanup immediately from Alyeska and we

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never attempted to shift it to the federal government. Next we said we were sorry, including a letter from the chairman of the board which was published in newspapers all across the land, that we acted like we are sorry.

Lightering, it's often overlooked, and the fact is, as Mr. O'Neill said, the lightering effort kept all or part of a million barrels of oil from getting into the water. Now, Captain Deppe will come and testify about that and will tell you what was done, and I'll ask you to remember, you heard about the Braer spill, the crew just abandoned the ship. Twice as much oil that was lost in Prince William Sound was lost in the Braer spill. Compare what we did with what happened there.

Now, I don't think Mr. O'Neill seriously tried to deflect from the effort it took to lighter that vessel and the response of it by saying we sold the oil. What do you want us to do with it? Throw it away.

Now, the cleanup. There is a great temptation, and Mr. O'Neill does it, to simply put a price tag on it and think that that explains and ends the matter. It doesn't, and I ask you to listen to the witnesses that we're going to call, Mr. Otto Harrison, Mrs. Connie Buhle, Mr. Jim O'Brien, about the cleanup effort. I don't want you to listen to numbers. I want you to consider the attitude that Exxon and these people took in doing this cleanup. I want you to consider, please, the commitment

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that it represented under the circumstances that they were facing, and I want you to consider, please, the effort that was put into it.

Connie Buhle is going to come and testify as to one of the many, many people that went to work in Houston bright and early on the morning of Good Friday 1989, called all over the world to get equipment and people into Alaska to work on the spill to clean up the spill. Mr. Otto Harrison, who was in charge of the cleanup, is going to come and testify to you about what was done and what effort was made to clean up the spill, and Mr. Jim O'Brien, who was one of the world's foremost experts in cleaning up spills, gone to all of the big spills, one of the best experts that could be found at the time, was hired immediately by Exxon and he's going to testify to you about what was involved in cleaning up the spill.

Now, this is not bragging, they are not going to brag, but what we want you to see is the commitment, keeping the commitment and effort that it took, and when you hear all this evident you will have clear and unequivocal answers to the questions that I mentioned at the outset.

And in addition to that, we're going to put on some evidence about the claims program that was established immediately. It was designed to pay money quickly to those people like fishermen, but not just fishermen who were losing money because of the spill and who needed that money to care

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for themselves and their families. It paid out over $300 million, and that was a very elcquent we're sorry.

There was a community liaison, which was a humanitarian effort to ease the pain that the local communities experienced because of the spill. These were a lot more diverse than the clean-up program and they included things such as payments to municipalities for their added or incremental cost resulting from the spill effects, jobs training program to train people to take the jobs that were working in other jobs and went to work on the spill, and also for assistance to Native villages and corporations.

In a very real sense, it cheapens the commitment and the effort to put a price tag on it, but punishment and money is the issue. It's been phrased in Phase III, so the proof is that the cleanup expenditures were over $2 billion in addition to the $300 million in claims payment. Of course, you add to that the monies paid in connection with the federal and state settlements and fines. These facts can't be disputed, I think, so the attack on this effort and what it really means about Exxon and what it stood for will come from a different direction.

I have to give Mr. O'Neill credit, he's a very skillful lawyer and he's very good at trying to make a sow's ear out of a silk purse. What he will do is not only focus on the things he mentioned in the beginning, but he's also going to focus

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your attention on some things a PR guy named Don Cornett said after the first few days of the spill, and you'll see it and hear it, and what he said is offensive particularly taken out of the context, which he was operating and out of the context of the other things that were going on. And I'm not going to try to stand here and defend it, but do not be misled by it. Mr.

Cornett was not involved in the clean-up operation at all and Mr. Cornett did not set corporate policy, and please remember that these remarks came in the first day or two following the spill.

Mr. Cornett was operating in his own department and worrying about the PR beating he was taking. What he said and whatever he was thinking did not influence the clean-up effort and certainly cannot be compared with the obviously sincere commitment Exxon made to clean up the spill. Compare what we did with Mr. Cornett's words and compare Mr. Cornett's words with the words of two Coast Guard admirals. This is Admiral Ciancaglini, that's '89. I think I've painted myself into a trap.

Here is the end of it. That's what he said, say about the people, then he was replaced by Admiral Robbins, or at least Admiral Robbins came along later on. This goes to the question of federalizing the spill, whether Exxon stayed with the responsibility or whether the responsibility should have been turned over to the federal government. This is why it wasn't.

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Compare those words with what Mr. Cornett said, compare the actions of Connie Buhle, Bill Deppe, Jim O'Brien. As good as he is, Mr. O'Neill cannot change the undisputable facts about what Exxon actually did in response to the spill, the effort and expense that it took and the duration and the sincerity of the commitment to make things right.

Now, I do need to say a word here about this PR business because we've heard an awful lot about it in this trial, and the message I get from this PR argument is that you should not give Exxon credit for anything good because whatever it does good is done for some PR purpose or you can't believe that because we have a PR department.

Well, let me tell you we did have a PR department, they did work in the aftermath of the grounding, and unfortunately they did say some things that help his theory along a little bit if you just consider those little snippets in isolation and ignore what was going on and if you make the mistake that PR sets corporate policy or that PR was in charge of getting any real work done.

Let me tell you something else. The PR department, as you well know from the proof you've heard in this case, did not change a single fact and I doubt they ever changed a single opinion. The PR effort was like trying to stop a herd of buffalo by standing in front of the stampede with a stop sign written in Russian. The PR argument is an attempt to get you

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to ignore the forest of truth by focusing your attention on a little satchling.

Now, there is another large body of truth that I want to talk to you about that addresses the question whether we got the message or do we need to be punished some more to deter us from the conduct that caused the grounding of the spill. I'm talking about the changes made by Exxon as a consequence of the spill.

Now, all of the changes that we're going to discuss were not done just by Exxon, and one of the things that was necessary to understand, to appreciate the situation between then and now, is that everybody, the industry, the governments, Coast Guard, the Environmental Protection Agency, everybody had a similar view of the remote chance that anybody could drop 250,000 barrels of oil in Prince William Sound. We did not stand alone in underestimating or in not appreciating that you needed more protection than was available.

You will not hear and you have not heard proof that somebody else was doing a lot more. When this spill occurred, it was like a clarion call to Exxon, to the entire industry, to Alyeska, to the state governments all across the United States, and particularly to Alaska and to the United States of America, particularly the Coast Guard, the Environmental Protection Agency and the Department of Transportation. All of these organizations suddenly realized that the risk had been

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underestimated and that everybody had been lulled into to a false sense of complacency by a good record of safety before that.

There is 8,000 transits without a problem, then everyone came to the painful and humbling recognition that we were not as smart as we thought, and suddenly everyone recognized a higher level of protection was necessary. Now, that is really what Mr. Stevens, in that piece that Mr. O'Neill kept putting up here this morning, that's really what I was trying to say to Congress, and when that testimony comes on, you will notice that it's preceded by another comment that kind of puts it in context.

The chairman of the subcommittee was asking Mr. Stevens about this, and before he says the statement that you saw up on the board, Mr. Stevens says I'll take the broader question and try – and then come to the more specific. The spill plan, that's what he's talking about, the contingency plan, in place was not adequate to handle a spill of that magnitude. That was recognized in the plan, the plan submitted to the federal government and to the United States Coast Guard. The words – you've said – you read the plan, used words in that section are highly unlikely. In other words, the prospect of having a spill of this magnitude are highly unlikely, so therefore the spill plan, the contingency plan, did not have in it a schedule of equipment that would be designed to handle a spill of this

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magnitude in the water before it hit the beach. That's the context in which Mr. Stevens is talking about, and that was true for virtually every contingency plan that existed in the United States of America in 1989.

Now, what happened here was after this happened, after the unthinkable happened, then things changed, and today contingency plans insofar as physically possible provide that there will be equipment on-hand to handle this type of spill in the water before it gets ashore.

Now, on changes, the proof is going to show you that Exxon reviewed the grounding and spill not in such a way as to limit the corrective action it should take, but to broaden it. It would have been easy to fire people, blame it on them and run off and go into something else. That would have been easy, been a lot cheaper too, but instead of trying to narrow the focus and narrow the problem solving to the cause or causes of the accident, Exxon looked at everything in its operations to see what could potentially cause an accident of this magnitude; in other words, a new look.

The world viewed this potentiality much more differently after March 24th, 1989, than it had before, and looking at it with that blinding clarity of hindsight, there were many, many, many changes made, and not just by us. And some of the changes we made are in response to changes required by the federal and state government. I'm not trying to claim credit for all the

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claims, but I want to tell you about these changes and you'll see that they not only address the problems involved in this grounding but other problems as well, whether or not they had anything to do with the grounding.

In fact, we took to heart every criticism, every criticism and every suggestion and everybody's theory as to what the cause could be, and in any case where we thought that was reasonable, a change would reduce the overall risk, we made the change.

Now, I mentioned the change in the alcohol policy that Mr. Raymond is going to testify about. There were other corporate-wide changes. I want to talk to you a little more specifically about the changes that Mr. Elmer is going to talk about. Now, these are in no particular order and I'm going to try to go fast so I don't take up too much of your time.

The first of these, let's talk about the manning. After the accident we decided that it would help reduce a potential for a problem if we put an extra mate on every ship, so we did. For fear that there was a potential problem with fatigue, we added a lightering mate in San Francisco that would make it easy on the front end of the voyage, make it easy on the ship's crew going from San Francisco to Valdez, and at the other end we added a loading mate here in Valdez, a chief mate, to reduce the possibility that fatigue could impair performance. Now, having done that, we then pretty quickly realized that

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wasn't enough as we studied the work hour situation, so we decided that we needed to do some more things, so we put in some work hour restrictions. Now, shortly after that Congress gave us some, too, but we had them before we were required to have them, and then when Congress passed them in the Oil Pollution Act of 1990, we reformed outside to Congress's. That wasn't enough, either. In order to make sure you're complying with work rules and regulations, you have to have something to check, and that was a hole in the past.

You remember officers – we didn't pay overtime for officers because they were on salary and so we didn't have a record of how long people were working on the ships. Officers we did if they were unlicensed, but we started requiring that logs be kept of the hours officers were working on these vessels, so not only would we have the rule that you're only supposed to work this amount of time, but we had a way to check on it.

We also have now an auditor, a guy who does nothing but ride the ships, and one of the things this guy does is go on the ship and make sure these guys are working the hours they say they are working, that they are writing them down and that these comply with the – with our policies and with the regulations. This is a good example of making changes even though we didn't think the fatigue problem had anything to do with the accident.

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You'll remember what I told you in closing argument in Phase I. We didn't think fatigue had anything to do with this grounding, nevertheless we made all these changes.

Now, training, the first thing we did in terms of training was to go back and eliminate any possible confusion that there was or could have been with respect to who is supposed to be on the bridge when you get into Prince William Sound. And what we said was, face-to-face, every master, every officer, every deck officer entering and leaving port gives you but one option; that is, two officers on that bridge. If you're entering or leaving port, you cannot operate with one officer up there.

Now, just so you know, boys, in Prince William Sound you enter port at Cape Hinchinbrook, and when you leave port you're leaving at Cape Hinchinbrook. There in Prince William Sound the only option you got is two.

Now, we also saw, then we looked at our training in 1989, that it was possible that people were not getting the training we wanted them to have. They weren't getting enough training and some people could be falling through the cracks, so what we have done is we have required every deck officer to have a certain kind of training, and that training includes a bridge team simulation course in Rhode Island, where a whole group of officers, the normal contingent that would be on the bridge is taken up there. There is a computer simulation, this huge wrap-around screen, very impressive. You have this bridge and

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this simulator takes them through conditions in each and every major ports in the United States, including Prince William Sound, and it goes through expected situations and unexpected situations. And you talk about remembering, getting the message, each one of those teams goes through the voyage of the Exxon Valdez, constant reminder, constant reminder, have we got it, we got it.

Now, in addition to that, they have a ship handling course imposed right after that, where we not only teach the skills and the maneuvering of a vessel to everybody, not just the captains, not Grenoble, this is not Grenoble, teach it to everybody and teach them how to use the radar, and we get evaluation read back, did Joe do it right, did Jack do it right, we get feedback.

The navigation, the Loran and MARSAT, the plot and fix method, you could probably figure out where you were within 1500 feet or so, if the satellite was in the right spot, you got the right time and all that where you were always trying to figure out where you were based on where you had been.

Now, in today's technology, with global positioning system – and in weeks we're going to go to differential global positioning, you're going to get to the point in weeks, within 20 feet where your ship is, you have improved radar and we have a system Mr. Elmer is going to explain to you the Ex-bridge system. It takes this global positioning business, the radar

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and everything else and it puts it on a screen, and that screen will project where you are within 20 feet, what's around you, what's above the water, where the other ship is, land, what's under the water, and on that you can even put your course.

And indeed we require that they put a course in there, and you put that course in there and if you get away from that course, there is an alarm that goes off, and as you go down through that you can see within 20 feet of where you actually are.

Now, what do we do in Valdez? Well, instead of having nobody or an Alamar agent up there, we have put one of our senior most captains in Valdez and he is now called the Valdez port operations coordinator. He's Captain Bill Deppe, not only a ship group coordinator, coordinates with ships, the Coast Guard, coordinates with all regulatory agencies and the community, and the watchdog.

We have restrictions on the number of people who can go ashore at all – at any visit at any port.

There are, as you know, rules about how much alcohol a person can have within a certain amount of time before he can get on a ship. Do you remember the four hour rule, .04 and all that? We said that's great for everybody else, but for our captains and chief engineers, heck with that, our captain or chief engineers can no longer drink on a tour of duty, period. There is no such thing, if you're a captain of Sea River

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Maritime, of going – port in Valdez or San Francisco or anywhere else, and when you come back, and this is required by the State of Alaska, take a breathalyzer before you take off, and if any of our captains blow anything, that's it.

Check-in is required for every member of a crew that goes ashore. You've got a security checkpoint, but we require a check by the mate on duty, breathalyzer, already mentioned, extra policing of the alcohol policy at every spot in Valdez. We got the Valdez port operations coordinator, Captain Deppe, you have a loading mate, a radio officer up here, you have all kinds of people up here making sure that the rules are being followed. We also have random searches and we have a hotline.

Now, before you leave Valdez, going out like that fateful night, it is required that you have a voyage plan and you tell people about it, and with Ex-bridge you have to put it up there so everybody can see, we know what we're going to do and if we're not doing it, somebody is going to know about it.

We have weather rules and ice rules. Our policy says if ice can be a hindrance and it's nighttime, you cannot go at all, if it's daytime and if there is ice and it's not a danger, you can go, but you have an escort, and that escort in that situation will be in front of you so that that person – that vessel will encounter the ice long before you do, and obviously, in light of all that's happened, if it's a problem, you got to come back, because there is a new rule that we

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have. You can't leave the system, you can't leave the traffic separation system, you can change lanes to account for ice, but you cannot leave the system.

Now, you're also going to hear some other changes involving oil spill response and things like that. I'm not going to take the time to go into this. I do want you to know one other thing though, particularly as to sea river. You remember hearing there was no after care and there was no formalized monitoring, written out monitoring, for under the alcohol policy? There is now. There is now. If you think about it, once you hear this proof and you compare what I told you and what Mr. Elmer is going to tell you about and what Mr. Raymond is going to tell you about, we have made a change in virtually every area you've heard about, whether it caused the accidents or not, during the course of the trial, every area.

Now, once again, it's going to be hard to dispute those facts, but I don't expect that he's going to leave them sitting out there unmolested. Probably is going to question the sincerity and the motivation and the sincerity of the effort. He's seen that as his job and he's pretty good at it. An old stand is to talk about Exxon as some evil group suggesting to you that everyone at Exxon lies, everyone at Exxon is bad and everything done by Exxon is for some ignoble purpose; in other words, don't trust a word that they say, the only thing they understand is the lash, and the lash you have is money, so use

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it freely for my side.

Now, we all know from our own personal experiences, from the country's experiences, what terrible unfairness and uncondemnations of whole groups of people to propagandize that way. To say or even think that all of a whole group of any human being is bad inevitably is inaccurate, it's mean and it's downright stupid, it's an insult to everybody.

When we came into Phase I, we knew we had made mistakes and we told you so. We told you at the very beginning. We also told you we were liable for the actual damages suffered by the plaintiffs. In short, we came into this case feeling guilty and honestly told you so.

Now, with our feeling of guilt, remorse, I suspect we've been a little too meek in responding to these suggestions of light, and a little too timid in defense of the clients' honesty and integrity, but now is the time for you to judge us as we are, as the truth tells you we are. Look at what we did, look at the efforts we have made, look at the size of the commitment since the spill and look at the wholesale changes we have made since the spill. I trust you won't let these side attacks and generalizations deflect you from the truth, because they tell you and show you much better than my words that we were sorry, we were not and are not in denial and that we have gotten the message.

These are the facts, then, that you will have before you as

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you decide this last claim, the claim for punitive damages, and the potential facts are that we acted responsibly, we committed to clean up the spill, we committed to restore the Sound and we committed we would do everything we could to see that it didn't happen again.

In short, Ladies and Gentlemen of the Jury, I respectfully submit to you that when you consider proof in Phase I and you consider what happened after the spill and what was done after the spill, on the main things, the main issues, you're going to conclude that this corporation behaved like you would want a responsible business to behave after this accident. Exxon did what you would want them to do, any business to do after this kind of disaster, and we were able to do it because of these successes that Mr. O'Neill was talking about in part, and because of the commitment, the sorrow, the remorse that we made, and if that's the case, if I'm right about that, and I think the facts are going to lead you in that direction, then you have a very solemn and terribly responsible duty as citizens, as jurors, to say so in your verdict on punitive damages. And by saying so you complete the message. You complete that message, you underscore that message and you make sure that everybody gets it. Thanks.

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you decide this last claim, the claim for punitive damages, and the potential facts are that we acted responsibly, we committed to clean up the spill, we committed to restore the Sound and we committed we would do everything we could to see that it didn't happen again.

In short, Ladies and Gentlemen of the Jury, I respectfully submit to you that when you consider proof in Phase I and you consider what happened after the spill and what was done after the spill, on the main things, the main issues, you're going to conclude that this corporation behaved like you would want a responsible business to behave after this accident. Exxon did what you would want them to do, any business to do after this kind of disaster, and we were able to do it because of these successes that Mr. O'Neill was talking about in part, and because of the commitment, the sorrow, the remorse that we made, and if that's the case, if I'm right about that, and I think the facts are going to lead you in that direction, then you have a very solemn and terribly responsible duty as citizens, as jurors, to say so in your verdict on punitive damages. And by saying so you complete the message. You complete that message, you underscore that message and you make sure that everybody gets it. Thanks.

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The second stipulation has four separate parts to it. First, the following Phase II-B claims for actual damages were resolved as follows: A class consisting of Alaska Natives made

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claims that their subsistence harvests were reduced as a result of the Exxon Valdez oil spill. Exxon has agreed to pay $20 million to the class on these claims. The next series has to do with claims for actual damages that will be resolved by proceedings in Phase IV that will not involve you. First, commercial fishermen in fisheries affected by the oil spill were unable to fish certain fisheries as a result of the Exxon Valdez oil spill including pot shrimp, trawl shrimp, Dungeness crab, brown king crab, tanner crab, king crab, halibut, sablefish, miscellaneous finfish, miscellaneous shellfish, miscellaneous groundfish, smelt, scallops and bait herring, commercial fishermen participating in these contend $24,764,000. Defendants admit that there was some loss in each of these fisheries, but contend that the actual damages were lower. Second, commercial fishermen in Lower Cook Inlet, salmon seine and salmon setnet fisheries sustained losses due to closures as a result of the oil spill. Commercial fishermen in these areas contend that damages in 1989 amounted to $787,000. Defendants admit that there was some loss in each of these fisheries, but contend that the actual damages were lower. Three, commercial fishermen in fisheries affected by the oil spill contend that they have sustained losses because the prices at which their fishing vessels sold have been reduced as a result of the spill. Defendants deny that the Exxon Valdez oil spill caused a drop in the price of vessels

sold, and contend that the actual damages, if any, were less than the amount claimed.

Four, certain commercial fishermen from fisheries affected by the oil spill who sold their fishing permits after September 1993 contend that the prices at which their fishing permits have sold have been reduced as a result of the spill. Defendants deny that the Exxon Valdez oil spill caused a drop in the price of these permits and contend that the actual damages were less than the amount claimed.

Five, landowners, including certain Native corporations, who own shoreside lands in the oiled areas of Prince William Sound, Kenai Peninsula and Kodiak, contend that oiling of those lands by the Exxon Valdez oil spill resulted in damage of at least $130 million. Defendants assert that many of the lands involved were never oiled by the oil from the Exxon Valdez. As to lands which were oiled, defendants admit that they are responsible for damages, if any, caused by the oil, but defendants contend that such lands have been, for the most part, cleaned up and that any residual damages are temporary.

Six, the Cook Inlet Aquaculture Association, Kodiak Regional Aquaculture Association and Prince William Sound Aquaculture Corporation contend they sustained losses due to a reduction in the price of fish – I'm sorry, reduction of the price paid for fish actually harvested in 1989 and state that these damages are $18,860,000. Defendants contend that

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hatcheries, the hatcheries damages, if any, were less than the amount claimed.

The third area has to do with claims for actual damages that are to be resolved in Alaska state courts. First, the municipalities of Kodiak Island Borough, Larsen Bay, Old Harbor, Ouzinkie, Port Lions and Cordova contend that they have sustained losses due to the Exxon Valdez oil spill and state the damages they have suffered at the present trial, 8,784,546. Defendants contend that the damages suffered were less than $75,000.

Two, other municipalities, including Seward, Valdez, Kenai, Kenai Peninsula Borough, Chignik, Akhiok, City of Cordova and Whittier, losses at a minimum equivalent to those municipalities presently in trial in paragraph one above. Defendants deny that these municipalities were damaged by the Exxon Valdez oil spill or contend that the damages suffered, if any, were lower.

We have a second paragraph two, and probably all of the numbers from this point on were supposed to have been shifted. The Native corporations of English Bay, Port Graham, Chenega, Chugach, Eyak and Tatitlek contend that they have sustained losses from the oiling of their land due to the Exxon Valdez oil spill and state the damages they have suffered are 110,898,000. Defendants contend that the lands far back from the shore land and other lands that were not touched by oil

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were not damaged at all and contend that the damage attributable to oiled lands amounts to about 1,500,000.

Third, the Native corporations of English Bay, Port Graham, Chenega and Chugach contend that they have sustained losses to archaeological sites on their lands due to the Exxon Valdez oil spill and state the damages they have suffered are 35,571,000. Defendants deny that archaeological sites were damaged by the Exxon Valdez oil spill.

Four, certain commercial fishermen in fisheries affected by the oil spill have claims in state court for losses they claim for the depressed sales price of their permits and vessels. The Exxon defendants dispute these claims.

Five, the Native corporations of Chugach and Port Graham own and operate seafood processing operations that were impacted by the Exxon Valdez oil spill. Exxon paid these processors 9,515,000 in settlement of their claims.

Six, certain commercial fish processors claimed that they were damaged as a result of the Exxon

Valdez oil spill. Exxon paid these processors 113,500,000 in settlement of their claims.

The fourth part of this stipulation has to do with the membership of the punitive damages class. Each and every claimant entitled to recover damages from defendants for damage resulting from the Exxon Valdez oil spill is a member of the punitive damages class and is a plaintiff in this action for

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purposes of this Phase III. No other jury will award punitive damages to these plaintiffs in any other lawsuit.

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MR. JAMIN: Ladies and Gentlemen, by agreement we're now going to publish two additional documents, portions of which I'm going to read to you. This is a memorandum dated March 19, 1990. It's from Michael Stalzer to Dwight Koops, and the subject is fleet licensed officer analysis work hours.

As background, Mr. Stalzer's writes: There are safety concerns about the numbers of hours individuals have been working in the fleet. These concerns arose in the '80s when manning reductions were occurring and additional responsibilities were being shifted to the fleet officers with no accounting for the additional time required to do these tasks.

Later in the background section he indicates: Recently the fleeted officers have documented their work hours for January 1990 and added suggestions for reducing the workload.

In the section that Mr. Stalzer describes as analysis, he indicates: The data received confirms management's own observations and the feedback which the fleet has provided to management concerning the number of hours work. The work rule guidelines were violated 74 out of the 94 positions, or 78.7 percent of the time. The data indicates that the workload is heaviest in the deck department when compared to the engine

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department. The deck department had 123 incidents of 15 hours or more per day versus 47 for the engine department. The deck department had 32 incidents of 340 work hours or more per month versus 24 for the engine department. The data indicates that the workload is heaviest for the senior officers in each department, and of the 20 positions which did comply with the guidelines, seven of these, or 35 percent, were concentrated on the Exxon Baytown and the Exxon Galveston, which have four mates.

On page 2 of the document, in the section entitled recommendation, Mr. Stalzer writes: In the interest of safety, it is management's responsibility to insure that the guidelines are followed.

And on the fourth page of the document, PL-13, Mr. Stalzer sets out two charts, one with the number of incidents, 15 hours or more worked per day in January 1990, and then down at the bottom half of page 5 of PL-13 sets out the actual reported work hours in January of 1990.

I call your attention to the, basically what's a notice down at the bottom: The work guidelines limit the maximum number of work hours per month to 340, and we have highlighted, but I will not read those lines, for the Benicia, the North Slope, the Long Beach, the San Francisco and the Baton Rouge, and note that there is a line summarizing the data where more than 340 hours per month are determined, the incident line.

[7142]

Exhibit 13 will be available for you in the jury room.

The next exhibit which I would like to publish is available in a board format, and I'll set up on a second easel, Ladies and Gentlemen, which is Plaintiffs' Exhibit Number 175. It is a memorandum from Mr. Frank Iarossi to Mr. Dwight Koops, dated September 5, 1989, and I want to call your attention at the outset to the beginning of the third paragraph on another subject. Mr. Iarossi writes: On another subject, I am growing a little impatient with our slowness in coming to grips with other operational issues highlighted by the grounding of the Exxon Valdez. Someone in operations needs to take some initiative fast. Areas which need to be addressed very soon and action steps proposed include very clear instruction to our masters regarding operations in PWS during ice season.

In parens, Mr. Iarossi writes: It's incredible that September is here and we have still not addressed this issue.

Number two, very clear instruction regarding vessel speed in PWS and other areas such as SF Bay.

Item three, very clear prohibition against leaving the traffic lanes in PWS, unless emergency conditions exist and then only with the express permission of the MSO Valdez.

Number four, some fail safe method of ensuring that watchstanders clearly know when the autopilot is engaged.

Number five, a very clear directive on maintaining a lookout at all appropriate times. In parens, the idea of

allowing a coffee break is just unbelievable.

Number six, a very clear statement that the Navigation and Bridge Organization Manual is not a guide. It establishes how our vessels must be operated, and that it is the master's responsibility to ensure it is followed at all times as appropriate.

From the second page I call your attention to the second paragraph: Last week during a hearing before the Alaska Oil Spill Commission, Jerry Aspland of ARCO Marine publicly and for the record stated that in the aftermath of the Valdez grounding, ARCO Marine has established the following policies. One, all vessels will remain a minimum of a hundred miles offshore, except during direct approach to and from port; two, restricted speed in PWS and Puget Sound; number three, no deviation from the traffic lanes in PWS; number four, breathalyzer tests for masters before leaving any dock; number five, autoalarm on all steering gear autopilots; number six, master's judgment as to whether he leaves Valdez at night during ice season.

These steps clearly establish a standard of care in our industry, and I hope we all have come to understand what that means to us. We could not defend having a lesser standard. It is more than a little disturbing that ARCO has come to grips with the Valdez grounding while we, over five months later, have not.

[7144]

The memorandum is copied to Mr. Paul and Mr. Tompkins.

* * *

[7144]

EXAMINATION OF FRANK IAROSSI (Video) BY VIDEO EXAMINER:

Q Now, Exxon is in the business of transporting crude oil by sea, right?

A Crude oil, yes.

Q And other substances?

A Yes.

Q Substances which Exxon Shipping and Exxon USA were aware created a danger to the environment if released?

A We understood the nature of crude oil, yes.

Q Exxon shipping and Exxon USA were aware that a master of a tanker where the master had an alcohol abuse problem was a potential for a disaster to the environment?

A We understood the risks in the business, yes. We understood the responsibilities, yes.

Q As of March 26th, 1989, other than attorneys for Exxon, had you talked to anyone concerning the cause of the grounding of the Exxon Valdez on March 24th?

A No.

Q Did you as of March 26th, 1989, had you instructed anyone either within Exxon Shipping or within Exxon USA or Exxon

[7145]

Corporation to make – to interview the persons on the – that were present on the Exxon Valdez at the time of the grounding?

A When I arrived in Valdez on March, still the 24th – Friday, I can remember the days better, it was Friday evening, one of the five people that came up with me was our Exxon Shipping Company generally counsel, and his instructions were to initiate the investigation to determine exactly what had transpired.

Q I'm sorry, who was it that was with you?

A Bob Nicholas, who is the Exxon Shipping Company general counsel, and his role was to initiate an investigation to determine what had transpired.

Q Are you aware that the investigation was in fact conducted?

A There was, I'm sure, a whole series of investigations.

Q Have you since the spill gleaned any knowledge relating to the condition of Captain Hazelwood at the time of the grounding through your own personal investigation or conversations or discussions with persons other than counsel?

A The answer is no, with the exception of the NTSB published reports.

Q I'd like to mark as the next exhibit, 26794, a two-page document, our number 21, for Mr. Iarossi to Mr.

Koops, dated September 5, 1989. You had a chance to review 26794?

A Yes.

[7146]

Q Is that a document that was prepared by you?

A Yes.

Q Now, on the second page you list six new policies established by ARCO Marine?

A Yes, as I understood them from their presence.

Q And you characterized those six new policies as clearly establishing a new standard of care in our industry, is that correct?

A Well, that was a phrase that we had used subsequent to the grounding to – that's what I said, yes.

Q Was anyone else terminated from Exxon Shipping Company as a result of the Exxon Valdez incident?

A No.

Q Was anyone's position affected as a result of the Exxon Valdez incident, were they demoted, transferred?

A I think the mate on watch was demoted to an able seaman, my recollection.

Q Was anybody – were any officers at Exxon Shipping Company transferred, demoted or had any other personnel actions taken as a result of the Exxon Valdez incident?

A No.

Q Was anybody at Exxon USA subject to adverse personnel action as a result of the Exxon Valdez incident to your knowledge?

A Not to my knowledge, no.

[7147]

Q With the exception of Captain Hazelwood and the mate on board who was demoted to an able-bodied seaman, were there any adverse comments placed in the personnel file of anybody at Exxon Shipping Company as a result of the Exxon Valdez incident?

A Not to my knowledge, no.

Q How about at Exxon Corporation to your knowledge?

A Not to my knowledge.

Q Prior to the grounding of the Exxon Valdez in March of '89, was there a loading mate assigned to the Exxon Valdez?

A You mean in addition to the regular crew?

Q Yes.

A No.

Q Was that ever discussed to your knowledge within Exxon shipping prior to the grounding; that is, having a loading mate?

A Not at my level.

Q You never were privy to any discussions?

A No, not that I recall.

Q Do you recall that after the grounding a loading mate was assigned to the Exxon Valdez at the Port of Valdez?

A It was one of the changes made in response to the incident itself and all of the aftermath of the incident.

Q Were you a party to that decision?

A Yes.

[7148]

Q I'll show you the transcript. We have a transcript that was produced by Exxon, and I'm interested – and I'll tell you ahead of time, I'm interested in the entire page 19. Will you read the entire page 19 and then tell me if that's what you said? Will you read it out loud?

A Okay. Could I read the question from 18 so I understand it.

Q You can read all you want to read.

A The speaker who is not identified says, what does the crew tell you about what went wrong. Mr. Iarossi's answer, our people are asking questions and making an investigation. We are doing that right now.

The speaker said, are you deliberately shielding yourself from orders so you don't have to tell us.

Mr. Iarossi's answer, we intend to tell you everything we know. There would be no reason to shield it. It's going to be out from the NTSB study and the Coast Guard hearing so there is no way I could shield. What I'm going to do is to make sure I tell you before anybody else does.

The speaker says, sir, my answer is, you can take that as a fact. It will be my job to tell you first before they tell you, Bill Peters.

Q I'm interested, did you commit publicly at the press conference to be the one to first tell the public what went wrong?

[7149]

A To the extent we found out, yes.

Q At page 79 of the same book you were quoted as saying, there is no doubt that all of these contingency plans and all of this planning and everything did not anticipate ever having to respond to a spill this big, Iarossi said. I do not know why it didn't. I wasn't involved in the plan, but clearly no one ever anticipated trying to handle 250,000 barrels of oil on the water. This spill just overwhelmed everybody. No one was organized to control a spill of this magnitude. Did you ever make that statement?

A Yes, that's probably my characterization.

Q At page 31 of the same book you were quoted as saying, upon being informed of the fact that the vessel had lost an estimated 138,000 barrels by one George Nelson, you're quoted as saying we had an unbelievable problem on our hands. Did you ever make that statement?

A Yes.

Q At page 34 of the same book, you're quoted as saying, with regard to the mobilization, we started from ground zero, Iarossi said. There was no logistic system in place. Did you ever make that statement?

A In a certain context, yes, probably.

Q Was the statement made in the context of the Exxon Valdez oil spill?

A Yes. I don't recall what I was referring to as far as

[7150]

logistic system, but I'd have to go back and look at what the exact question was.

Q Page 297 of the same book, you're quoted with regard to the response to the oil spill as saying, quote, it's just that it was totally inadequate relative to the magnitude of the spill. Did you ever make that statement?

A I wouldn't say that there weren't details that couldn't have been done better, but I've seen EPA and Coast Guard reports that basically give us a B-plus or better on most of the response work. It's just that it was totally inadequate relative to the magnitude of the spill. I'd say a lesson to society is that a spill like this can happen no matter how low the probability, the potential is still there for it to happen, and another lesson is in the inadequacy of current technology, what we have is just not good enough no matter how fine-tuned a organization you have, unquote.

Q Did you make those statements?

A I would say that's my statement. I recall that.

Q Did you mean it to be truthful at the time you made it?

A Yes.

Q Let's talk about Exxon senior management for a minute. At any time after the spill were you ever called to account either orally or in writing for what happened with regard to the spill?

A What part, you mean the cleanup?

[7151]

Q With regard to the accident.

A No.

Q So nobody from the date the vessel ran aground to today has ever called on you to account for the accident?

A No.

Q Now –

A Within Exxon, I've been asked questions by a lot of other people, but not Exxon.

Q From the date of the accident to today, have you had to submit any reports to Exxon USA or Exxon Corporation with regard to what happened about the accident?

A No.

Q From the date of the accident until today, have you yourself conducted an investigation with regard to what happened as to the accident?

A Friday night I asked the general counsel of Exxon Shipping Company, that's March 24th, to initiate an investigation Saturday that became an Exxon USA investigation and I was out of the loop after that.

Q Did Exxon USA ever report back to you the results of their investigation?

A No.

* * *

[7162]

EXAMINATION OF LAWRENCE RAWL (Video) BY VIDEO EXAMINER:

Q Are there risks in the production and transportation of oil?

A There are risks in everything, but, yes, there are.

Q I'm going to hand you a document the reporter has marked as 33100.

A Are we through with this?

Q Yes. Have you ever seen 33100 before?

A Yes, I have.

Q What is it?

A It's called an open letter to the public dated April 3rd,

[7163]

1989.

Q And –

A It was a newspaper ad, as I recall.

Q Who paid for the newspaper ad?

A I presume Exxon did. I assume they did.

Q Is that your signature on the bottom?

A Yes.

Q Did you participate at all in the drafting of the document?

A I don't recall participating in the drafting. It's possible I might have edited it or something, I don't recall.

Q Did you approve it?

A I signed it, which would indicate I approved it, I'm sure.

Q What was Exxon's purpose in running this advertisement?

A Well, I recall not really thinking that it was necessary to have such an advertisement, but certain people, and I don't remember which advisors felt like it would be useful. There was concern that the public didn't understand this and that it would be good to put it in a newspaper.

[7166]

Q Is there – does Exxon Corporation, Exxon USA or Exxon Shipping, any of the three separately or together, have an intention to make public the results of any of its ongoing investigations as to the causes of the incident?

A I thought we've made a lot of reports public. Now, I can't really get specific as to – in fact, I know we've made a lot of reports public, but we've provided information to the National Transportation Safety Board, I think there was some testimony made that were related to that. I don't know what the report said, but they were related to that. There were other hearings, other than the ones you referred to, that I testified at in the Congress where some kind of reports were made or questions answered under oath. So I don't understand the question actually. I think we've been doing – there are some things I'm sure that have not been reported but are still under investigation.

Q Do you know if – well, have you come to a conclusion as to why the incident happened?

A No, I haven't. I think I've testified on that.

Q Now, was it your understanding that this plan did recognize that if there was a catastrophic spill, large volumes would reach shore?

A My understanding, that was somewhere in that plan. I read the large oil spill part of that plan. Of course it covered a lot of other things, and I'm not sure these words are

[7167]

sufficiently precise, but a large spill it was recognized some would probably reach shore.

Q As a result of your experience, would you agree with the proposition that a risk of running oil out of the Port of Valdez is that there will be a large spill and that as a result of that large spill large volumes would reach shore?

A There is always a risk in transporting anything. This was a contingency, and the word contingency means if you have such a spill. I don't think this plan, when they wrote it, they felt like this was a predetermined, going-to-happen kind of thing, if I answered your question.

Q Now, was it true that Exxon had a good year in 1988?

A Yes.

Q And at the time of this annual meeting in May 18th, 1989, the Valdez spill had occurred?

A Yes.

Q And in the bottom right-hand corner of the first page it appears that you expressed the opinion that Exxon's overall financial health remains sound and its operations are well positioned for the future. Do you see that?

A Yes, I see that.

Q And was that your view as to the health of the corporation at the time?

A Yes.

* * *

[7172]

Next, Your Honor, I would like to publish PX620. This is from President Stevens of Exxon USA: My own view is that that occurrence, 200,000 barrels in Prince William Sound, was viewed, quote, so highly unlikely that the consequences of it which have occurred pretty well as much as envisioned were viewed as acceptable. By today's retrospective view, that is not the case. That may be incomprehensible, Mr. Chairman.

* * *

[7175]

EXAMINATION OF JACK CLARKE (Video) BY VIDEO EXAMINER:

Q Mr. Clarke, you are a lawyer, correct, sir?

A Lawyer by training, yes.

Q Are you licensed in any states right now?

A Yes.

Q What states are you licensed in?

A New York.

Q What is your present title, sir?

A I'm a director and senior vice-president of Exxon Corporation.

Q How long have you held that title, sir?

A 16-plus years.

Q That's same title, is that correct?

A Yes.

Q What is your current residential address?

A 3831 Turtle Creek Boulevard, Dallas, Texas.

Q Who do you report to within Exxon Corporation, sir?

A I report to the chairman.

Q How long have you reported to the chairman, sir?

A Since I became the director and senior vice-president.

Q Well, sir, has the spill to your knowledge had any material adverse effect on the business operations of Exxon Corporation?

A Material adverse effects on its operations, is that the

[7176]

question?

Q Yes.

A No, I'd say not.

Q Has the spill and the cost incurred by Exxon in responding to the spill had any material adverse effect on the financial condition of Exxon?

A I think that the expenditures that we made were very substantial, and I think that the – they did not affect our triple A rating, which, as I recall, we were one of 11 corporations in the United States with a triple A rating.

Q Sir, were you the member of the board of directors of Exxon that supervised the company's public affairs activities that were taken in response to the oil spill of the Valdez and the subsequent contamination of the Alaska shoreline?

A I think that a fairer way to put it is that it was in terms of people on the board of directors, that the chairman and the president and I tried to work together on those issues.

Q Sir, did you consider the Exxon Valdez oil spill and the subsequent contamination of the Alaska shoreline with oil that ran aground from the spill to have a catastrophic impact on the coastal habitat of Alaska?

A Well, obviously I'm not an expert on impacts on the coastal habitat, but my belief is that it was not a catastrophic impact.

Q Do you think it had serious effect on the Alaska

[7177]

environment?

A I think that there were serious impacts of some kinds for a period of time, yes.

Q Sir, do you consider the grounding of the Exxon Valdez and the subsequent discharge of oil from the Valdez to have caused any catastrophic effects on the economy of the shoreline regions of Alaska?

A No.

Q No?

A No.

Q Can you tell me why you hold that opinion?

A I haven't seen any evidence to support that.

Q Have you looked for any evidence to support whether or not the oil spill had a catastrophic effect on the coastline economy of the state of Alaska?

A I'm aware generally of ports of impact, yes.

Q Do you know if the oil spill and the subsequent

contamination of the Alaska shoreline had any serious effect on the local economy of the coastal regions of Alaska?

A My perception is that in a economic sense, the amount of money that was spent in respect to the cleanup significantly contributed to the economy in terms of reducing unemployment in the state and providing income to a lot of people.

Q Do you consider the oil spill to have been beneficial to the state economy?

[7178]

A I'm just saying that I understand that a lot of employment was provided as a result of the money that was spent on the spill. I'm not going to make a judgment as to whether on a net basis they came out ahead or not, I'm just reporting what I understand to be the facts.

* * *

[7192]

CROSS EXAMINATION OF CONSTANCE BUHL BY MR. O'NEILL:

Q Do you want to take a break for a second?

A I think I'm going to be okay, but thank you for offering. Go ahead.

Q Thank you for your work on the spill. And I have a few questions.

A You bet.

Q Normally I come up here with a transcript and a big stack of papers, but I have a couple questions. As a result of your experience in those days and pulling the equipment together and searching for equipment, you searched for the equipment in United States and Europe?

A All over, even Russia.

Q I think it's fair to say, and it's relatively obvious, that there was not equipment anyplace in Alaska to deal with the spill?

A I agree.

Q And again I think it's fair to say and it's obvious, but with a spill of this magnitude, in excess of 200,000 barrels, oil is going to reach the shore?

A That's probably fair to say. In hindsight, that proved to be the case.

[7193]

Q Did you know in the contingency plan, that was also envisioned? Did you know that or not?

A I have never read the contingency plan.

Q Save yourself the time to read the contingency plan.

A And I think that the objective of the contingency plan was not to address a spill of this magnitude, that a spill of this magnitude was considered to be a very remote possibility, and I think that it was remote enough that whom the powers to be that were involved in developing that plan, which were the shipping companies and EPA and the State of Alaska and the Coast Guard, all concurred that the remoteness of that possibility precluded them from having that itemized in their spill response.

Q And it wasn't –

A Again, I haven't read the spill response, but that is my understanding.

Q Because if we have a spill of this magnitude, and the terrible things that result from a spill of this magnitude, the best way to attack it is by not allowing it ever to happen, prevention, common sense, isn't it?

A Prevention is, for any accident, is truly the best

approach, yes.

Q And I was interested – I've got one or two more questions and then I'll sit down. You made the comment that there was still a million barrels on the vessel after it ran aground and it had discharged

[7194]

260,000 barrels?

A Yes, sir.

Q And that million barrels on the ship, which Captain Deppe is going to come and testify about, but that million barrels, the reasons that we lightered it was because that million barrels also presented a threat to Prince William Sound and the communities around the Sound, ship was stranded, it had an additional million barrels and that additional million barrels was also a threat?

A I concur.

* * *

[7194]

DIRECT EXAMINATION OF WILLIAM DEPPE

BY MR. SANDERS:

* * *

[7199]

A When Mr. Iarossi arrived in Valdez, I was already there, and Mr. Iarossi asked me to go on board the Valdez and relieve Captain Hazelwood.

Q Did you do that?

A Yes, I did.

Q And when you went up to relieve Captain Hazelwood, did you have any discussion with him concerning what had happened or anything like that?

A No.

Q You simply relieved him?

A Yes.

Q And after you relieved him, what did you do?

A Well, the first thing I did was got together with some of the senior officers and try to assess what the situation on the vessel was.

Q For what purpose?

A Well, it was – what I found out shortly after arriving was a very precarious situation from what I could tell. Three-quarters of the bottom of the vessel had been ripped open by rocks, we had lost a tremendous amount of oil from the vessel. The vessel was aground, we didn't know how much of it was aground. We didn't know really the stability of the vessel. If anything occurred at that moment, if it somehow

[7200]

refloated, whether it would stay afloat or not. There was the possibility that because of the damage on the bottom, that with the tide action and the motion of the vessel on the rock where it was, it could create some stresses on the ship that could break it in half, and it was – I was trying to gather as much information as I could in a short period to find out what our next step should be.

Q And was there an ultimate aim to all this? Had lightering been mentioned at this point?

A Yes, lightering was something that was mentioned before I even went out there. We were going to try to lighter the ship, if we could, to get as much oil off as we could before anything worse happened out there.

Q And you were to be the captain of the vessel that was to be lightered, correct?

A I was the captain for about three days after Captain Hazelwood left, the official captain on board.

Q We'll get into how you changed jobs, but on Friday, the 24th of March, when you arrived and relieved Captain Hazelwood, you were to determine whether lightering could be done in terms of the safety of that ship, correct?

A That was the major function. We were going to attempt lightering. My job was to figure out how we could do it.

Q And the first step you took was to determine how dangerous the situation was, correct?

[7201]

A That's correct.

Q And you talked with the people on board, correct?

A Correct.

Q And you made your assessment?

A We had some divers that came alongside also, and they gave us some information early on, too.

Q And as I understand it, the two principal dangers that concerned you were, one, whether the ship could break apart, given the rising falling tides and the damage that had been done, that was the first; the second was if it floated off the rock on which it had grounded, what would happen to it, would it sink?

A Yeah. And the third one was blowing up.

Q And what was your assessment after you went out there, looked at the situation, talked to those people, what did you think?

A Well, we had really scanty information. Our initial assessment was we thought we could stay there and start the lightering operation. It was real important, talking to our naval architects, that we keep the vessel aground, that we didn't refloat in any way. So all the plans had to be developed around keeping the vessel on the rocks and not letting it get off the rocks. I was told if we did refloat that, we would probably capsize and sink, although all those determinations weren't totally made at that point by the naval

[7202]

architects.

Q Let me stop you a second. How did you talk to the naval architects, where were they?

A They were in Houston and I talked to them via satellite telephone.

Q Is that the group Ms. Buhl was talking about just a second ago?

A I believe so.

Q So you consulted with them after you had seen the ship and after you had talked to the officers on board?

A That's correct.

Q Now, as a result of your assessment, did you give the crew a choice of staying on board?

A Well, the next morning before we started lightering operations, we met with the whole crew and we discussed what we were going to do, the dangers and the way I thought they were developing for us, and we tried to go over all kinds of safety aspects before we did anything and try to guarantee personal safety. One of the options we gave everyone was that if they thought they weren't able to continue on board, after what they have been through, that they can leave the vessel and we'll try to find a replacement. No one decided to leave; everyone decided to stay.

Q And in making that decision, you had already gone over the

[7203]

dangers as you saw it?

A Well, that was the first thing we did the next morning, was try to get everyone prepared for the worst case scenario. If we did break in half, if we did have refloat inadvertently for some reason and the vessel got into an emergency situation, we wanted to guarantee that the people were taken care of first as best we could under the circumstances. So we went over all those plans before we did anything, to make sure that everyone was prepared to get off the ship as rapidly as we could if something bad happened during that time.

Q Then following that and other discussion, you actually gave them the option of whether they stayed or not?

A That's correct.

Q And they all stayed?

A Yes.

Q And I believe you said this, but I want to make sure it's clear, that at the time it was your assessment that there was approximately a million barrels of oil still on the ship, correct?

A We thought we had a little over a million barrels left on board, that's correct.

Q And when did the lightering actually start?

A I got on board Friday night and the lightering started Saturday afternoon.

Q So the very next day?

[7204]

A Right.

Q And just so there is no question about it, tell them what lightering is.

A Lightering is just taking the oil that's on board the Exxon Valdez and transferring it to another vessel.

Q Now, that sounds simple, but I think we need to explain how difficult that is in the situation you had out there. First, can you describe to the jury the particular problem caused by having no bottom in many of the tanks and how would you possibly be able to take fuel out under those circumstances? And since you and I have done this, I know you need a little –

A Probably be best to draw a picture than try to explain it, I'm not that good an explainer and it would probably be easier to draw a picture.

Q Well, the problem was, you were explaining it to me –

MR. NEAL: That's a real chore, Captain. I've worked with him a long time, haven't been able to explain anything to him.

MR. SANDERS: I object to Mr. Neal's interruptions.

BY MR. SANDERS:

Q Will this be all right?

A I guess.

Q I'll get you a pen.

A Well, the cargo tank is similar to a big milk carton, I guess you could say. It looks something like that, and there

[7205]

is – there might be 15 cargo tanks on board the Exxon Valdez full of oil. A normal tank would have a pipeline in the bottom of it here and there might be oil up to this level, and when you pump out the cargo, this oil would just come out down here and up through this suction valve and out into the cargo pumps and over the side of the ship. And that's how we would normally do it if the bottom was intact; the oil would feed out through gravity and go out. On the Exxon Valdez there is a hole in the bottom of each tank, so you had this suction valve down here. Oil floats on top of water, so when you try to – what happened initially, the oil might have been there high in the tanks and the water outside was at that level (indicating). The oil immediately went down to that level and that's where we got the initial 260,000 barrels of oil that came out of the ship right there. But at this point the oil was stabilized equal with the water outside, so water could come in and out of here easily without any oil coming out for the most part. And if we tried to start a pump up right now and pump out oil, we would get water coming in and not any oil coming out, so the dilemma was how to get the oil out of the ship. What was decided on was to – and the only way we figured we could do it was to put pumps in from the top of the tank, and there is little pumps that are manufactured that can fit through about a 12-inch hole and it's on the deck of each ship

[7206]

that you can take a plate off of and slip these pumps and they can be driven by hydraulic oil and they can pump maybe a thousand barrels an hour, if you're lucky. But, anyway, what we did was we got a bunch of these pumps and flew them out to the ship. We inserted them in the tanks and just put them in the oil right there and we pumped the oil out from the top. As we pumped the oil out from the top, because oil floats on water, water would – oil would flow to the bottom, and as we kept pumping, it would fill up with water from the bottom and the oil would go out the top. So that's how we lightered the majority of the oil.

Q Thank you, Captain. You can sit down now. Now, you mentioned the prospect for explosion, danger. Was there a particular area in which that danger was the greatest?

A Well, when we were pumping the oil from the top like that, oxygen could come in through the openings that we had opened up and we would create an explosive atmosphere between the void space, the deck and the oil. By putting the tools and lines and equipment down there, we could get a spark, and if we had an explosive atmosphere, you could blow up the ship. We ran the inert gas system as soon as we started getting close, which generates gases that don't have enough oxygen to allow an explosion, and that just – that system ran the whole time to get that atmosphere from being an explosive atmosphere.

Q How do you get that atmosphere?

[7207]

A We have meters that can check that.

Q Now let's explain – if you explain how you could not use the regular pumping system to pump the oil out of the tanks, because that's where the water – in some of the tanks at least?

A Sure.

Q So you're pumping from the top, correct? Would that mean that you had to redo the entire system above the deck in order to get the oil up to pump it off to another ship?

A Yeah. Once we got the oil to the deck, we had to do something with it.

Q I think I've got some pictures to help us out a little here, but first I've got a blow-up before – I have to play with this machine over here. This is Exhibit DX8375, which is a blow-up, and could you tell the ladies and gentlemen of the jury what this is and why we have it up here?

A That's – I don't know which one of those ships, it's either the Baton Rouge or the San Francisco, but it's one of the ships we used to lighter and it's tied up along the Valdez. The smaller ship is the ship we used to lighter.

Q This is the Valdez and that's a cloud that's blanking that off?

A Yeah, that's a shadow. Can I stand up?

Q With the Court's permission.

A What we did here, all those individual pumps we had in different tanks were just put down through these little holes. You can see there is a little pump there, there is a pump over here, and we got these hoses that were strung all the way down the deck. You can see how they – we pump the oil up from the tank to the main deck and then we had to do something with it. So what we did, we took all this oil and ran hoses from the individual tanks and ran them over to this manifold right here. This is where we normally discharge oil if we're at a dock, or unload oil, so we ran these different tanks and hoses to this manifold, and over on this side we pumped it right across the ship, and over on this side we connected hoses to the lightering ship and pumped the oil into the lightering ship just like we normally load oil onto a ship, onto this one. The reason we did that was we felt if we ran individual hoses across from each tank this way, that we would stand a chance of spilling some oil. These hoses were a little more flimsy than what you would normally use to go across water with, and we thought it would be a safer and easier operation to just go across on several hoses here rather than run maybe 15 hoses in different places that way.

Q Thank you. I want to briefly go through some more detail about how this was done, and we've got some pictures here to help with

[7209]

that. Now, this is another picture of the Valdez with another ship lightering. Can you describe what we see there?

A It looks like it's similar to the picture we just saw where we were – where we just had tied up the ship there and were getting ready to lighter it. One thing you can see on this picture is that the Valdez has got a – the ship is listing to starboard, or leaning over to the right side of the vessel, and that was something that was occurring twice a day on us, because the right side of the ship and the center line of the ship was – all those tanks were holed. That's where the vessel was aground, on that side of the vessel. The port side was afloat. And as the tide came up, the port side would float and the starboard side would stay on the rock, and twice a day we would get about a five or six degree list to starboard, and then we would go back down to port again and we would get even keel or get a little bit of a port list. And you can see right there the vessel is listing a little bit to starboard. That's where we were just sitting on the rock, right there on that starboard side.

Q Captain, particularly when the tide would go up and down like that, did you hear any noise from below in the Valdez?

A There was some real scary noises that were generated once in a while down there. People working down there on the pumps would tell us about tremendous cracking and banging noises that

were occurring, and a few times when I was walking out there, I heard them also. The whole ship would vibrate as a piece of metal let go or something would crack down there that hadn't previously cracked down there, and it got your attention when it happened.

Q Let me show you Exhibit DX8379 in evidence, and if you can, use that light pen up there.

A Is this it right here?

Q Yes. We can see it.

A What we're seeing here is just the – as I showed you earlier, the cargo hoses that went across from one vessel to the other, and I'm just going across it really slowly here, we connected these cargo hoses up and just left them there, and that was just a permanent connection so we wouldn't have to keep moving those smaller, less adequate hoses back and forth, so we could – we would stand less of a chance of spilling oil that way.

Q Are you ready to go to the next picture?

A Yes, please.

Q DX8388 in evidence, what is this?

A That's – this is the collection side of the Valdez. That was the starboard side of the Valdez, the manifold on the opposite side of the lightering ship. That's where all the hoses came together and that's where we collected the oil on the vessel.

[7211]

Most of those manifolds there, the chief engineer and the engineering staff put together for us on an emergency basis so we could collect the oil and connect those hoses in a mass like that. That big one on the end is something we had ordered especially, and it flew around the Sound about a week before we got it. And it weighed about a thousand pounds, but we did use it eventually.

Q Do I understand that all of this business up here was rigged by the crew after the grounding in order to make this system that you described to the jury possible?

A The crew put that together in order to make this possible, that's correct.

Q Now let me move to DX8383 in evidence.

A That's just another view of the same thing, the manifold there with those different connections that the crew would put together.

Q And the purpose of that is to get the oil from these different kinds of pumps into the manifold so that it can go across to the lightering ship in the normal – using normal hoses, correct?

A That's correct.

Q The next one is 83 – DX8389 in evidence. What's this?

A That's an example of a – we call that a prime mover. That was one of the – there is a diesel motor that's connected to a hydraulic unit that would power the pumps in each tank, and

[7212]

that was – each pump had to have its own prime mover. The Coast Guard had several units. That's one of the Coast Guard's units out there, and that was what powered the pumps we were using to pump out each tank.

Q I'm glad you raised that. I gather that you were not alone in working on this lightering project?

A No, I was not alone. There was lots of help out there.

Q And that help included the Coast Guard?

A The Coast Guard were the first people on-scene with their Pacific Strike Team.

Q Was the coordination good and the cooperation good between you and the Coast Guard and the other agencies that helped?

A The Coast Guard were quite heroic in this thing. They worked around the clock and never asked for a thing, never took a break. They did a great job.

Q And they are the ones that brought in these prime movers?

A They brought in three pumps, and then we, through our own resources, brought in – eventually I think we had close to 20 pumps, maybe 17, 18. I think we may have had 11 in operation maximum at any time.

Q Let me show you, this is the final picture, DX8381 in evidence.

A That's just one of the tripods that were rigged up that would hold the pump in the tank. One of the challenges the people operating each pump was, especially when the oil started

[7213]

getting pretty close to maximum oil out of the tank, was as the tide came in and out, the oil would rise 12, 15 feet in the tank or go down, and to try to keep the pump in the oil was difficult. So the people were having to adjust the pumps to keep the pump near to surface and not get it in the water. Sometimes we pumped water, but they worked hard to try to keep them adjusted properly so we would get mostly oil.

Q I guess it's obvious, but I think we ought to make the point. Is it true that the pumping in every step in this operation, unlike a normal operation, was a hands-on, 60 seconds out of every minute operation?

A There were people at each pump site, and watching the prime movers, keeping those going, there were diesel motors that had to be taken care of. There were hydraulic units that had to be monitored and the pumps had to be adjusted and there were people constantly doing that. We had up to 70 people on board the vessel during the maximum activity there trying to get all this done.

Q Now, as the time went on, did you become more comfortable with the seaworthiness of the vessel, or did the fear of those two or three things happening stay with you during the entire time?

A I think we all learned to live with the uneasiness that we had about something going wrong. The longer we stayed there it became less likely that it would occur because it hadn't

[7214]

occurred, but I never felt totally comfortable that I was going to be safe at all moments there.

Q Did there come kind of a humorous incident when that was brought home to you?

A Well, after about a week on board we had gone through and drilled safety into everyone constantly every day at our meetings in the mornings and just walking about, making sure that everyone was prepared to get off if anything bad happened. One morning at about 5:00 in the morning I was sleeping in my room and a fire alarm went off, and then the general alarm went off which is the reaction to the fire alarm usually going off, and everyone just scurried about trying to get to their stations, get to the lifeboats, get their survival suits on.

Q Get ready to abandon ship?

A Yes. And it turns out, which is good for us anyway, that the cause of the whole thing was someone who didn't know how to use one of our $500 toasters down in the galley burned the toast.

Q Now you mentioned that you were captain of the Valdez for three days only. What was the job change?

A We brought another captain out to help out with a lot of the administrative work out there and assist me so we would have double coverage. I became primarily involved in lightering operations, so I was in charge of the lightering

[7215]

after that point.

Q So the lightering became your job after the third day?

A That's correct.

Q Who took your place?

A Bill Wallace.

Q Now how long did it take to lighter the oil that could be taken off the vessel?

A I think it took us around ten days, ten or 11 days.

Q How many lightering ships did you need?

A We used three.

Q Which were the?

A Baton Rouge, the San Francisco and the Baytown.

Q And after the ten days, I gather – well, did you find that you had lost more oil than you started out thinking you had lost?

A Shortly after we – I got on board we thought we had lost 240,000 barrels of oil, and that's what we were reporting for the first several days. After we had gotten into the forepeak tank which we thought contained 20,000 barrels of oil, we found later that tank was mostly water, and what we thought was 20,000 barrels of oil was oil in the sounding tube, because the sounding tube showed a reading of oil there. Although when we got in the tank itself it was mostly water. So that brought the estimate up to 260,000 barrels at that point instead of 240.

[7216]

Q So you originally thought you spilled 240,000 barrels of oil, and then subsequent investigation of the forepeak tanks showed that you lost even more?

A Yeah, we thought there was oil that somehow gotten into the forepeak which really wasn't there.

Q So if 260,000 barrels was spilled, how much did you end up lightering at the end of those ten days, how much did you save from going in the water?

A We lightered almost a million barrels.

Q After the ship was lightered, was it then floated?

A Yes, I think the day after the Baytown was gone, I believe we refloated it the next day or a day-and-a-half later.

Q And where was it taken?

A To Outside Bay.

Q And that is located on Naked Island?

A On Naked Island, yes.

Q And were repairs done thereafter and then it was moved down to San Diego to the shipyard?

A I left the vessel in Outside Bay after several days there. But we continued to skim oil, get as much oil as we could in Outside Bay, and I think there was a little bit more that was taken out there, and the vessel was prepared for the trip to San Diego from there.

Q One question I guess, this is more curiosity than anything. We have heard testimony that on Sunday the 26th of

[7217]

March, 1989 you had a storm?

Q So you originally thought you spilled 240,000 barrels of oil, and then subsequent investigation of the forepeak tanks showed that you lost even more?

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CROSS EXAMINATION OF WILLIAM DEPPE BY MR. O'NEILL:

Q Captain, I just want to talk for a minute about your assignment as Valdez port operations coordinator. You were assigned there in September of 1993?

A That's correct.

Q Which was about four-and-a-half years after the spill?

A Yes.

Q Was there a Valdez port operations coordinator between the spill and the time you were assigned there four-and-a-half years after the spill?

A No.

Q As Valdez port operations coordinator, do you do what Alamar does too, or Alamar used to do?

A No.

Q You don't?

A I do some of the things Alamar – Alamar was an agent. The agent functions are being done by the vessel now, by themselves. If anything unusual comes up –

Q Then you handle it?

A If there was a serious injury or something out of the ordinary, I would get involved in it.

Q Was Alamar the agent from the time of the spill through September of 1993?

A They were the agent until, I believe it was either December

[7219]

‘93 or January ‘94, I'm not sure.

Q So for four, four-and-a-half, five years Alamar continued to be the agent?

A That's correct.

Q And you came on duty about four-and-a-half years after the spill?

A That's correct.

Q Now I want to move to the lightering, and I'm confused, and how can I be confused? I'm confused because there has been prior testimony in this case in Phase I about how the vessel was stable up against the rock and everything was fine, and in listening to your testimony you were concerned about the vessel breaking in half?

A Do you want an answer?

Q Yes.

A I don't know whether it would break in half or not. That was a possibility.

Q You were scared?

A There was a possibility.

Q I'm not impuning your bravery. Most brave men are scared, but there were times when you were on that vessel when you were scared?

A It was an unpleasant situation the whole time we were there. I wouldn't say there was a moment that we weren't afraid than another moment.

[7220]

Q It's even worse, isn't it, but there was a possibility that the vessel would break in half. That's a correct statement?

A That was a possibility.

Q There was a possibility that if certain things were done, the vessel would capsize?

A That's right.

Q There was a possibility that the vessel would blow up?

A Right.

Q And then there was one other danger that presented. I think you said there were four?

A I think I said there were three.

Q Those three. And those weren't remote possibilities, those were things you were concerned about?

A I think they were – the chances were better than average – than normal, let me put it that way.

Q And the spill could have been much bigger than it was. We had another million barrels on board, isn't that right?

A If we didn't get the oil off the vessel, there could have been another million barrels spilled in Prince William Sound.

Q So we could have had a spill that was five times as big as the spill that we had?

A Correct.

Q And in hearing your testimony – I had a different cross-examination than this one, but in listening to your testimony, it became apparent to me that you were concerned

[7221]

about people's lives being in danger?

A In the worst case scenarios there, if the vessel had one of those three things happen to it, people's lives would have been in danger.

Q And that included your own?

A Correct.

Q Now, was there any possibility with regard to the vessel next door – do you call it lightering because it makes one vessel lighter, do you know?

A I don't know.

Q Well, I was wondering about that, but with regard to this sister vessel, and I don't know whether it's technically called a sister vessel, but the other vessel, that was at risk too to some extent, wasn't it?

A I'd say lesser risk, but there was risk.

Q And with regard to the Coast Guard officers on board or who came up, who bravely stood by you, they were at risk too, weren't they?

A There was risk.

Q So this grounding not only resulted in a 260,000 barrel spill, but it placed at risk another million barrels in the Sound that was at risk?

A Yes.

Q Didn't turn out that way, but it was at risk?

A Yes.

[7222]

Q And it placed at risk the vessel; that is, while the vessel has been put back together again, if the vessel would have been broken in half or capsized, the vessel was placed at risk?

A That's correct.

Q And indeed this grounding placed at risk people's lives, didn't it, including your own?

A People's lives were more at risk lightering than they would have normally been.

Q And because of the risks of oil spills, the risk to vessels and indeed the risk to people's lives, it's incumbent upon all of us to be exceedingly careful in the transportation of crude oil by tanker, isn't it?

A I'd say that's a correct statement.

* * *

[7332]

DIRECT EXAMINATION OF GUSTAS ELMER BY MR. SANDERS:

Q Mr. Elmer, what is your job?

A I'm president of SeaRiver Maritime.

Q And when did you take over that job?

* * *

[7416]

Q I'll use Mr. Sander's copy. This is in evidence, it is Exhibit Number 13. And to put it in context, this is dated in March of 1990. That's a correct statement, isn't it?

A Yes, sir, I'm looking at it.

Q And he talks about there are safety concerns about the number of hours individuals have been working in the fleet. That's the general subject of the memorandum, isn't it?

A Well, that's the introducing sentence.

Q Now, when you talked about manning, you were very careful, when you started your testimony, to deny that fatigue had anything to do with the grounding?

MR. SANDERS: Objection to the characterization of testimony.

BY MR. O'NEILL:

Q Is that a fair characterization of your testimony?

THE COURT: You can answer.

THE WITNESS: My position and my belief is that the

[7417]

testimony that I've heard and what I understand, that there is no evidence that fatigue caused this accident. And you used the word accident and I agree with you. My belief, my company, we don't believe fatigue caused this accident.

BY MR. O'NEILL:

Q Now, this is a study by Captain Stalzer, who came in here and testified with other Exxon people, and he refers to the past. He said, these concerns arose in the '80s when manning reductions were occurring and additional responsibilities were being shifted to the fleet officers with no accounting for the additional time required to do these tasks. Do you see that?

A Yes, I do.

Q What's he talking about?

A I don't know what concerns arose in the '80s. I wasn't there, so I'd be speculating to give you an answer. I know about this memo; I read it as you do.

Q Would it be fair to say that we have a piece of paper from your company which indicates that there were concerns about manning – there were concerns about safety concerns, about the number of hours people were working in the fleet, and that those concerns arose in the '80s when manning reductions were occurring?

A That's what it says.

Q And this is a paper from SeaRiver Maritime, Exxon Shipping Company?

[7418]

A It's a paper that was put together by a group of people and Captain Stalzer was part of that group.

Q Your best people on it?

A That's my understanding.

Q In March of 1990 we had – they took a look at 94 positions, is that right?

A That's what it says.

Q And for 74 out of those 94 positions, or 78.7 percent of the work rule guidelines were being violated?

A Right, not laws or rules or Coast Guard regulations. By the guidelines that Exxon Shipping Company had introduced, guidelines, yes, sir, company imposed guidelines.

Q Your own internal rules were violated three-quarters of the time?

A Internal guidelines.

Q Indeed most of the compliance was only on two vessels, the Baytown and the Galveston?

A That's what I believe this report summarizes, yes.

Q And this is almost a year – this memo is almost a year after the grounding of the Exxon Valdez?

A Yeah.

Q And in this memo it says that the data indicates that the workload is heaviest for the senior officers in each department. Do you see that?

A I recall that. I don't see it as I'm looking at it.

[7419]

Q It's the fourth bullet down.

A Yes, sir, I see it now.

Q And the data was collected in January 1990, so this isn't old data, this is data about work conditions ten months after the spill. That's a correct statement, isn't it?

A I don't think – yeah, nine, ten months, that's correct.

Q Do you find it alarming that your work guidelines were violated 75 percent of the time, in excess of 75 percent of the time, by people on ocean-going vessels, like the Exxon Valdez, a full ten months after the grounding of the Exxon Valdez? Do you find that alarming?

A Will you allow me to answer the question my own way? This memo reflects management pulling together a group of senior officers to look at an issue. We had put the second third-mate on the Galveston and the Baytown already, and that's where you see those two ships are performing best. What you see, this basis, this memorandum that came from a management request identified, and you haven't shown the middle part of it, in which they annunciated a great number of changes that they suggested be done were largely accepted by management. The third mate was then put on every ship in order to conform with our guidelines, which then subsequently conformed with the law of the land.

* * *

[7422]

Q I want to go over some of these changes that you talked about that have been made.

A Okay.

Q With regard to – you're aware of the six hour rule?

A With regard to the mates, yes, I am.

Q And the changes with regard to keeping records, putting additional mates on, monitoring time records with regard to the mates, are made in effect to comply – among other reasons, they are made in recent to comply with 8104-A?

A They are made to comply with the regulations of the United States Coast Guard.

Q And the Congress, because the six hour rule is a statute passed by the Congress?

A Sure.

Q And the six hour rule is not new, it was passed first in

[7423]

1913. Are you aware of that?

A Yeah. I read that someplace, very interesting.

Q So it has been a requirement to comply with six on and six off for almost 80 years, 81 years?

A So it would seem.

Q And indeed in OPA '90, when the Congress took a look at the issues with regard to tanker safety, they went ahead and they amended it and they added even more requirements, didn't they, with regard to the number of hours you could work?

A Yeah. Work hours, yes.

Q And so that indeed now nobody can work more than 36 hours of duty in any 72-hour period?

A That's part of the rules.

Q And that was a subject that Congress addressed in OPA '90 in part as a result of this oil spill?

A It's part of OPA '90, yes.

* * *

[7430]

Q When you spilled oil in 1989 off of Bligh Reef into Prince William Sound, specifically, you're legally obligated to clean up the spill?

A There are laws – I'm not a lawyer, I'm a marine man, I'm an engineer, and I have a couple legal advisors to help me. There are laws of the land to which you have to responded, and where your thumb is points it out quite clearly. I'm not a lawyer.

Q You don't know, so as the president of SeaRiver Maritime five years after the Exxon Valdez spill, you don't know whether your company was obligated to clean up that spill on March

[7431]

23rd, 1989? You don't know?

A What I know is what we did, and I understand it took place on the laws, et cetera, but I'm not a lawyer.

Q Have you ever looked at the Alaska statute that was in effect with regard to the requirements to clean up a spill?

A Back in '89?

Q Yeah.

A I don't think I have.

Q Would it surprise you to know that a person causing or permitting the discharge of oil shall immediately contain and clean up the discharge of oil?

A I think you're showing us a statute so I can read it as you can.

Q That's the statute, that is the statute in effect in 1989. Does that statute surprise you?

A I don't think it does, no, sir.

* * *

[7444]

DIRECT EXAMINATION OF LEE R. RAYMOND
BY MR. NEAL:

Q Mr. Raymond, we'll start out the way we do with everybody. What is your occupation?

A Chairman of the board and chief executive officer of Exxon Corporation.

Q Before we get to the actual spill and the what happened

* * *

[7475]

Q I think I'm going to – I think we've talked about how long the cleanup lasted and so forth. Let me ask you this. Were you involved in any other part of the program? Let's take the claims program for fishermen and others. Were you involved in that?

[7476]

A Yes. The claims program was an area of, I guess, particular interest to me. I guess if you probably talk to some people in the company, you'd find out that I from time to time can drive them kind of nuts, but one of the reasons that that happens is I tend to kind of walk around and see what's going on. And the first time I was ever in Valdez we were having a lot of discussions – it was over some strip shopping center and we had some offices up there and we got into a discussion about the claims program. And I was asking how does it work and all that type of thing. And they said, well, the office is just downstairs. So I kind of filed that away and the next time we took a coffee break, I just wandered downstairs and walked in and said I'm here to file a claim, what's going to happen. And I found out what was going to happen. Now, as we left – as I left Alaska that time, I stopped in Juneau to see the governor, and we talked about a lot of things that had to do with the spill, but on the specific issue of the claims program the people in Valdez had pointed out to me that the speed of the claims program was going to be held back because they really didn't have all the information they needed. They needed to have confirmation that the fishermen actually had licenses and what kind of licenses they had and all kinds of data before they felt comfortable paying the

[7477]

claim. And it was going to be very difficult for us to get that kind of information, so I stopped – among the things I talked with the governor about, he said I have all this information, well, we didn't have this information. So I said, to the extent you can make that available to us, we can really get this going. And his chief of staff was there, Mr. Pesta. We had access, on a confidential basis, but we had access to all the data the State would confirm; this is the kind of license the person has, this is the kind of thing they do, to accelerate the claims program. Now, somewhat later as I tried to chase what was going on in the claims area. I kind of got the impression that it was getting bogged down, and it was kind of getting bogged down because the lawyers were getting involved. And what was happening – of course, normally when you pay money out, you ask people to sign a release, and some people were willing to sign releases, other people weren't willing to sign releases, and there was a lot of to-ing and fro-ing. I said, from New York, forget the release, just pay the money, get a receipt that you paid the money and some day we'll sort all this out in court. Here we are. But some day we'll sort it out in court, because it isn't good to not pay the people.

[7478]

Q So you paid claims without getting a release from the person you paid?

A Right.

Q You just got a receipt?

A That's correct.

* * *

[7497]

Q Now let's get down to the cost of the spill. I have

Defense Exhibit 6399-A, which is in evidence, and let's run over this quickly. Okay? The total actual and potential costs of the Exxon Valdez spill, now he's talking about cost to Exxon, right? And we have them all here lined up, less tax

[7498]

reduction and adjustment?

A Correct.

Q So the fixed and incurred expenditures are approximately two-and-a-half billion dollars, is that correct?

A After tax, that's correct.

Q After tax?

A Right.

Q And then what's out there waiting to be will total that, plus what's out there waiting to be will be up to 2.8 billion dollars after tax, is that correct?

A That's correct.

Q Now, you have in here -- there has been some suggestion that there has been no penalty or no punishment for negligence here, no punishment for conduct. Were we punished for our conduct criminally?

A Yes, sir, we were.

Q Now, was there a criminal case in this court?

A There was in this court.

Q And as a part of that, was there a payment of a hundred million dollars to the state and federal as part of the criminal case?

A Yes, there was.

Q And was there a federal fine of $25 million?

A Actually there was a fine, Mr. Neal, of $150 million, of which $125 million was remitted because of the response that

Exxon had taken following the spill.

Q So the fine was really $150 million, but was reduced to 25 million because of --

A That is correct, and I assume that was not for just complying with the law.

Q Now, let's see what else we have on that. So to this point the cost to Exxon is two-and-a-half billion after tax and may be 2.8 billion after tax?

A That's correct.

Q Now, Mr. O'Neill in his opening statement said the cost to Exxon was a mere hiccup. Do you remember that?

A I certainly do.

Q Was this a mere hiccup to Exxon?

A Well, that comment, I think, Mr. Neal, has bothered me and I've been trying to think about how to try and put this in some kind of perspective in terms of its impact on Exxon, and let me see if there aren't two or three ways I can describe it.

First of all, Exxon is about a hundred -- at this point it's 113 years old. There has never been any single event in the history of the company that has had this kind of cost associated with it.

Q The largest expenditure in the 113-year history of the company?

A That's correct.

Q You said you had some more ways?

[7500]

A In order to pay these bills, of course, our plans are usually pretty well set for the forward years, and although you see a tax offset there, as we all know, you don't get a tax reduction until you have made the tax expenditure. So as the costs began to escalate in 1989, the only way the corporation really had of dealing with those costs was to go out and borrow money. And in 1989, at the end of 1989, our debt levels were by far the highest they had ever been in the corporation's history.

I think another perspective I would put on that draws on data I have already talked about earlier today. And that is if you look at $2.8 billion after tax, and you try and put that in the context of our U.S. operations, to pay that $2.8 billion, we had to have 33,000 people operating a capital employ of over $15 billion for three-and-a-half years in order to pay that bill.

Now, the other comment I'll make just to try to still answer this, as the costs started to escalate rapidly in 1989, and if you'll recall that little folder that Otto Harrison waved yesterday and said this is a clean-up plan on April 15th, 1989, there was no conceivable way we had any idea what the total cost was going to be, and the cost started to escalate very rapidly.

The first point I'd make, we didn't flinch, we wouldn't back off, we were going to pay the bill. But the other point

[7501]

I'll make, it became clear to me that the corporation could never, never have this kind of thing happen to us again.

Q Is that the reason you started talking about all the changes that you insisted be made?

A Yes, sir.

Q Now then, I want to put this in context for the jury because they will have the exhibits. If you take $2.8 billion and you take Defense Exhibit 6347, I'll ask you this, isn't that far more than all the after-tax income from Exxon Corporation, from all U.S. sources, for the year 1991, '92, '93?

A That's correct.

Q Now, what would it be --

A And the first half of '94.

Q What if you added the first half of '94 to it?

A Well, I think that's about $400 million for the first half of '94.

Q So you would have then approximately the cost, ultimate cost for the spill, after-tax cost for the spill of $2.8 billion, would be all -- the after-tax income would approximately equal all the after-tax income from Exxon Corporation, from all U.S. operations throughout the entire country for the last three-and-a-half years?

A That's correct.

Q Now, Mr. Raymond, let's drop just for a minute the thing

[7502]

about money. Was that the only impact that this spill had on Exxon Corporation?

A No. In some senses, it's hard to even try and verbalize or articulate what happened to us. As I commented, we're a company that's 113 years old, and while there will be people in the court who will focus on how many oil wells we own and how big our refineries and how many tank truck and service stations we have, the real key to Exxon is the people, and that's always been the case.

I reminded -- and I know, Mr. Neal, this is going to take longer than you want, but I'm reminded in the earl y days of the corporation when the people -- when the people who were managing it then, if you look at the history, said what we really need -- the only thing we really need are the best people, and if you have the best people, all the rest of these things we can deal with.

And I would make that same comment here. The Exxon people have a tremendous pride in the organization and they have gotten that over the years by -- all across the world, by virtue of their dedication and to a degree the success that the company has had. I can't think of a single event that really shook, what I would say, the bedrock of our employees' views of themselves and the corporation as did this event.

Now, in saying that, I also want to make it clear that in no way am I trying to suggest, redeflect or minimize the effect

[7503]

that this spill had on Alaskans and Prince William Sound. I understand that. I understand that from the first days I came here, and that's why we did a lot of the things that we tried to do.

But I do have to point out in terms of Exxon and our people, our 90,000 around the world, this has had a very, very serious impact on them, and their whole focus is, and many have said in their careers they worry about whether or not we'll ever be able to regain the position we had in the communities around the world and the stature we had in the business community because of this event.

Q I think two more questions, really. Mr. Jamin said something to the effect that, well, the taxpayers helped pay for the cleanup and all of these other things. The chart I've showed you was 2.8 billion after tax?

A That's correct.

Q And what do you think about the statement that the taxpayers helped clean it up?

A I don't think that's totally accurate. You have to realize that nearly all the money we paid out went to other people who the IRS always has a way of finding and they pay taxes. So to that extent the government got revenues from another source, and I suppose I could get some highfaluting economist to come in and run through the multiplier effect and he could tell you how this all dribbled down the chain.

[7504]

I'm not saying that the government came out even, I have no idea on that, but to suggest that all of that tax reduction fell on the burden of the taxpayer simply isn't accurate.

Q Anyway, 2.8 billion after-tax dollars fell on Exxon?

A That's correct.

Q We're talking about punitive damages. In view of Exxon's situation, would a punitive damages award be deductible for tax purposes?

A Well, as you can expect, first of all, I'm not a tax expert, so all I can do is ask our tax people how that works out.

MR. O'NEILL: He's disqualified himself from answering. I object, 403, he disqualified himself from answering.

MR. NEAL: Could we have just a brief side bar on this?

(At side bar off the Record)

BY MR. NEAL:

Q Mr. Raymond, thank you. You, very frankly, have disqualified yourself from answering that question by not being a tax expert.

A I'm rather pleased.

Q Now, Mr. Raymond, one final question. Under the law, where appropriate, punitive damages may but are not required to be awarded to punish and deter. Do you believe punitive damages

[7505]

are necessary to punish and deter Exxon and others in this case?

A Well, Mr. Neal, no, I do not, but that's exactly what everybody in this courtroom would expect me to say. It's not my decision to make, it's the jury's decision to make, and I guess I would just hope that the jury, when they consider this issue, they consider the response that Exxon had, the commitment we made, the responsibility we accepted, and the commitment we've made both for the corporation and for others to find better ways such that this thing won't happen again.

MR. NEAL: You may examine.

CROSS EXAMINATION OF LEE RAYMOND BY MR. O'NEILL:

Q Mr. Raymond, your lawyers said in the opening of Phase III that we accept the jury's verdict in Phase I. Were you here for that?

A Yes, I was.

Q Was your company reckless?

A The jury, I believe, Mr. O'Neill, has concluded that.

Q Now, in all these 12-step programs, including treatment for alcoholism --

A I didn't understand.

Q In these 12-step programs, including psychological treatment for alcoholism and other diseases, are you aware that it is an established principle that before you make any

[7506]

progress you have to acknowledge the full scope and responsibility of your mistakes? Have you ever heard that before, talk to anybody who has gone through treatment?

A No, I really haven't. I'm not trying to be argumentative, but I don't know what you mean by 12 steps.

Q It's a very different thing, would you agree with me, to say, yes, we were reckless or I understand that that's what the jury found in Phase I? Those are two very different things, aren't they?

A I'm not sure I understand the question you're asking me.

Q Can you answer the question was your company reckless? Can you answer that yes or no? Can you answer it -- if you can't answer it yes or no -- if you want to answer it yes or no, either way, tell me, but I'd like either yes or no, or I can't answer the question.

The question is, was your company reckless? And I think that's a fair question. A Again, I don't want to be argumentative, but I don't think in asking the question you can tell me how I have to answer. The facts are as we know. The facts are as we know.

The jury concluded that Exxon was reckless, I'm not arguing about that, I'm not looking back, I'm not disputing it.

Q Are you going to appeal it?

MR. NEAL: Your Honor, objection.

THE COURT: Sustained.

* * *

[7507]

BY MR. O'NEILL:

Q Now, you testified that this 25 million dollar number, 1 hundred million dollar number and 9 hundred million dollar number were because of recklessness – excuse me, because of negligence. A couple minutes ago you said they had to do with negligence?

A May I say what I said?

Q Sure.

A I think what I said was in the federal and state settlement, which was in this court, which was a negligent misdemeanor, which was for whatever happened in Prince William Sound, there was a federal fine of – really it was 150 million, of which 125 was remitted, a hundred million for federal and state restoration and 9 hundred million for state and federal settlement.

Q Isn't it true in the agreement settling of the case, this one hundred million dollar number and this 9 hundred million dollar number were described as compensatory and remedial in nature and not punitive?

A That's what the agreement says.

Q Yes?

A Then I'm not going to argue with it.

* * *

[7538]

Q And there were an awful lot of small processors who didn't participate in the claims program?

A You mean they didn't file a claim?

Q No. The claims program, from this chart and from my recollection, essentially shuts down in 1991. Do you recall that?

A I'm not sure I'd characterize it quite that way, but there became – I think my best recollection is that the claims program was getting to the point where it was becoming very difficult for us as the payor, so to speak, to also make the judgment as to what the – being in the position of both judge and jury, in a sense, of paying and having to make the judgment of who should get that payment.

Q So you decided to duke it out with the fishermen in the court system?

[7539]

A That is not a fair characterization. What we decided to do was, we concluded that there is a purpose in the law, and the purpose in the law is to come to a reasonable decision as to what the right level of compensation was, which I think is the issue – one of the issues that this jury has already dealt with.

Q Have you been aware of the fact that the chairman of the board of Exxon Corporation represented – the then chairman of the board of

Exxon Corporation represented to Senator Stevens from Alaska that this kind of proceeding wouldn't be necessary, were you aware of that?

A I'm not aware of that.

* * *

[7556]

MR. O'NEILL: May it please the Court, counsel, ladies and gentlemen of the jury. What amount of money is necessary to punish Exxon Corporation for its reckless acts, reckless acts that caused the worst environmental disaster in United States history? And that's the question before us.

Now, your role is unique to our country in that the 7th Amendment to the constitution sets up the jury system, and in our country when it comes to issues of punishment like this, that is not relegated to the executive branch of the

[7557]

government, and the legislature can't do it, the Congress can't do it and state legislators can't do it; the jury system does it. And when it comes time to express society's condemnation of conduct that we all know is wrong under our system of government, juries do it. That's how we do business in our country.

So to the extent that you sit there and you think, who am I to cast judgment on Exxon Corporation for what went wrong, the answer to it is two-fold. The constitution and the laws of the United States have set it up so that you're the ones. And the second reason is that, the reason that there are 11 of you, is so that you can bring the considered judgment of 11 people and their life experiences to the problem at hand.

Makes sense. But instead of having one juror or two jurors, we have a number of jurors so that all your life experiences, your attitudes, your different views, which are all valuable, are brought to the problem at hand, and the combined wisdom of 11 of you, history has proven that the combined wisdom of 11 of you is a heck of a lot better than the combined wisdom of one or two people, so we have a jury system.

And the jury system has been with us for hundreds and hundreds of years, goes back to the tenth and eleventh century in England, and punitive damages as a concept for expressing our disapproval, society's disapproval of actions, has been

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with us for hundreds of years.

Now, could we see the first jury instruction?

Jury instruction 24 says that the amount of punitive damages that is necessary to punish a defendant is the penalty that is necessary to express society's disapproval of conduct that society condemns, and that's what I'm talking about. You are here to express society's disapproval of conduct that society condemns.

And that is the jury instruction and that is your role, and in this case, because we have set up a punitive damages class and because Your Honor has chosen to supervise a punitive damages class, this is the only jury that is going to address this issue. And in fact with regard to Exxon Corporation, this is the only jury that has heard the whole story. With regard to Exxon, this is the only jury that has heard the whole story of Exxon's conduct with regard to the grounding of the Valdez. Exxon has not appeared before a jury before in the last five years with regard to this grounding.

So you have the responsibility of being the only jury, you had the responsibility of being a jury that takes the place of juries in the state court system, that takes the place of juries in other federal cases. You are supposed to take it all in and do it once, and that's quite a responsibility.

And to say – a lot of times in these cases the lawyers say, well, the world is looking at you, and you read in

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newspapers about the lawyers making an argument "you have to send a message to the world or corporate America", most of the time that isn't true, most of the time those cases end up on the back page of the business section, that's a lawyer's argument.

In point in fact, the world is looking at you, the directors in mahogany polished boardrooms in Houston, New York, Brussels, Paris, France, Hong Kong, are going to know exactly what you did. And ordinary citizens in the United States, Norway, Germany, Japan, are going to know what you did. And what you do in this Phase III is an expression of what our society's values are. That's how it's going to be interpreted and everybody is going to know about it.

Now I want to talk for a minute about the standard for punitive damages, and jury instruction 27 lays them out as clearly as they can be laid out.

And the first is the degree of reprehensibility of the conduct. The conduct, the Phase I conduct, is the first thing that you look at. The second thing that you look at is the magnitude of the harm likely to result from the conduct, as well as the harm that actually occurred. That's two separate things, what was put at risk and what happened. And the third is the financial condition of the defendants. These are the three primary things you look at.

As mitigating factors, you look at the existence of prior criminal sanctions or civil awards and the extent to which a

[7560]

defendant has taken steps to remedy his conduct. Now, the word mitigated is defined in the jury instructions, and when you go back to the jury room and you consider this, I urge you to look at the definition of mitigating, because it doesn't say if you find these factors in place you let them off the hook.

The three primary factors are the degree of reprehensibility, harm and the financial condition of the defendants, and they ought to be. What they did, who they hurt and how wealthy they are make eminent sense, because you punish the conduct, the conduct has to be looked at within the scope of the danger it presents to society, and what is punishment for a poor man can be nothing for a rich man.

Now, with regard to the conduct at issue, I want to pull up jury instruction 28 from Phase I. That's the one you've got right there. This is the jury instruction that I am sure you discussed back in the jury room at great length because it is the core of the Phase I jury instruction, and this is the conduct that you found to be reckless in Phase I and now I'm asking you, because of the seriousness of the conduct, to condemn the conduct.

Now I want to, if we can, revisit a minute, and I'm going to do it by videotape, some of the proof that we've seen in Phase I, Phase II and Phase III. I could stand here and talk about it, but all that seems to do is engender arguments about who said what to who. So rather than talk about the conduct,

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I'm going to put on a videotape and we're going to revisit some Phase I evidence and some Phase II evidence, and then because I didn't have the time to put the Phase III evidence on a videotape, I'll talk about that afterwards, but if we could –

(Videotape Played)

MR. O'NEILL: The conduct that led to the grounding of the Exxon Valdez took place over four years, and it took place with the complicity of almost every officer of Exxon Shipping Company, Dwight Koops, Harvey Borgen, Frank Iarossi, Andy Martineau, and you can go on and on and on. They were told during the course of that four years, repeatedly from 1985 to 1989, to two or three days before the grounding, there is a problem here.

And the conduct wasn't a result of paper policies, the conduct was a result of a sickness in the organization, and that sickness had to do with the way we treat each other as decent human beings. And I talked about it at some length with the witnesses. If somebody has a problem, you say how are you doing on your problem, how is your treatment, how is your family, are you happy, unhappy, is there something I can do for you, is there something the company can do for you.

What happened here was the result of a lack of basic human decency. And what happened as a result of that lack of basic human decency at Exxon Corporation? A lot of people were hurt.

The Exxon Valdez, in fact, had impacts on landowners in the

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Sound, on Kodiak and the Alaska Peninsula. It had over $280 million worth of impacts on commercial fishermen, Phase II commercial fishermen.

Municipalities, Valdez, Cordova, Whitter, Seward, Kodiak, Chignik, were impacted both with regard to the spill on their lands and the basic nature of those communities was ripped apart. The influx of clean-up workers and influx of demands on city services took those small, sleepy, happy communities and turned them upside down. There are fishermen who were hurt by this who we haven't talked about yet with any jury, and they will be in Phase IV of this case.

As His Honor read, there were some payments made to canneries, there was a disruption with regard to canneries. Aquaculture associations, Prince William Sound Aquaculture Association, Cook Inlet Aquaculture Association, the Kodiak Aquaculture Association were hurt by the spill, Alaska Native corporations were hurt by the spill.

In point of fact, in Prince William Sound, Kodiak, Chignik, the communities were ripped apart as a result of the spill. And this is a foreseeable event, the consequences of which occurred as predicted. These are the people that are here for justice, and they include the full tapestry of society in the affected spill areas.

Now, the second part in His Honor's instructions not only covers the harm that occurred, but also covers the harm that

could have occurred, one million more barrels of oil on the ship, and the fact that the conduct at issue places people's lives in danger, and it does, and Captain Deppe testified about that. This conduct resulted in, scope-wise, the greatest environmental disaster in the history of America. That's the second factor.

The third factor is wealth, and I'd like to take a look at jury instruction 34 for a minute. Your new jury instruction 34 will say, in considering a defendant's net worth or net income, you may consider what portion of a defendant's net worth or net income is most relevant to the activities that were impacted, or you may decide that all the defendant's net worth or net income is relevant, so it's up to you what you look at.

Now, Exxon Corporation is run as a corporation, and you don't go to work for Exxon Shipping or Exxon Chemical or Exxon USA, you go to work for Exxon Corporation. And like Mr. Elmer, you go between division and division. And Exxon Corporation, if you look at those annual reports, publishes consolidated financial statements, and the reasons that they do that is because they are run as one company, and, more importantly, with regard to their assets, they are run as one company.

Now I want to go to the 1991 annual report of their company, and this is how they tell you they manage their money. Cash flow is centrally coordinated in order to efficiently move funds from units generating cash to units

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where funds are needed to finance new investments or meet new operating requirements.

That's the 1991 annual report at page 4. This is how they run their business. And this 10 to $12 billion of cash flow is an important number because this 10 to $12 billion is discretionary cash that they have at the end of the year, and it can be invested in dividends for the shareholders, it can be invested in how much cash they keep in their wallet at the end of the year, or it can be invested – reinvested in the company.

In addition, and this stipulated fact is in the jury instructions, the number of which I do not recall, but you'll see it, the parties have stipulated that we have the Exxon defendants, and when you look at the special verdict form, which I'm going to talk about at the end, this is one number for the Exxon defendants, and in this case I would suggest to you that the complicity doesn't just go throughout Exxon Shipping Company, but who came in here to defend the conduct, the Exxon medical department, Mr. Cornett, where is he from, the Exxon USA public relations department.

But when it gets right down to it, the big defenders of the conduct were Mr. Rawl and Mr. Raymond. And what they did in coming in and defending the conduct, they ratified that conduct. When they mounted this defense in Phase I, they ratified the conduct. The complicity of this thing goes from

[7565]

top to bottom, but I'm going to come back to the complicity of this thing going from top to bottom when I talk about that dispute resolution agreement, because that's reprehensible, but we'll get to that.

So Exxon Corporation is in fact run as one corporation, and I want to go over for a minute, if we could, the board that Mr. Rhodes used, and I want to talk about its financial health. And I figured out one thing over the weekend that I want to talk to you about, too.

Now, remember we started in '88 and go all the way through to '93. I'm going to sneak by, I'll block His Honor off, he won't mind.

The dividends per share of Exxon Corporation have gone up every year from 1988 to the present, including the spill. They have. The total amount of cash dividends paid out for every year, including the spill, have gone up, and they pay out about $3 billion a year, three-and-a-half billion dollars a year in cash dividends. The stock price on the stock market, like my clients' permits, is affected by things extrinsic to the piece of paper. The stock price has gone up every year, including the year of the spill.

Now, we see that there is a drop in earnings per share in 1989, and I was curious about that, and I went back and I read the 1989 Exxon annual report, and I did it for two reasons. If you recall, Mr. Raymond testified that the $2.7 billion was the

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biggest expense Exxon has ever made on anything. He testified to that. And looking at these numbers, it struck me that [illegible].7 billion shouldn't have had this kind of effect on earnings per share, so I went back. And when you go back to the jury room, I would recommend to you pages 33 and 34 of the 1989 annual report, because Exxon paid, in 1989, for McColl-Frontenac, which is formerly Texaco Canada, $4.2 billion in cash in the year of the spill, and on pages 33 and 34 they describe that.

So the year of the spill, where this allegedly devastating expense was taking place, they had cash to pay $4.2 billion for another subsidiary, and that's in here on pages 33 and 34, and if they want to argue about it, I suggest you read it. So the year of the spill, not only could the dividends go up, but we have over $4 billion to use on another acquisition.

Now, the after-tax net number is an important number to look at, but so is the cash flow number. The cash flow number represents what you and I would have left over at the end of the year, and we might, if we had anything left over at the end of the year, we might put something in the bank, we might reinvest some of it in our house, but that's an important number and I want to talk about that.

Let me have the next one.

Jury instruction 33 says that you cannot take the gross numbers, and I'm just looking for one, gross revenue, that you need to be more sophisticated in your approach than just

[7567]

looking at a hundred billion dollars in revenue, and that makes a lot of sense. But this number here, the equity, is a net number, okay, and, in addition, the after-tax net is a net number.

And this last sentence here, if you consider a defendant's income in assessing its financial condition, you may not consider a defendant's gross income, but only the difference between gross income and all expenses that must be paid out. This is a definition of cash flow. That is gross income and expenses that must be paid out of that income.

Now I want to leave this one up, and if you could get me the cash flow board, this is an exhibit, it is Exhibit Number 6317-B, and it shows what the cash flow is for each of these years. And then it shows that out of this cash flow, they make a decision to expend, a discretionary decision to spend on property, plant and equipments or dividends or other reasons this 10 billion, 8 billion, 11 billion, 10 billion, 10 billion and 11 billion. So this fills out the detail from here.

Now, what is Exxon going to say? It's going to talk about the two mitigating factors. Do you remember we had five factors, the big three and the two mitigating factors, and they are going to say look at the cleanup. And I would offer again what I've been asking about in the interrogation of the witnesses, the law required the cleanup, and this is Mr. Elmer's testimony: Have you ever looked at the Alaska statutes

[7568]

that was in effect with regard to the requirements to clean up the spill? Would it surprise you to know that you're obligated to immediately contain and clean up the discharge of oil, that's the statute, that's the statute in effect in '89. Does the statute surprise you? I don't think it does, no sir.

Now, why doesn't it surprise him? A, because he's in the business, and, B, in this book, All I Really Needed to Know I Learned in Kindergarten, one of my favorite books, and this is a really good book – you know, part of the problem in this courtroom process is that it's possible for a defendant with enough money to come in and create a reality that doesn't make sense, and what a book like this does is it reminds you of basic human decency. And in the rules of this book, there is a rule that says clean up your own mess, it's one of the eight or nine rules in here. Another rule is say you're sorry when you hurt somebody, but you clean up your own mess.

And Exxon is in here claiming credit for what I really need to know I learned in kindergarten. And in point of fact, they cleaned up about 15 percent of what they spilled, so they are claiming credit for what the law requires, what we learned in kindergarten, and doing part of the job.

Now, they spent a lot of money on it and the people who worked on the cleanup worked hard. Not only does Exxon's sense require them to clean up their own mess, but that was a business risk they took.

[7569]

Let me see that one.

Now, this may seem sort of a "why is he doing that" question, but you see how it fits in the business. We all don't come home everyday to expect praise about complying with the law. "I ought to be awarded for complying with the law". What I said is a ridiculous proposition, this setup to comply with the law, that's what I said. Absolutely everybody has to comply with the law. You comply with the law, I comply with the law. I don't come home and say to my wife Ruth, good job today, I complied with the law. I mean, I don't do that.

But in addition to clean up was a risk that they took, it was a risk doing business. It was so highly unlikely that the consequences of it which occurred pretty well as much as envisioned were viewed as acceptable. The spill was a callous, cold-hearted business risk that they took, and they made the risk worse.

If this was the risk that I was going to take with defenseless people – and they were viewed as acceptable by who, by fishermen? If this was the risk I was going to take with defenseless people, I would be real careful. Fishermen have no protection against this risk. The Native corporations, the landowners, the municipalities, have no protection against this risk. If I was going to take this risk, I would be really, really careful. I would not have this policy.

Now, with regard to clean up, I would submit to you that at

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least – and remember Mr. Cornett in the emergency center tapes and how they tried to disallow Mr. Cornett, and he's now the director of public relations for Exxon USA, he got promoted, this is the guy who brought you, well, if you just have to get out there and drive it around, do it, and I would encourage you to take the three noisiest fishermen down here and hire those suckers, and hire those suckers, and load them down with something and have them drive it around there in Prince William Sound, and hire those suckers.

There is an exhibit that you ought to look at, Exhibit 603, this is an Exxon fax: Even cleaning a few ducks and otters gives the impression of caring. And then they promote Mr. Cornett, but that's the cleanup. The claims program, they are going to claim success for the claims program. They paid half of what they owed to the fishermen, the biggest chunk of the claims program, about a hundred million dollars went to seven or eight corporate canneries.

But the claims program, you pay somebody when you hurt them, you pay them when you hurt them. It's compensatory in nature. And Mr. Rawl's promised the Congress, and we saw the promise here on Monday, I'm not going to make the people of Alaska who were hurt by the spill go to the mat. That's what he told the congressmen or senators, and we're – we are going to the mat.

Now, the third thing they are going to say is we made these

[7571]

changes in our policies. Now, the first thing I want to say about that is, didn't we hear about their policies in Phase I, remember the big collage of the safety awards, remember the safety belt buckles? We heard how great the policies were in Phase I, and the policies in Phase I didn't do a thing, they didn't do a thing. And the safety belt buckles didn't do a thing, because safety belt buckles don't hurt unless the person wearing the safety belt buckle cares.

In addition, the changes they claim they are making is what the law requires, so they are coming in and saying give me credit for what the law requires. There is a statute since 1913 that says six on and six off, and it takes until 1990 to get a board on the statute. The Congress amends the work hour laws because it doesn't trust Exxon, the states of California, Oregon, Washington, Alaska feel they need protection, so they pass oil spill statutes in the wake of the Exxon Valdez, the Congress of the United States, the American people need protection from Exxon Corporation, so it passes OPA '90.

The Congress of the United States feels that the people of Prince William Sound need such protection from Exxon Corporation that it passes a statute that prohibits this vessel from going into Prince William Sound. The policies, whether they deal with spilling oil or safety or fatigue or work hours, are passed to comply with the law and they should have done it a long time ago.

[7572]

And with regard to their embracing of the future, I would like to discuss two exhibits with you. I would like you to read Exhibit 13 and Exhibit 175 when you go back to the jury room. Exhibit 13 says in March of 1990 our own internal policies with regard to work hours are being violated on three quarters of our vessels. A year after the Exxon Valdez; the SeaRiver Mediterranean.

Exhibit 175 is in September of 1989 and it's by Frank Iarossi to Koops. They put Koops in charge of implementing the changes to the program. Koops is now the number two guy at SeaRiver. Dwight Koops, the Gulf Coast fleet manager, one of the people that caused the problems is the number two guy, is Mr. Elmer's assistant, he's the ocean fleet manager. Dwight Koops is the ocean fleet manager, Don Cornett is the director of public relations.

But in this memorandum, Mr. Iarossi says it is incredible that September is here and we still have not addressed the ice issue, the idea of allowing a coffee break is just unbelievable, and then he goes on to say about Jerry Aspland of ARCO Marine; that ARCO is setting a new standard in the industry, ARCO sees the grounding of the Exxon Valdez and says we weren't involved, we're not in trouble, but we're going to go and look at what we're doing and set a new standard in the industry, which is what you would expect from ARCO, but it is not what you would expect from Exxon Corporation, the people

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who brought you the grounding of the Exxon Valdez.

Now I want to talk for a minute about what happened after the spill, and I'm going to suggest to you that Exxon Corporation lives in a different world and the corporation executives live in a different world, and I'm going to make reference now to a minor part of that, but it's a very telling minor part of that, and that Mr. Raymond's testimony compared how much he makes compared to Mobile.

Now, Mr. Raymond has $14 million in stock options that he has yet to exercise. He makes a couple million dollars a year, he lives in a different world than we do, and I'm going to talk about that, but after the spill Exxon cleaned up part of its mess, it paid for part of the harm done, contrary to what Mr. Rawl said. It is claiming credit for complying with the law, and now I want to talk a little bit about some things that we found out about last Thursday that I find very interesting, the law department investigation.

There is a law department investigation, which apparently has never been reduced to writing. Couldn't tell that from the testimony, but it's never been reduced to writing. Now, the genesis of this law department investigation, I want to go back in time with regard to the law department investigation. The genesis of the law department investigation was Iarossi there for the first day or two, and he tells the people at a meeting in Valdez that he's going to get to the bottom of what happened

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and report to them.

We had that videotape testimony last Monday or Tuesday, and then he says, and a couple days later was taken over by the law department, and then he was asked, I asked him, did they ever tell you, and he says, well, no, but they will only tell me what I need to know to run my business. Now, I think the law department as to the real causes of this thing are real important to the guy who is running the business. Then the law department investigation goes on and the law department investigation is not going to be told to anybody so long as the litigation was going on, that's correct.

Now, what litigation is this? That's the litigation before you. So there is a law department investigation that we know nothing about that is being withheld from all of us by Exxon Corporation. Does that bother you? It bothers me a heck of a lot.

Now, in this case, as you've seen from when we started on May 2nd, there is extreme difficulty with the proof in a case like this because none of these guys were there to do the monitoring, none of these guys were there at the board meetings. They weren't. So you got to pull the facts out, but one of those facts is the law department investigation.

Now let's talk even more interestingly, though, despite the law department investigation, Mr. Raymond came here to testify about all of the changes that he and the board had implemented,

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and I asked him a series of names, Mary Williamson, Jim Shaw, those kind of names, and he didn't know who any of them were – let's put that one up first.

So this is the guy, the take-charge CEO, who comes in to testify here and says that he's fixed all the problems, but he didn't know who these people were three years after the grounding, he didn't know who the key players were, and this is the guy who did the reporting to the board of directors, who is charged by law with running this company.

I'm not – well, I was not here in Phase I, I'm not aware of all the evidence. You were the guy on the board, the officer from the company that did most of the information of the board with regard to the Valdez disaster, is that correct; that's correct. Oh, the board of directors that runs the corporation and the take-charge CEO who was supposed to fix the problem doesn't know who was involved in the problem.

I asked him, did you talk to Koops, Borgen and those guys. He says, yeah, I talked to them briefly, and they told me Hazelwood was the most monitored man in the fleet. So up to May 2nd of 1994, Exxon Corporation, who is trying to address serious institutional problems, a cancer within that company, doesn't know what happened, the board of directors doesn't know what happened, and indeed the board of directors, in this mahogany polished boardroom in Houston, Texas, had at the time of Mr. Raymond's deposition not asked for an assessment as to

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the cause of the grounding.

Now, if you were a member of the board of directors bringing our common sense to this problem, if you were either the president or the CEO of the company or a member of the board of directors who caused this terrible thing to happen, wouldn't you say I want to know exactly what happened? I mean, we can have all of these policies and such that we're going to run out and scurry about writing, but don't you want to know what happened? I would. That's the first thing I would want to know, what happened. Maybe I would yell at somebody, maybe I wouldn't, and if you yell at them, you yell at them, but I want to know what happened.

Now, here is a little quote on monitoring. This is Mr. Raymond's trial testimony on Thursday. Now, I find this kind of interesting, too, because now they are claiming credit for having a monitoring program in Phase III, but remember they had a monitoring program in Phase I, but they didn't have a monitoring program.

Now, the other interesting thing about Mr. Raymond, who comes in here and testifies about the alcohol policy, and this goes to how far remote these people are from the rest society, and I was in a dialogue with him about recklessness, and if you recall, I said isn't one of the first things you have to do in a 12 step program is come to grips with the full ramifications of what you did. Do you recall that testimony? What was his

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answer? He didn't know what a 12 step program was.

Now, in the world that most of us live in, we know about Alcoholics Anonymous and the 12 step program. We may not know what the 12 steps are, but we know what the 12 step program is.

Now, if you were chairman of the board – let's approach this from an Exxon sense. If I was a chairman of the board of one of the biggest companies in the world and my company caused the biggest environmental disaster in the history of America and there was alcohol involved, I'd learn a little bit about the problem.

And with this particular problem, is it possible to learn about it without at least hearing what a 12 step program is? If I was the chief executive officer or a member of the board of directors of one of the biggest institutions in the world and I hurt people, and I hurt them, I would want to know who I hurt. I'd want to know who I hurt so I could know how to help them, and I wouldn't come before a jury in the United States courtroom and not know the name of one single person that I hurt. You know the names of more people that Exxon Corporation hurt than the chairman of the board of Exxon Corporation, Tom Dooley, Les Meredith.

Exxon covered up before Congress, and we saw that in the videotape. Exxon gave, the year of the spill, Exxon Corporation gave these guys bonuses, they have given Mr.

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Raymond and Mr. Rawl bonuses every year.

Now, with regard to Mr. Raymond's unexercised stock options, the book value of the unexercised options is $10 million. The potential of the options reported to the Securities and Exchange Commission is $20 million, but in 1989 he and Mr. Rawl were given bonuses.

Now, what happens in Japan, what happens in Japan if in fact something like this happens? The chairman of the board of a Japanese company steps down, but I guess in the United States, in one of the biggest companies in the world, if you create a disaster, you give people bonuses. The world that these people live in is like Never, Never – it's like Alice in Wonderland.

Do you want to look at the bonuses, go through the proxy statements, and when you look at them the rules change in about 1991, about reporting, so they need to give fair reports after 1991, but the compensation consists of the compensation – these EBU units and stock options, the most lucrative of which are the stock options, and Mr. Raymond and Mr. Rawl stock values went up between 1989 and 1994.

Did they discipline those involved? I would suggest to you that most of the people who brought you the wreck of the Exxon Valdez, if they haven't been given bonuses, they have been promoted. And that isn't right, either.

Now, while people were being promoted, and people in the –

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another interesting thing, go to the 1989 year-end statement, if you search through it, you can find that the outside directors, that they approved a stock bonus program for the outside directors in 1989.

1989 was quite a year. We buy a company in Canada, we give ourselves bonuses, and with regard to the outside directors, we put into place a bonus system for the outside directors. That isn't remorse. You know, if you're sorry, you acknowledge the full scope of what you did. You don't come in and weasel words around, was your company reckless, yeah, my company was reckless, first step towards moving on. But these are the people who brought it to you, and they are still with us.

How many of these employees who came in here, the people who were forced to come in here and testify about these stories in Phase I are victims.

Yeah, let me see that the dispute resolution agreement. They will try to argue this away and argue this away and argue this away, but you cannot change the written word. Why would anybody agree to this? This is a contract to lie, and I didn't know until Thursday that this contract to lie was approved this year, this year, by the chairman of the board of Exxon Corporation.

Now, you can try to argue it away or you can say the lawyers made me do it or you can say Captain

Hazelwood made me do it, but this is a contract to lie by both parties. Does

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this signify remorse?

And then you ask – something like this you ask the guy, isn't this reprehensible, does this bother you? It should bother him. Thank you.

They have called some of their own employees liars, Shaw, Steve Day, Mary Williamson, and they denied in Phase I a series of problems, fatigue, alcohol, manning. No one would have known but for this jury and the persistence of these plaintiffs what went on. No one would have known the full scope of what went on but for these plaintiffs and their persistence and this jury and its attention.

Now, with regard to punishment, you have two tasks in front of you. Would an award of punitive damages serve the purposes of punishment and deterrence, and, if so, what amount is necessary to achieve those purposes.

I'm going to use this one because I don't have the right one. There are two purposes, and the instructions in the verdict form lay out the two purposes. Really there are three, punishment in and of itself, and you'll see that's clear in the instructions and clear on the verdict form, the deterrence of Exxon Corporation – yeah, that will work. This works.

Punishment, purpose one, deterrence of the defendant and others. So we have three purposes. We punish the conduct in and of itself and then we punish for deterrence of Exxon and we punish for deterrence of others. Now, with regard to the

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addition, poor stockholders, unlike, for example, Captain Hazelwood, have profited every year from the spill.

Now, Captain Hazelwood is an interesting comparison both with regard to Mr. Raymond, Mr. Rawl, Mr. Koops, Mr. Borgen; The Shadow, Paul Myers; Captain Sheehy, you can go on and on and on. Frank Iarossi is now the president of the American Bureau of Shipping. Who did the industry put in charge of safety standards for the industry, Frank Iarossi. All of those people are better off today than they were in 1989.

Captain Hazelwood is a good example. Why do you ask for a dollar against Captain Hazelwood? Enough is enough. But everybody else has thrived, they have thrived. Thank you.

I want to go over a board of numbers and I want to talk about it in terms of punishment. This is not an exhibit, but it's to make me be able to talk better off of a board than a piece of paper.

We know that, with regard to a billion dollars, that has no impact on them, that was not worth Rawl's time, and you'll have in the jury room that videotape of his press conference. Remember the press conference that I told you about in the opening? Watch that. It will give you a clue about the value of a billion dollars to the chairman of the board of Exxon Corporation. $2.7 billion is the total that was spent, and as Exxon's lawyers admitted in the opening, Exxon has thrived since 1989 despite the $2.7 billion, and in the year that they spent $2.7 billion on the grounding of the Valdez, they bought this company in Canada for 4.$1 billion, they paid their executives top bonuses and the shareholders got the highest dividend in the history of Exxon Corporation.

Now, they demean that and they say these dividends aren't so high because you've got to take into consideration inflation. When you go back into the jury room, look at the highlight pages on each of the year-end statements. The year-end statements are filed with the Security & Exchange Commission. Look at the highlight pages, and in the highlight pages, including every year, 1989, '90, '91, they tell you this is the best the company has ever done.

So we know that $2.7 billion, Exxon thrives, and money is the language of corporations. You and I have souls to damn and bodies to kick, we do. Exxon Corporation has no soul and has no body, and its language and the language of the people in boards of director's rooms throughout the world is this, this is their language. The 1989 after-tax net was $3.5 billion, and that includes a year in which they spent $4.1 billion on this acquisition, and they paid the costs of the spill. That's a number you can place in context. 5 billion is the average yearly net profit. 7.92 billion was the cash flow the year of the spill.

This 5 billion, Exxon, because of its size and wealth, can sustain a 5 billion dollar award and shrug their shoulders,

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just shrug their shoulders. One year's average cash flow is 10 billion. Exxon spent $16 billion of its cash in buying its own stock back. A bizarre thing for a company to do, but that is not money that needed to be invested in its year-to-year operations.

They paid out $16.7 billion in dividends between the year of the spill and the time of the signing of the dispute resolution agreement, and they paid out $20 billion, or the value of the Exxon stock appreciated over these five years. The poor Exxon stockholders get the benefit of a $20 billion appreciation in stock.

Now, my job in this is to represent them (indicating) and to drag the truth out of them (indicating) and to bring that to you. Your job is to look at these numbers and to come up with a number that does three things, or maybe you come up with three numbers and put them together, I don't know, but that punishes the conduct in light of its reprehensibility, the scope of the harm, the scope of the harm that could have occurred, and the wealth of the defendant.

You're going to punish the conduct, you're going to get them a message. And I would submit to you that based upon what they did in the courtroom in Phase I and what they did in the courtroom on Thursday and the changes they have made in their personnel and the state of knowledge of the board of directors of Exxon Corporation about what happened and the state of

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knowledge of its executive officer about what happened, and the fact that we hear the same thing about safety policies in Phase III as we heard about in Phase I, and the fact that they think it is a keen thing to claim credit for complying with the law, and the fact that they think it is a nifty thing to claim credit for cleaning up their own mess, and the fact that the chairman of the board describes the advertisement (sic) as an advertisement and he didn't particularly think it was a good idea at the time. They haven't gotten the message.

And then to all of the other Exxon corporations of the world, if there is not a significant verdict in this case, to the other Exxons of the world what does that say about our society's values, what does it say about business risks? You know, if you're going to take these business risks, you're supposed to be careful. What does it say about reckless conduct and our society's approval or disapproval of reckless conduct?

If the headline in the newspaper, and in this case it will be Barons or Future or Money, is that Exxon walks away, Exxon gets off, Exxon goes scot-free, what does that say to the rest of the oil industry, what does that say to the big 15 or 16 powers of the world, that we can mount a defense in a courtroom that gets us off the hook, that we don't have to change our people.

You know, it's interesting who they fired. They didn't

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fire anybody who wears a white shirt. They didn't fire anybody who wears a white shirt. As the kids would say, there is an attitude there. But you have to do something, you are the ones that have to do something.

And the point of fact where I started off, the constitution says that you're the ones charged to deal with this problem, and His Honor with a mandatory punitive class says you're going to deal with it for all of the different plaintiffs and the different court systems that are involved in this thing.

And then you say in Phase I, the conduct was reckless, so what you're going to tell Exxon Corporation and you're going to tell these people in these boards of director's rooms, and they are not the Connie Buhls of the world, the meeting that you're talking about has Jack Clarke, Lee Raymond, Larry Rawl, bodyguards outside, in a board of director's room, that's where you're going, isn't it?

I have five more minutes and I want to talk about the verdict form, because I always do. Now, make sure you sign it. I didn't catch it, but I'm guessing that's what the heck happened. Ken Murray, jury.

Do you unanimously find from a preponderance of evidence that an award of punitive damages against Defendant Hazelwood is necessary in this case to achieve punishment and deterrence, and I've asked you to fill that in yes and I think that is an important social statement to make. You have to condemn the

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conduct and you have to condemn the fact that he hadn't come to grips with the conduct.

If your answer to interrogatory number one is yes, what amount of punitive damages do you find necessary for those purposes, and the purposes are punishment and deterrence, and I'd ask you to put in one dollar because I think that's a significant statement, and I think it's a statement that has relevance in Captain Hazelwood's's life. In all honesty, because this is the first time that everything has come out, I think he would take a dollar to heart, I think it will make a difference to him, like St. Paul falling off his horse on the road to Damascus.

Do you find from a preponderance of the evidence that an award of punitive damages against the Exxon defendants is necessary in this case to achieve punishment and deterrence? Should Exxon be punished for its recklessness in the grounding of the Exxon Valdez, the greatest environmental disaster in the history of America? Yes. For punishment, deterrence of Exxon and deterrence of others, for justice, for those guys, for justice for those women.

If your answer to interrogatory number three is yes, what amount of punitive damages do you find to be necessary for those purposes. And that's your job, and we know it's more than five and we know it's less than 20. We know it's more than five and we know it's less than 20, and I could give you a

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number that I think, and that is bringing my life experience to bear on a very difficult question, and I think that's a waste of time because each of you are going to go back in there and bring your life experiences to bear on a very difficult question.

But it's more than five and its less than 20, and that's what they ask you to do, is they ask you for purposes of punishment and deterrence to make the world a better place, and a situation in which you, in fact, have the opportunity to make the world a better place, to grapple with those numbers and to grapple with age-old concepts of punishment and deterrence and right and wrong.

Thank you.

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MR. NEAL: May it please the Court, counsel, ladies and gentlemen of the jury. I waited for an hour-and-a-half while Mr. O'Neill was up here to simply admit to you that this massive amount of money that he's asking for doesn't go to charity, it doesn't go for something else. It goes solely to

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their side, to their side, who have already been awarded all their actual damages. Not once did he mention that.

Let me start out a little slowly here by simply telling you that I'm sure you know by now, now that you have become judges of the facts, what Judge Holland learned several years ago when he assumed the bench and became a judge of the law. Judges of the facts and of the law never, ever, satisfy everyone, and judges of the facts and judges of the law sometimes never satisfy anyone. That's the burden you have.

In Phase I, although we disagreed, you found us reckless. That's your decision, that's the system, we respect it. In Phase II you awarded the plaintiffs $287 million. That's your decision, that's the system, we respect the system.

I doubt that Mr. O'Neill and I have ever been involved in a case in our years when the jury came back and didn't agree with our position. I doubt that there was ever a time when we want to jump up and say, hey, you're right. I can't speak for Mr. O'Neill, but he is a fellow trial lawyer and I've never had a time when I ever thought the jury was right if they didn't agree with me. By definition they are only right when they agree with me. Well, that's not the way it works, everyone agrees with you or not.

Let me tell you from the bottom of my heart, and I know this to be a fact, every man and woman at Exxon, whether they agree with your verdict or not, appreciate your methodology.

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We appreciate the way you went about resolving Phase I and Phase II. We appreciate the obvious care you took to decide the case on the facts as presented in this courtroom and under the law as given you by His Honor.

Your reward is not to have people agree with you, because it never happens all the time, and sometimes – as I said, sometimes no one agrees with you. Your reward is simply your knowledge that you've done the best you can do under the circumstances. And, by golly, let me tell you, you keep doing that and that's good enough for me.

We now start Phase III, and that's the issue of whether – whether you should award punitive damages, and, if so, how much. We start out with two propositions. One, and I'll show you by the Court's instruction number 26, one is that you, which is a fact, you must assume all the plaintiffs involved have been paid or will be paid all of their actual damages and that this phase is not to compensate for actual damages.

Your Honor, do you want us to pull this back?

Okay. Now let me say what Mr. O'Neill didn't say, but I'm sure it was an oversight. When we put up some kind of instruction like this, I want you to know that's not necessarily the entire instruction, it's what we want you to notice out of that for the sake of this argument, but Mr. O'Neill did it and I'll do it. We put up a part of it, but the Court expects you, I expect you, and I know you will, to look

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at not only this entire jury instruction, but the entire set of jury instructions.

So back to this. The first thing we start with in Phase III is that, quote, you should assume that all plaintiffs have been or will fully be compensated for all damages they may have suffered as a result of the spill, which is in fact a fact. You may not make an award of punitive damages for the purpose of compensating any plaintiff.

The second thing we start with is the proposition in the law, as will be charged you by Judge Holland, that punitive damages are not favored, they are not favored in the law, and I will talk about why I submit to you they are not favored later on, but jury instruction number 25, the first paragraph says punitive damages are not favored in the law and are never awarded as a matter of right, no matter how egregious the defendant's conduct.

I've learned that egregious means the same thing basically as outrageous means, that you have discretion to award or not award punitive damages in accordance with these instructions. So punitive damages are not favored and are not a matter of right regardless of how egregious or outrageous the conduct.

The third thing we learned is instruction number 22, punitive damages may be awarded to punish and deter, to punish and deter.

Ladies and gentlemen of the jury, we apologized for the

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spill from the get-go. We accepted responsibility immediately. We immediately handed a check to the federal and state governments for $15 million to conduct scientific studies to see what it would be – what it would cost or how to go about restoring the Sound. Nobody required us to do this, no law required us to do this. We cleaned up our spill at a cost of $2.1 billion.

Let me tell you something. Mr. O'Neill says all of this is required by the law and therefore you get no credit. Look at the instructions, look at the instructions and see where in there it says it's required. What we did was required by the law. Your law comes from the Court's instructions. We paid claims over $300 million in claims to fishermen and others. And you know what, we never asked for a release.

Now, one of my colleagues, when I was talking about releases the other day, suggested that since the jurors are not lawyers, somebody might not know what a release is. Well, in this – in our business, if you're going to settle – somebody makes a claim against you and you're going to settle with him, you say I'm going to give you this money, but I'm going to release you from all liability, I want to give you this money and have you sue me.

In our case, as Mr. Raymond told you, it was slowing up the process to start that in the beginning. Forget the releases, we'll give them the money and they can also sue us, all we want

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are receipts showing that we gave them the money. No law required us to do that, no law whatsoever.

We tried to ease the stress to the communities involved by the spill. We should have done that, but contrary to what Mr. O'Neill told you, no law required us to do that. If we were taking people away to work on the spill and paying them substantial sums, we brought people in to do the work that's necessary to run a city or a village. Nobody required us to do that.

We stepped up, and the Court will instruct you on punishment, too, and how to consider that, we stepped up – the federal government charged us and we stepped up and we said, yes, we were negligent. Unlike what plaintiffs' lawyer told you, we have never in this case said we did it all right, we have never said that. We stepped forward and said we were negligent, and we were assessed a 150 million dollar fine for that negligence right here in this court.

Now, as Mr. Raymond told you, all but 25 million of that fine was reduced, or reduced to 25 million because of our conduct, our good conduct following the spill. Now, in that case, that criminal case, we also paid a $100 million to the state and federal government. In toto – strike that.

We also committed to see that the Sound was restored and we committed 900 million to a billion dollars, which is flowing out now as we speak to the Trustees, federal, state Trustees,

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to restore the Sound. In total we spent $2.8 billion after taxes, and you'll have it here and this is a chart that is in evidence, $2.8 billion lacking what, 798. $2,798,000,000 after taxes to clean up, claims, punishment, et cetera, and I'll talk some more about this. We vowed to do everything in our power to change whatever we had, to change to make sure this didn't happen again.

Mr. O'Neill talks a lot about message and getting the message and sending the message. Ladies and gentlemen of the jury, this is getting the message, this is acting responsibly, this is acceptance of responsibility, this is punishment, and it is deterrence.

Now I want to talk a few minutes about Phase I. I had hoped not to do this, because we spent a month on Phase I, but I have to do it, I have to answer some things that were brought up, and I know that you all don't like squabbles between lawyers, I appreciate that. I know you think that it doesn't help you, I appreciate that. I know that you've gotten the message that what Mr. O'Neill and I say is not evidence, the evidence is in. Nevertheless, I have to address certain allegations he made and certain snippets of testimony he took out of context on Phase I and II and tried to readdress them and put them in context without going through the entire Phase I again. I know you'd kill me if I tried to, and I would deserve death if I tried to.

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I do want to say this. One of the suggestions he made was that the Exxon board of directors didn't get reports and were not interested in this. Members of the jury, you heard it uncontradicted. The Exxon board of directors were very interested in this, and every month they got a report on everything Mr. Raymond knew. And, indeed, as Mr. Raymond pointed out to Mr. O'Neill, Mr. O'Neill, you had the agenda for every board meeting every month, you got that in discovery and you have seen that there was a place there for a report to the board of directors every month.

Now, there is a suggestion – there is a suggestion that we didn't go around firing people. We didn't conduct a witch-hunt and therefore we didn't care. Members of the jury, your own experiences – and I submit to you the fact it's easy to fire people, lop off their heads – as Alice in Wonderland, lop off their heads, off with their heads. That doesn't fix the problem.

What we did was not conduct a witch-hunt, but to go out, as I'll talk to you in a few minutes, we went out to look at the problems and tried to fix every problem. Everything that might be a problem, we tried to fix it and change it. The easiest thing for us in the world to do would have been fire a couple of people and say, okay, now we fixed the problems, let's go onto business as usual. We didn't do that.

They have also said that, well, Mr. Raymond up here didn't

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say, oh, we were reckless when he was on the stand and didn't say the first step that he's talking about. You know what, if Mr. Raymond had said – this is the kind of Catch 22 you get into sometimes with a clever lawyer like Mr. O'Neill. If Mr. Raymond had said, oh, we were reckless, you would have been hearing from Mr. O'Neill saying that we're lying in Phase I when we thought we were not reckless.

If we say we are not reckless, then you'd hear Mr. O'Neill say we are in denial and therefore we didn't get the message. Mr. Raymond said it best when he said, look, what I think is not important, what I thought wasn't important. The jury decided we were reckless, now let's move on, and that is the perfect answer to that question.

One thing Mr. O'Neill couldn't avoid talking about was the compensation to Mr. Raymond. Let me tell you something, I wouldn't have the responsibilities for 91,000 employees with the problems that exist – involve now, for that compensation or double his compensation. Life is too short for that. But he went into Mr. Raymond's compensation and he never, never refuted what we brought out, and that is Mr. Raymond makes far less than CEO's of anything like comparable companies in this company. He makes less than ARCO, he makes less than Mobile, he makes less than Texaco. And you know what, he makes one third the compensation of Merrill-Lynch, but, as he said to you somewhat humorously, I'm not trying to file any claim on that,

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I get paid handsomely.

Now, there is a suggestion made that we didn't make a formal report, thus there was some kind of coverup. Mr. O'Neill says the law department investigated, I'd love to have their report, I'd love to see their report.

Ladies and gentlemen of the jury, we have been three-and-a-half months giving you the law department report. Mr. O'Neill took literally hundreds of depositions of our employees. He subpoenaed and got hundreds and thousands and millions of pages of paper. We gave you our law department report right here.

And let me tell you something else, that this demonstrates that his idea is that there is some coverup is nonsense. Mr. Raymond, as he told you, directed every person at Exxon to cooperate fully in the investigation of the National Transportation and Safety Board, and he directed to everyone at Exxon cooperate fully with the United States Department of Justice, and as he told you in this very courtroom, the United States Department of Justice, after they had conducted their investigation, complimented Exxon for having fully cooperated with them. That's not a coverup.

And there is a suggestion by Mr. O'Neill that somehow we lied to the fishermen when we said we would pay claims. And he points to this man Cornett. Ladies and gentlemen of the jury, to fishermen and others, we paid without releases $300 million

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in claims. We couldn't pay them all. They started in this courtroom, as you'll remember, demanding $980 million. Even before you got to work on a verdict, they had reduced that to 895 million, and we all know that even that claim was far too high. We did the best we could to settle claims, but sometimes you just can't settle them.

Now, the suggestion has been made, and I'd like to put this up on the Elmo, if I could, a suggestion has been made here that Prince William Sound is dead. As a matter of fact, Mr. O'Neill in his closing argument in Phase II said as follows, I hope we can read that: There was damage to the nursery habitat, the areas along the shore, there was a loss of food, we find egg mortality, larval mortality, loss of juvenile growth, genetic damage and a continuing damage to soil in the echo system, pink salmon – he's talking about Prince William Sound – pink salmon have crashed.

Members of the jury, I submit to you if they have crashed, they have crashed against each other because there is not enough room in the streams for all that are coming back now. And as Mr. Harrison told you, in the last five years there has been the three largest returns of pink salmon to Prince William Sound in history.

He also suggested to you that, and you'll remember this, you put an ad in the Detroit newspaper, but you didn't tell the people of Prince William Sound and Alaska you were sorry. We

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brought out then that we had to put an ad in the newspapers, we had to put an ad out otherwise the papers wouldn't take it, but we put an ad in practically every newspaper in Alaska saying we are sorry. Those include the Valdez newspaper, Cordova – Cordova, Juneau, Anchorage, Ketchikan, amongst others.

And then he suggested throughout this trial that our employees lied. I think that hurt. I think that hurt more than any statement made by the plaintiffs.

It is simply not true. Our employees came up here and did the best they could to tell you the truth. And now he's saying we called them liars. We never called them liars. We think our employees told you the best they could, best they knew.

Ladies and gentlemen of the jury, I don't consider myself the smartest lawyer in the world, but when somebody suggests that I might put on perjured testimony, I dislike it. I dislike it for two reasons. One, I wouldn't do it, and, number two, if I were evil enough to do it, although I may not be the smartest person to do it, if I were evil enough to put on perjured testimony, I would be smart enough to make sure a jury wouldn't find us reckless in Phase I. Our employees did the best to tell you the truth and not once did we suggest that they were liars.

Then Mr. O'Neill goes to the dispute resolution agreement. Mr. Mike Chalos may have something to do about this, but you heard the proof and Mr. O'Neill kind of endorsed this in a

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sense, because he says in this trial everything came out for the first time. You know why everything came out for the first time? We asked Mr. Hazelwood, Captain Hazelwood, to come in and testify, hurt us or help us, but come in and testify, let the jury and let us have it because we, as was pointed out, we weren't able to talk to him, his lawyer, doing an appropriate job, would shield him from us so we couldn't talk to him.

So we go to him and say, come in here and tell it like it is. As they say sometimes around, in Tennessee for sure, tell it like it is, Captain Hazelwood, and he says, I won't do it unless you agree that you won't use what I say in our dispute later on. That was the only way we could get him to testify.

And then being lawyers, being lawyers, we said okay, if you want it, it got to be both ways, but that dispute resolution agreement, let me assure you, was created solely and simply to get Captain Hazelwood in here to tell you and tell us his position, his reaction, was he impaired, not impaired, and that was the only way we could get him in here.

Now, they also said to you, look, you purchased a company in 1989 for $4 billion, even though the spill occurred. Look at the same reports, ladies and gentlemen of the jury, I think they will tell you that we committed to purchase that company in 19 hundred and 88 and we had to follow that through.

Now, I want to speak a few more minutes about conduct and then I will move on and I will spend the rest of my time,

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members of the jury, talking about affirmative things.

You will remember that we returned Captain Hazelwood to master the vessel. We did that, we had a report from his doctor, that's undisputed, that he was fit for duty to return as a master of a vessel. We reviewed that – they talk about we just ignored the risk. We weighed very carefully the risk of returning Captain Hazelwood to duty.

Do you remember that finally, as Mr. Iarossi told you and Mr. Graves told you, we finally concluded that if we didn't return Captain Hazelwood to duty, we would be driving problem drinkers into the closet, and in their judgment, the risk of driving problem drinkers into the closet and having problems from problem drinkers was greater than the risk of returning Hazelwood to duty, but we knew it was a risk either way.

Now, we've changed our policy where safety sensitive positions are concerned and now we've reversed the risk, but we thought that if we would tell people with a problem, and I'm not going into whether he's an alcoholic or recovering alcoholic or an alcohol abuser, but we thought that if we returned Captain Hazelwood, who has gone and successfully completed rehabilitation, if we return him to the master of the vessel as the policy seems to suggest, then we will get others who have a problem we don't know about to come forward to seek help. If we don't return him, there will be masters and others out there in safety sensitive positions who won't come up.

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So we waived that risk, not ignored that risk, but we waived that risk, and, gosh knows, drink, drugs and alcohol are such a problem in society today, we still don't know how to deal with that risk. But we didn't ignore the risk, we waited, we did the best we could.

Now, you may have found – I don't know why precisely you found us reckless, and it's not relevant, you may have found that returning Captain Hazelwood was such a bad judgment, that was reckless, so be it. And we tried to monitor Captain Hazelwood. I suspect we didn't do the world's best job of monitoring Captain Hazelwood, and as I think about it now, it's probably impossible to monitor the master of a seagoing vessel. After all, he's on 60 days and goes home 60 days, when you can't monitor him at home, and you all wouldn't like it if we did, but he's on a vessel, and we tried and we thought we could and we tried, and we may have made bad mistakes in there and that may be why you found us reckless, but we didn't ignore – we didn't ignore the risk.

Now, right here I'm going to go to a couple more instructions because I want very – I want – if I don't do anything else, I want to call your attention to this. Mr. O'Neill says you found Exxon defendants reckless in Phase I, now how much, how much punitive award. He misses a step. He says you found them reckless, they are a big, successful company. Let's talk about how much, and being a big successful

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company is really his only basis, as I can see it, for saying you should punish us.

He misses the following step, and I'll read from jury instruction 20 and jury instruction 30, and I fairly said these are excerpts, so look at all of them. The Court will instruct you that the fact that you have determined that the conduct of Joseph Hazelwood and the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them. And then 30, the fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible or an award of punitive damages should be made.

So don't let – when you go back, and I know you will because I observed your – haven't observed it, but I've been sitting around knowing that you are taking all the care in the world, so don't let him jump the step on you. The first issue you have is, should you award punitive damages at all. And there again, I remind you one more time that punitive damages are not favored by the law.

Now let's take one more point – two more points about our conduct. Before I do that, I want to talk to you a moment about these videotape clips. You know we spent a month in Phase I putting on proof. It's rather remarkable that plaintiffs would come in – as I looked at the clock, I think there was something like 12, 11 or 12 minutes, maybe even less,

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of little snippets of evidence in Phase I out of a month-long trial. The opportunity for distortion, for misleading, is remarkable there, and I won't try to catch them all, because I think you'll probably remember the proof, but they put on Mr. Shaw, Mr. Jim Shaw, and he says I reported that Captain Hazelwood had been drinking.

You know what they didn't put on, as you remember, the fact that Mr. Sheehy investigated that and came back and reported to Mr. Koops that he couldn't find any evidence of it. They didn't put on that. Then Captain Mihajlovic, do you remember him, went out there and also investigated that report and came back and said – and I can pull it up there because I did it on that screen – that is pure baloney. That's the problem you get into when you use videotapes. You take a little snippet, but you don't put on the truth, the whole truth and nothing but the truth so help me. And I'm not going to get into the snippets, but I do have to correct one or two of them.

Now, they did put on where Mr. Day reported to Mr. Myers the Mary Williamson matter, I believe it was. What they didn't put on was Mr. Day acknowledging and saying, you know, he was busy and he may not very well have heard me.

And they put on Captain Hazelwood, who said that he told Mr. Myers about having a beer or beers with Kimtis in his apartment outside the Portland shipyards. What they didn't tell you is that he went to lunch, came back later, got to

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thinking, told you this from the stand, and said, you know, I'm not at all sure, I don't think I told Mr. Myers about the drinking beer. Didn't put that on.

And then Mr. Martineau, they put on a little clip of Mr. Martineau saying I knew nothing about the monitoring of Captain Hazelwood. What they didn't put on, but what is the undisputed proof, is that when – at the same time Captain Hazelwood was being transferred to the West Coast fleet, Captain Martineau was leaving the West Coast fleet. There was no way for him to know anything about monitoring, and, if not leaving the West Coast fleet, was becoming a master – master of a different vessel.

Now, they also said that Mr. Day – put on a little clip of Mr. Day saying he knew nothing about monitoring. Mr. Day was involved in this process something like ten days to two weeks. I won't continue on that. I think it's quite obvious to all of us that 10 or 11 minutes of a month's trial has a great opportunity for being misleading and unfair, and I'm sure that you will recognize that and deal with it accordingly, and I won't go through a lot of other examples, practically every one they put up.

Now, you found us reckless and in – in Phase I, but, you know, as I think about it, there are many different levels of wrongful conduct in human endeavor. One is negligence, that's the lowest. We're all – all guilty of it. I submit there is

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a thin line up to the next one, which is reckless, and you found us guilty of that. Then you move to the next step of willful, malicious, intentional wrongful conduct entered into for profit. There is no suggestion that we were willful, that we were malicious, and certainly we didn't run that tanker aground for a profit, wrongful conduct, conduct not willful, not malicious and certainly not for profit.

Now, from this point on I want to be positive. I have thought, and I know I've been directed, Jim, knowing that you're an advocate and sometimes you get excited and sometimes you get agitated, I want to – and I've been directed to take the high road in this case, and I want to spend the rest of my time not squabbling with lawyers, but to tell you what we've tried to do since this tragic spill occurred, which we were responsible.

First, as I said, we apologized. Second, we step forward and said it's our oil, it's our vessel, we accept responsibility. Now, that seems like an ordinary merit, but that doesn't always happen. First let me show you a clip of our immediate acceptance of responsibility.

(Videotape Played)

MR. NEAL: Now, I said that's not always the case. There was another oil spill around here, a spill from the Glacier Bay, and this is such a long trial, I'm not sure people remember, I know you don't remember everything that happens in

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the course of the trial, but there was an interesting dialogue between one of the lawyers, the plaintiffs' witness, Dr. Crutchfield, and the Court, and here is what happened there. Look at this now, contrast that with Exxon.

Question: Now in the case of the Glacier Bay situation that you looked at, that was a case where – by the way, that was a spill from a ship owned by some somebody called Trinidad.

Answer: I'm – trying to determine who owned that ship was beyond my capabilities.

And then the question, there was difficulty with that, and the Court says: We had trouble with that.

Contrast the two. Contrast the two. That's a transcript of June 24th, 1994, page 5094, line 14, to 5094, line 20. Thank you.

By the way, I've had things come to my mind sometime, that I didn't want to do it, but I'll do it while it's on my mind. Brian O'Neill and some of the lawyers up here are talking heads, we got a script and we talk, talk longer than you all want us to, but I do want to thank you, the people that have been helping us, Ms. Irene Stewart, don't thank Jimmy Sanders, he's too cocky anyway, but I'm sure Mr. O'Neill thanks the people he's had who had to do most of the work here.

So we apologize, we accepted responsibility immediately, unlike others, and, third, we committed to clean up the spill.

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Right here I want to say again, that plaintiffs' lawyer says we're entitled to no credit for that. Well, you look at the instructions and see if we're entitled to no credit. You look at the instructions and see if it says everything that Exxon did it was required by law to do. Look at it. I just leave it to you to look at it and see who is right.

Our commitment, I think, was demonstrated with our first two witnesses we put on in Phase III. Connie Buhl, who worked all night, what a magnificent employee and a magnificent human being. I don't think people like that would work for a company that is an evil empire, as plaintiffs try to make it out. And Bill Deppe, who risked his life and crew to get that oil off the vessel, a million barrels. One of the great stories, not been told much, that Exxon people went out there at the risk of their life, lightered one million barrels of crude from that vessel in the position it was in, and not more loss of another barrel of oil, and not a single serious injury. A remarkable, remarkable story. And people like Bill Deppe don't work for an evil empire.

Our commitment involved, and you've heard it, unlimited authority to Otto Harrison to spend whatever it took to clean this up. You heard Mr. Harrison say I talked to Mr. Rawl, Mr. Rawl said you've got unlimited authority, you've got all authority, and if somebody stands in your way, somebody from Exxon stands in your way, come to see me. That is commitment.

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And then we had this little anecdote that I thought was one of the most telling things I've heard. A fish hatchery, a person from a fish hatchery in the first day or two of the spill came to Mr. Iarossi and said we need money immediately, we can't wait until you get all geared up. Mr. Iarossi took out his business card, turned over his business card and wrote pay one million dollars. That man took it to the bank and got his million dollars immediately. That is commitment.

We brought in forces from all over the world. At one time we had over 11,000 people here. We built floating hotels on the water, we built bunkhouses on the shore, we brought in 12 million pounds of food just in 1989, and we brought in a massive amount of equipment and clothing. But I think best – with regard to cleaning up the spill, perhaps the best proof is from the admirals, Robbins and Ciancaglini.

(Videotape Played)

MR. NEAL: Thank you. I have talked to you about the claims program, not demanding releases, we did that. I've talked to you about the community liaison program, no one required us to do. I want to point out to you with the Court instruction, let's look at number 27, and this is what will guide you to see how our commitment to clean up, our commitment to pay claims, our commitment to community liaison fits into the law, and I'll start right up here. This may be all of 27, but I've said enough about that.

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In determining the amount of punitive damages to award, if any, you may consider, among other factors, and then the reprehensibility of the conduct, the magnitude of the harm that Mr. O'Neill went over, the financial condition, down here, the extent to which a defendant has taken steps to remedy the consequences of his or its conduct or prevent repetition of that conduct. I'm talking about the spill here, the cleanup, the claims program, and in a minute I will talk about the changes we have made that you should consider, to prevent repetition of that conduct.

We made another commitment. We made a commitment to do whatever was necessary to restore Prince William Sound, or to make Prince William Sound sound again, and what we did there, we – as I said, we immediately committed $15 million to conduct studies on the processes to go about that.

We paid $100 million to the state and federal government, and we committed – and are spending 900 million to a billion dollars to make the Sound sound again. You have seen the Sound, I've seen the Sound. You will have to judge how well we're doing. Not all of that money has been spent as yet. And then – why don't we leave that up just a moment, Irene.

The next commitment we made was commitment to do whatever we could to make sure that this didn't happen again, and again, this instruction number 27 will tell you in determining punitive damages you may consider what the defendants did to

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prevent repetition of that conduct.

Now I'm going to tell you – Mr. O'Neill said but you don't get any credit for that because the law required that. I'm going to challenge him on that and see what we did that the law didn't require and did require. First thing we did is, you heard Mr.

Raymond say I said we could never have this happen again, and I'm not going to look just at the shipping company, I'm going to look at the whole worldwide organization. And so he undertook an audit of all the risks that would be out there in the company, and he made changes and ordered changes in those risks, and then he created a separate organization to look at those changes every year to see that they were being followed, whether any more was needed to be made, that's the worldwide company. The law did not require it.

He was – the company was instrumental in creating a marine spill response corporation, and Exxon committed 50- to $80 million to that organization to make sure that they could respond – the whole industry could respond better and quicker to oil spills, no law required that.

As Mr. Raymond told you, they went in and revised completely the corporate-wide alcohol policy, and, as I said before, I don't know how these all come out, but they revised the policy to say, gee, and I don't want to back up and say on behalf of Captain Hazelwood and Mr. Chalos, we don't say that Captain Hazelwood was impaired or not impaired when making this

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statement, but did he drink that evening, and he did maybe inadvertently have a drink within four hours, and he had had some sort of a problem. What Mr. Raymond said is, whether that had anything to do with this spill or this precise spill other not, we can't take that chance again. We are going to create something called safety sensitive positions, and if you've had an alcohol problem in the past, you will never go back to those safety sensitive positions. But not being an evil empire, what they said was, if you seek treatment, we will give you a job, we will give you a job with the same pay you had, but you won't go back to these safety sensitive positions, we just can't take that chance.

Now, you know what? As Mr. Raymond told you, that is an effort to avoid what problem you may or may not have found in this case. You know what, Exxon has been sued 106 times claiming that's the wrong policy, that you got to put them back. The alcohol policy also provided for random testing.

Now, you remember Mr. McMasters? Mr. McMasters the plaintiffs put on as an expert in the alcohol policy, the alcohol problems. He said I don't like random testing, don't believe in it. We said we're putting in random testing, too, we're putting in random testing for those sensitive – safety sensitive positions, and we're putting in random testing for other positions.

And then Mr. Raymond, as he told you said, look, I don't

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want people, our employees, to think that senior management or higher people in higher positions of the company can avoid random testing, you put it on all senior management.

And you know what? As he told you, he will get a call at his office and say, you will be at the infirmary, or wherever it is, in one hour for random testing, and if he doesn't go, he can be fired.

We change the policy for those who had a problem and were returned to their positions, not safety sensitive positions, but they have gone through rehab, returned to work. We now have a written – written detailed policy for monitoring those people. We thought we monitored before, but we admitted we didn't have a written detailed policy.

And then, you know, Exxon and Exxon Shipping, if somebody thought that there was a problem that might have contributed to the spill, we'd look at that, and if we thought it might have – whether we agreed it did or not, we thought if it had merit, we will look at it and maybe we will change it.

Now, there has been a suggestion in this case that crew members or subordinates won't report on a superior. Remember some question about whether a crew member would report Captain Hazelwood if he had been drinking. You know what we did about that, maybe that's a problem, so we instituted a hotline and a post office box, and now every employee is told, repeatedly published, if you find anybody who is violating the law, who is

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violating the company policy or who is doing anything you consider to be wrong, if you don't – we want you to report it, and if you don't want to report it and give your name for some problem, you call an 800 number and you make your report, you tell us about it, you don't have to give your name, you don't have to identify yourself.

And then they went one step further and said if you don't want to call, if calling bothers you, send a message to a post office box and tell us what you said. And you know what they did? They set up an organization. If they get those complaints, they have set up an organization to investigate them. That's not required by law. That is not required by law.

And then the shipping company went even further, and let me tell you what they have done, no, that's not required by law. Still under the Coast Guard rules and regulations, even today, a master can have a drink as long as – of alcoholic beverages, as long as it's not within four hours of assuming duty and as long as he doesn't have .04 in his system. Exxon Shipping Company says that's not good enough, we can no longer take that chance, we've got to see this doesn't happen again. So if you are a master or a chief engineer, you cannot have one single drink. Whether it's six, ten, eight hours, you cannot have one single drink during your tour of duty, about 60 days, 50, 60 days. You don't do it whether or not you're on the vessel –

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that's also been a prohibition, you can't do it when you're on shore, too much of a chance, and chief engineer, same goes for you, you can't have a drink of alcoholic beverages, whether it's on shore or not on your tour of duty. That, ladies and gentlemen of the jury, is not only not required by the law, but the Coast Guard still says you can.

And then there was a suggestion that maybe fatigue had something to do with this grounding. We didn't think so, but because that suggestion had merit, you know what we did, we added another third mate to our vessel. Now, unlike most shipping companies sailing the waters now, most shipping companies sailing the waters now have a master and three mates. We now have a master and four mates. A master, a first mate, a second mate, a third mate and a second third mate. The law does not require it whatsoever, not required by law.

And then we went beyond that and we said, look, if there is any sort of problem with the workload in loading and unloading these vessels, we will add a mate stationed permanently at Valdez to help loading. That mate is there today, it's not required by law.

And then we said, okay, we unload in San Francisco, lighter. If there was a problem there, we will add a mate permanently stationed there to help lighter, in addition to these four people now that I've just mentioned. So we have a lightering mate stationed in San Francisco to help with the

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lightering. That's not required by law.

And then we created something called an Ex-bridge, and I won't take a lot of time with this, but it's new technology that we've developed – there was a suggestion that maybe Cousins kind of lost where he was, so we came out with new technology called Ex-bridge. We locked on to the global positioning satellite, and now on Exxon vessels the mate with the conn can tell where he is within feet anywhere in the world, tell anywhere in the world he is within feet, and he can see from the Ex-bridge concept the dangers or the obstacles that may be around him. That's not required by law.

And there was a suggestion that maybe because our bridge navigation manual was ambiguous and maybe the master did have the right to go off the bridge in Prince William Sound, we didn't think so. We were confident that wasn't the way it read, but we said if there was any ambiguity, we have sent out a directive, in port is from the sea buoy at Hinchinbrook and therefore when you pass the sea buoy at Hinchinbrook going in, the master will stay on the bridge with another mate until you pass the sea buoy going out into the Gulf of Alaska. That's not required by law.

We have always, unlike the requirement of the Coast Guard, required a master to undergo a ship handling course before he's sailed for Exxon as a master. Now every mate, every mate, first, second, third, third, must go through a ship handling

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course using a simulator before he can sail for Exxon. That's not required by law.

And you know what they do on this simulator? One of the things they study, one of the things they study is the grounding voyage of the Exxon Valdez. Is that denial, are we denying it when we say you must study it? Here, we'll get your attention, you must study this, that's one of the things that all the mates must study, and that's not required by law.

And then we have put an independent auditor on our vessel and he rides our vessels and he reports on any problems he sees. Independent auditor, that's not required by law.

And these changes, may it please the ladies and gentlemen of the jury, are still going on, they haven't stopped. And let's see what the Court says, the Court's instructions will say about changes made to do everything you can to prevent the repetition.

And Mr. O'Neill kind of muted this a little bit in his argument, because I suspect he knew the instruction that was coming, but the two things this instruction says, one, you should consider – in determining whether an award of punitive damages is appropriate, you should consider steps taken by defendant to prevent recurrence of the conduct in question.

And the Court says something else because the law says something else, and the Court is the repository of the law, or the law giver to you. The law says if an accident happens or

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event happens, we should not penalize people if they make changes. So the fact that changes have been made after an event does not tend to show that such changes should have been made before the event, or that the policies and procedures in place were negligent or otherwise improper.

Accordingly, if you find that changes were made that reduce the likelihood of an oil spill in the future, you may consider the making of such changes as a factor to mitigate punitive damages. Ladies and gentlemen, we have taken those steps and, almost without exception, there are some required by law, but not what I've been talking about.

Every time my law partner Jimmy Sanders comes up, I lose my chain of thought. Why is that?

MR. SANDERS: I'm helping.

MR. NEAL: Okay, Jimmy.

I don't want to suggest to you, indeed I think it's important that you know, Exxon Shipping Company and Exxon are not the only people who have gotten the message and made changes. This was an event nobody thought would happen, and when the event occurred, not only Exxon, but others made changes. ARCO made changes. You've heard Mr. O'Neill talk about that. ARCO made changes. They said we haven't been doing it right, we need to make changes or we ought to make changes. The Coast Guard has made changes and the United States state governments have made changes. So we have all

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gotten the message, thank you.

So I'm coming to the end of my remarks. I had promised myself that I wouldn't take as near as much time as Mr. O'Neill. I still believe I'll make that, although I sometimes don't keep promises to myself.

We apologized immediately, we accepted responsibility, we committed to clean up the Sound, we committed to clean up the spill, we committed to pay claims, we committed to restore the Sound, and we committed to see that we could do everything in our power that this would not happen again.

Let me talk to you a moment about punishment and impact. There were two cases here, the civil case you've been involved in, and the criminal case, and I can tell you briefly about this. I told you about the criminal case, 150 million dollar fine. We paid 25 of that, 125 remitted because of our good works following the spill. We paid a $100 million to federal and state government. We have paid approximately 2.7 billion in addition to that. Ladies and gentlemen, that is punishment. That is punishment.

Now, this is after tax, the 2.8 billion. The other day in the opening statement he hadn't mentioned this summation, as I remember it, but you remember Mr. O'Neill saying, well, they have been punished for negligence, but they haven't been punished for recklessness. I'm going to show you what the jury instruction says about this. You don't break it down that

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way.

The judge will tell you you should consider the punishment we've already had, and it says you may consider as mitigating factors the existence of prior criminal sanctions or civil awards, that's both of these cases, against the defendant for the same conduct we were punished in this very court for, negligence, the same conduct.

We have now suffered approximately – in addition to the 125 million, we have now suffered after tax approximately 2.7 billion in civil awards. But plaintiffs say – plaintiffs say, oh, 2.8, they use 2.7, but you've use – seen of the chart, it's within a million of 2.8 billion. And they said – really said this 2.8 billion is only a hiccup to Exxon. You have the charts and you can see it for yourself, but $2.8 billion after taxes is equal – is equal to all the income Exxon has made from all of its oil and gas operations in the United States for the last three and one half years. What we paid after tax is equal to all the income Exxon has made from all of its oil and gas operations in the entire United States.

As Mr. Raymond told you, and I think that Mr. O'Neill inadvertently got this confused, Mr. O'Neill – Mr. Raymond also told you that what we paid here is the largest single cost expenditure in the 113-year history of the company. And he also told you that the expenditure here of 2.8 billion after tax caused the corporate debt level to go to its highest level

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in the history of the company.

And plaintiffs say, well, give us 15 billion more, I know you're just giving it to us, we have been paid our actual damages, but give us 15 billion more. Let me put that in context to you. Because we've dealt with such numbers, it's hard for me to comprehend them.

$15 billion is $500 million more than Exxon's entire investment, entire investment, not income, but entire investment in the oil and gas business – actually, it's $500 million more than Exxon's entire investment in the oil and gas business in the entire United States, but money is not the only story.

They brought up Steve Day. I want to bring up Steve Day again. One of the things that happened in this case is the impact, the non-monetary impact. And I thought this was best expressed in a moment, unguarded moment, by Steve Day, who basically said – this was put on in Phase I. It wasn't really relevant to Phase I then, but it seems to signify the human impact this case has had on the 91,000 Exxon employees.

Would you play that?

(Videotape Played)

MR. NEAL: Mr. Raymond told you that Exxon, and over the years, tried to get his employees, the best and the brightest. And he says this spill has affected not only how employees think about themselves, their devastation of pride,

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but also how others think about Exxon. It will have, as Mr. Raymond said, a lasting effect for the indefinite, indefinite future.

I want now to close by picking up another theme that Mr. O'Neill has said time and time again, "send the message". Now, I'm not going to be as flowery as he was talking about the world watching, very little publicity about this case. But how the world is watching you has nothing to do with your duty. Do justice, forget the world watching business as he said.

But he does keep saying send the message, send the message. Members of the jury, whatever you do, you're going to send the message, whatever you do. We apologize for this accident, we accept the responsibility, we paid $15 million to the federal government to start studying immediately, we committed to and did clean up the Sound, we committed to restore the Sound to its original status or better, we committed to pay claims. We committed to do whatever we could to see this didn't happen again, and we put out $2.8 billion, not because we were required to, but because we should do it.

Now, if you say now enough is enough, the message you will send is to companies is if you stop following – if you accept responsibility and you act responsibly, when it comes to punitive damages, we will give that great weight.

On the other hand, if you hit us now, the message you may send to other companies is, don't do anything, drag your feet.

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If you got any responsibility, make them take you to court because you'll be hit anyway. It's a somber job. I don't know what else we could have done that we haven't done in this case to rectify our conduct.

Finally, members of the jury, the Court will instruct you, as I've said several times, that punitive damages are not favored in the law. I submit to you that a reason punitive damages are not favored in the law is that punitive damages reward those who have already been made whole, reward those who have received all of their actual damages, and run the grave risk, probably do, to punish the innocent employees and stockholders.

I've never, in 35 years of practicing law, said to the jury give me this verdict or give me that verdict, answer this question my way, et cetera; I don't do it now. Give us your care, attention, do what you've done to this point, study the facts carefully, study the law of His Honor carefully, do what is right and just, and go home and sleep, go fishing.

Thanks. Thank you very much.

* * *

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MR. O'NEILL: Thank you, Your Honor.

This is the whole – this is the first time the whole story has come out, everybody agrees to that. This is the whole time – the first time the whole story has come out and come out into the public in the air where everybody can hear it. And who had control of the facts, who had control of the facts? Exxon Corporation had control of the facts and the law department had control of the facts, but it took five years for the whole story to come out despite congressional testimony, National Transportation and Safety Board hearing, a justice – and investigation by the justice department of the United States, and all of that, and this is the first time the whole story comes out. Does that bother you? That isn't right. That's amazing.

Now Exxon says – you know, some of these arguments that are made sound good when they are made, and I'm going to give you an example of one. One is the first example Exxon said it did. It points to the Glacier Bay and says we accepted responsibility for the spill, it's our ship, it's our oil, we accepted responsibility and that's an important thing to do. On its surface it makes sense.

Now I'm going to show you that that is a ridiculous statement. This boat is on a reef, and what does it say on the

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smoke stack and what does it say on the bow. Now what are they going to say, that this boat belongs to ARCO? This boat is in the 1986 annual report at page 13. Accept responsibility? They didn't have any choice but to accept responsibility. It's on a reef, the state authorities are coming out, the Coast Guard authorities are coming out, what are they going to do, paint the smoke stack and put SeaRiver on it. We accepted responsibility, it's our boat, give me a break it's their boat.

I mean, Exxon has no place to hide. So they say, having no place to hide, we accepted responsibility. That is a stupid, stupid, misleading thing to say, and what it means is they are making up arguments so they won't be punished. They are trying to get off the hook for a terrible, terrible thing that they did.

And this is the hook, jury instruction 27, and it lists the factors that you're to look at and the three major factors we had agreement on. The degree of reprehensibility of the defendants' conduct, it was reckless and it spanned five years. The magnitude of the harm likely to result, as well as the harm that in fact resulted, it was terrible and people could have died. And the financial condition of the defendants, there is no argument about that. So in the jury instruction, with regard to the three major factors, we've got agreement on that and that's what the law tells you.

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awards. They are required to pay potential and contingent expenditures. Phase IV claims and contingent state and federal claims are all compensatory damages, so I ask you – on this board, every number on here, an innocent spiller would have had to pay, with one exception, and that's the federal fine of $25 million paid for negligence.

Show me a dollar on that that is attributable to reckless behavior. It is not fair and it is an improper, chronic message to send to society that innocent spillers and reckless spillers are going to be treated the same, and you don't need to be a genius to figure that out.

On the claims payments, there is a real interesting comment made, we paid without releases, we started to require releases and then we paid without releases. What that means is they were making partial payments and they were initially requiring releases for partial payments, and then they saw the wrong in that and they made payments to people who they owed money and they receded for that, and that's what they should have done.

This oil spill, this disaster, this thing that affected so many people's lives, wasn't the result of written policies, it was the result of the same people that they still had working there, who they promoted, who have attitudes, and I don't think they live in the real world, but those same people are still there. Those same people were brought into the courtroom and they defended reckless behavior.

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Now, what message are you going to give Koops, Borgen, Iarossi and all of those people if you say you're coming in here defending that reckless behavior, we're going to validate that, we're going to validate that, and then they are going to go back to their company and they are going to know for the things they did from 1985 to 1989 they got away with them, and from the things they did from 1989 to 1994 they got away with those, and that includes the conduct in the courtroom, it does.

And if you want to talk about them learning their lesson – you know, I have a boy and a girl. Boy is older than the girl. And, you know, we've all heard it, but I didn't hit my sister. If I hit her, she made me do it. I didn't hurt her anyway. And that's what we've heard. And when your kid comes in and says – goes through the litany, you say hold it there, cowboy, we're going to have to have a serious discussion about accountability.

And we've heard today that fatigue was a problem, but it wasn't a problem, but it was a problem. And we have the Stalzer memo in 1990 showing three quarters of the vessels in the fleet with serious fatigue problems.

Now, from the closing today, is alcohol a problem with Exxon or isn't it, or was it a problem from '85 to '89? Can you tell whether the policy was a problem, can you tell whether the monitoring was a problem? Can you tell? I can't tell.

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Subsequent remedial measures, the extra mate – I mean, this is like the vessel – the extra mate and the loading mate in Valdez are made to comply with the six on/six off rule, and they are claiming credit for complying with the six on/six off rule, which has been in effect since 1913, and there is a memo. The Stalzer memo, when you go back to the jury room, points out that the problems, the fatigue problems, were caused by manning problems in the '80s. That's where they were saving the buck, that's where they were saving the buck, but the extra mate and the loading mate are made to comply with the statute that was passed in 1913.

And it's interesting how they turn things around. Well, society has learned a lesson, because these laws have been passed, the states of California, Oregon, Washington, Alaska and the federal government have enough of a distrust of this institution, enough of a distrust of this institution to pass oil spill laws protecting us against Exxon Corporation. That's what those laws do. And it isn't that those laws weren't specifically passed. The OPA '90 was passed in the wake of the Exxon Valdez and it prohibits this tanker from going into Prince William Sound.

So why do we need these laws by California, Oregon, Washington and Alaska and the federal government? Because this is a responsible, forthright can-do, positive part of our society. Is that why every legislator on the West Coast and in

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Washington D.C. had to take a look at oil spill prevention and oil spill response? That's because what happened, the first three factors, the conduct, the harm and the actors, were so egregious and so powerful that they needed to do something about it.

But one thing that they can't do, and as I said before, the Congress can't, and the executive branch cannot punish. And the framers of the constitution, when they set up our government, did that on purpose. They wanted punishment in cases like this to be in the hands of the people, and that's what we're talking about.

Now, there is – Mr. Neal starts off by saying what about this money to the plaintiffs, and why didn't Mr. O'Neill mention that? Do you recall when he said that at the beginning, why didn't I mention it, like I was trying to hide it? Do you want me to show you why I didn't mention it? Because I was told not to because it's irrelevant to the purpose of punishment, because it is irrelevant to the purpose of punishment.

The fact that the punitive damages would go to Alaska fishermen, Native corporations, every community in Southcentral Alaska and benefit this economy is irrelevant to the purpose of punishment. And the jury instruction tells you that, and when you look at the five factors for punishment, your duty in this case, that is not one of the five factors for punishment.

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His Honor, in a mandatory punitive class, will bring in not only the people that appeared before you, but people from all the other court systems and will administer the fund and that's what will happen to that and that's how come you're not supposed to speculate as to how that money might be divided among the punitive damages class, but the issue being raised, it's going to Alaskans.

You are supposed to look at the defendants, and you are the embodiment of our society with regard to the conduct that we're looking at. You are it, once and for all, only one ever, and the issue has never been tried in the open air of cross-examination, your scrutiny has never been brought to these facts before. And they have not paid once cent with regard to their reckless conduct, they haven't.

This case is about the members of these boards of directors at Exxon Corporation and at other corporations like it, the people who call the shots, and that's why I think the most fascinating bit of discussion in the courtroom was when Mr. Raymond was on the stand and we find out that he is the man who is responsible for informing the Exxon board of directors he doesn't know who any of the players are, he thinks Hazelwood was the most closely monitored man in the fleet. The board never asked for an assessment of why the grounding occurred. All of those things are irrefutable.

He comes here and tells us that he doesn't know who Mary

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Williamson is, he doesn't know that Hazelwood had a problem in 1985, the Graves report. What does that tell you about the board of directors of Exxon Corporation, about the interest of what happened? What does that tell you about Mr. Raymond's interest in what happened?

You know, they don't know, they don't know what happened. You know more about what happened in their company than they do, and they are here to tell you that they fixed the problem. And that doesn't make any sense, and the reason that it doesn't make any sense is because they still haven't come to grips with the problem, and they haven't come to grips with the problem because they live in a different world than we do, and they haven't come to grips that everybody doesn't make what the head of Texaco makes.

And corporations are very interesting institutions. The moral tone or the moral leadership is set from the top down, and corporations can have sick cultures. Like schools can have sick cultures, corporations can have sick cultures. And in a corporation, because everybody has got a specialized role, medical department, that's not my responsibility, that kind of thing, people avoid responsibility. And because there are all these layers, people can avoid responsibility, and because there is an anonymity, when you and I do something wrong on an individual basis, we can't hide. We are sort of like the Exxon Valdez aground. We're us, our name is – we have to accept

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responsibility for what we do as individuals, and a corporation, you can get a pass the buck, like we saw in the medical department kind of thing, I wasn't supposed to monitor, I was the president of the company.

How do we police against that attitude? We're not policing against paper policies, we're policing against attitudes. How do we police against attitudes? We police against attitudes, against institutions that are as big as this one through the jury system, and the message from the jury has to go not to Connie Buhl, but it has to go to the board of directors and it has to go to Mr. Raymond so that five years after the grounding of the Exxon Valdez, boards of directors have an interest in finding out what happened and the chairman of the board of Exxon Corporation has an interest in finding out what happened and so that the boards of directors and the chairman of the board have enough concern about the people that they hurt to at least know the names of a few of them.

With regard to all of these employees that have been promoted, everybody who had any complicity in this thing at all, I would submit to you that we have the same problem that we had with Captain Hazelwood and that when bad things happen or people are having troubles, we need tough love. And if you or I would have been the president of Exxon Shipping Company, or the president, more importantly the president of Exxon Corporation, with regard to these employees who had these

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problems, we would have seen some tough love.

What does that do? Not only does it fix the problems with regard to these individuals, but what message does that send to the company, what message does it send to the company to take occasional adverse personnel actions, to suggest to people that maybe this isn't their calling, to suggest to others that we got to fix our attitudes?

If you do that in a company, that sends a message to all of the other employees and it changes the corporate culture. That's on the one hand.

Now let's go on the other hand. We promote everybody who was involved, we take no adverse personnel actions, and then we parade them in the courtroom to defend them what happened one by one.

Now, Connie Buhl and Steve Day are two of over a hundred Exxon employees that we saw in here, and the higher they get up the totem pole, the more you get a Mr. Rouse that says, yeah, we have a relapsed alcoholic as the captain of our tanker, so on the one spectrum we have promoted them, let's not fire them, let's talk to them, and five years after let's make them come in here and defend the conduct.

Now you let that crew off. What does that tell them? What does that tell them, that this behavior is right? What message does that send? We got away with it, I came in here and lied my head off in Phase I and we got away with it. It's a

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question of tough love. It was a question of tough love with Captain Hazelwood and it is a question of tough love with the employees, and I would submit to you today that it's a question of tough love for society.

And corporations, as I said, have – when I was talking with Mr. Elmer, there was an interesting little colloquy. I don't have it, but it was – we were talking about learning to clean up your own mess, and I mentioned the fact that school boys get their knuckles wrapped. And he said, yeah, and I had to stay after school. Now, that's a very interesting comment for two reasons. The first is he had to clean up his mess and then stay after school. Obvious, but it's right.

And the second is, as people can have their knuckles wrapped, but a corporation has no soul to damn and nobody to kick. That goes back to the Lord Chancellor, the biggest lawyer in England in about 1760. And the language of corporations is unfortunately the language of might.

And shareholders get upset with their boards of directors on money issues, and shareholders will force changes in the board of directors either in attitude or personnel on the basis of money. And that is an ugly fact, but that is a fact of life. It's an ugly fact, it's a mean fact, but it's a fact of life. What are the magazines entitled that you read that deal with corporations? Fortune, Money. I mean, they are, and if

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you were going to effect a change in our society rather than – you know, many of these Exxon corporations, Captain Deppe, who is now the port captain at the time the trial date is set, how many of these changes are going to exist a year or two from now?

We saw the number of mates go down in the '80s. How many of these changes are going to exist a year or two from now if you let them off the hook? What kind of message is it going to send to other corporations if you let them off the hook.

The argument that they make, it's a very interesting argument, but again it's a childish argument, is if you punish us, the message that you're going to send to other corporations is they shouldn't comply with the law and clean up their own mess. Isn't that the argument?

I've rephrased it, but isn't the argument if you punish us, Mobile, Texaco, ARCO, won't comply with the law and clean up their own mess? No. If you punish them, two things are going to happen. If you punish them, two things are going to happen. There are going to be less messes. And we know there are other oil spills. We know the Braer spilled in 1991. You punish them, there are going to be less messes, that's the first thing.

And the second thing is they are going to clean their messes up, and when they make messes, they are going to effect real, meaningful changes in their personnel, and when they make

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messes, they are going to say I'm sorry in a real and meaningful way.

The newspaper ad is in the plaintiffs' exhibits with the newspapers that it was published in, and it's kind of interesting. It's not a big point, but when you go back to the jury room there is an A version and a B version, and we were given the A version, a discovery version, and then we were given the B version. Notice the order in which the newspapers that it's run in. They put the logos on the exhibits, but notice the order they are in, in the A-1 and the B-1, the A-1, all the national newspapers, and then somebody with a litigation mind said we better switch the order of the ads and we better throw in a couple more Alaska ones. Go back and look at A and B.

But, most importantly, Chairman Rawl said he didn't think that it was necessary to run the ad, that's what he said.

Saying you're sorry when you hurt somebody, and that is no small point. Saying that you're sorry when you hurt somebody, in coming to grips with the full scope of what you did and not hiding it from the public, are the first meaningful steps to changing attitudes and moving forward.

And with regard to changing attitudes and moving forward, nobody is going to move forward until you're through. Fishermen can't move forward, there are tens, twenties, thirties of thousands of people in the municipalities and the

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Native corporations, the other groups impacted by the spill, who are still angry and hurt about what happened.

And that is an important reason to punish. That's why, you know, we used to resolve these disputes with six-guns. Now we resolve them with juries, but the validation of their feelings is important and the validation of society's feelings and anger about this spill is important, and changing Exxon's attitudes are important and sending a message to others – you know, the statement that this case has not received any publicity, did you hear him say that? Absolutely incredible.

I mean, you're not supposed to read the newspapers; I do. Absolutely incredible. And society – your verdict is going to be a validation of society's values, and that includes values on people, the environment, honesty, that's – your verdict is a validation of society's values.

The numbers that I gave you there isn't much dispute about. They come out of the Exxon

Corporation year-end statements, and so as you go to do your duty, I wish you well. And we started with coats on and we're finishing with coats on. And all of the people who were hurt by the spill appreciate what you've done and what you're doing.

And in point of fact, these people in these board of directors' rooms are going to look to what you do, and the day after you do it it will be discussed in every major board of director's meeting in the country that exists. And your fellow

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citizens are going to look to what you do, and it is a very, very important, important task.

Now my part is over. You know, five years of work and all these depositions and looking at these documents, it's over, and now you can go and do your work. And we all wish you God speed and thank you for your time and we'll hang around and wait until you come back.

* * *

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No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX VOLUME TWO
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JOINT
APPENDIX

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JOINT APPENDIX VOLUME THREE
[Pages 1368 - 1494]

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APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:)
) No. A89-0095-CV
the EXXON VALDEZ) (HRH)
) (Consolidated)
____________________________________)
)
This Order Relates to All Cases)
____________________________________)

ORDER NO. 223

MOTION FOR PARTIAL SUMMARY JUDGMENT ON DAMAGE CLAIMS FOR UNOILED REAL PROPERTY AND ECONOMIC LOSSES NOT ARISING FROM PHYSICAL IMPACTS OF OILING

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively Exxon) have filed a motion for partial summary judgment on damage claims for unoiled real property and economic losses not arising from physical impacts of oiling.[1] Plaintiffs oppose the motion,[2] and Exxon has replied.[3] Having been fully briefed and oral argument having been heard, the motion is ready for ruling.

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[1] Clerk's Docket No. 4055.

[2] Clerk's Docket Nos. 4381 and 4112.

[3] Clerk's Docket No. 4487, 4085 and 4248.

Through the instant motion, Exxon seeks summary judgment on:

> (1) all claims for parcels of land that were not touched by oil from the Exxon Valdez spill; (2) the portions of all claims for "oiled" parcels seeking to recover for unoiled portions of those parcels above the immediate shoreline; and (3) all claims for economic losses that do not arise from physical impacts of the oil spill upon plaintiffs' lands.

Clerk's Docket No. 4055 at 2.

Exxon argues that the first category includes claims brought by plaintiffs whose parcels of land were landlocked, located on the eastern side of Prince William Sound which was unoiled, or received no oil on their land even though oil was in the area. Regarding the second category, Exxon argues that simply because a strip of shoreline was oiled does not mean that a landowner can recover for all upland portions of the parcel that were not oiled. Exxon argues that the third category overlaps the first two categories and encompasses most land claims asserted in the litigation. The third category includes plaintiffs who are seeking damages for alleged losses of property value resulting from a "stigma" or "loss or marketability". Exxon argues that such indirect economic loss claims are not recoverable.

Resolution of the issues raised by Exxon centers around the court's interpretation of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings, an injured person must have suffered direct physical harm to a proprietary interest to recover economic losses. See Imtt-Gretna v. Robert E. Lee SS, 993 F.2d 1193, 1194 (5th Cir. 1993), cert. denied, 114 S. Ct. 880 (1994). The limited exception to this rule created for commercial fishermen who may recover economic damages without accompanying physical harm, Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974), has no application to the issues raised by this motion.

In responding to Exxon's arguments, plaintiffs argue that the Robins Dry Dock rule bars claims for the loss of the financial benefits of a contract or prospective trade, but does not apply to non-commercial claims or those involving real property.[4] Plaintiffs' narrow interpretation of Robins Dry Dock has been rejected by numerous courts. See IMTT-Gretna v. Robert E. Lee SS, 993 F.2d at 1194 (After examining the history and central purpose of Robins Dry Dock, the court held that recovery for economic loss is unavailable absent physical damage to property), citing Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986); and Naviera Maersk Espana S. A. v. Cho-Me Towing, Inc., 782 F.Supp. 317, 319 (E.D.La. 1992) ("Robins stands for the proposition that a party may not recover for economic loss not associated with physical damages.") (footnote omitted), quoting Akron Corp. v. M/T Cantigny, 706 F.2d 151, 153 (5th Cir. 1983); and Holt Hauling & Warehousing Sys., Inc. v. M/V

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[4] Plaintiffs "assume for the sake of argument" that this action is a maritime tort. The court has held on numerous occasions that the case is a maritime tort to be governed by maritime law. See e.g. In re the Exxon Valdez, 767 F.Supp. 1509 (D. Alaska 1991)

Ming Joy, 614 F.Supp. 890, 896 n.13 (E.D. Pa. 1985) ("[T]o the extent Robins Dry Dock's principle 'is essentially a principle of disallowance of damages because of remoteness, ' . . . harm to non-contractual interests will typically be more remote than harm to contractual interests.") (citations omitted). See Order No. 121, Clerk's Docket No. 3194 at 13 ("Robins Dry Dock does not allow the award of purely economic damages.") (footnote omitted). For the above stated reasons, the court finds, pursuant to Robins Dry Dock, that plaintiffs may not recover economic damages absent physical damages.[5]

Plaintiffs also argue that their claims are cognizable under Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974). Oppen established a commercial fishermen's exception to the Robins Dry Dock rule and allows commercial fishermen to recover economic losses absent physical impact. Plaintiffs argue that the Oppen exception applies to any plaintiffs who have suffered foreseeable harm of a "particular and special nature," different in kind from the harm suffered by members of the general public. Id. at 570.

The court has held on various occasions that the Oppen exception applies to those who "lawfully and directly make use of a resource of the sea". Id. at 570. These persons are, primarily, commercial fishermen. See Order No. 121, Clerk's Docket No.

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[5] Plaintiffs cite Penzoil Producing Co. v. Offshore Express, Inc., 943 F. 2d 1465, 1473 (5th Cir. 1991), for the proposition that Robins Dry Dock does not apply when a plaintiff suffers physical damage to property. Plaintiffs seriously misconstrue Penzoil which stands for the obvious proposition that Robins Dry Dock will not bar a claim for economic damages which are accompanied by physical damages to a proprietary interest. Id.

3194 at 5 n.10; and Order No. 174, Clerk's Docket No. 4444. In creating the commercial fishermen's exception to Robins Dry Dock, the Oppen court stated "it must be understood what our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill . . . ." Oppen, 501 F.2d at 570. The court concludes that the Oppen commercial fishermen's exception to Robins Dry Dock, does not apply to the landowner plaintiffs herein.

Plaintiffs next argue that oiling of the intertidal zone interfered with their littoral rights, constituting a physical impact to a proprietary interest.[6] Plaintiffs apparently argue that the oil spill interfered with their littoral rights even though it may not have physically touched their property. According to plaintiffs, the interference alone constitutes a physical impact. Plaintiffs cite several cases in support of their argument that property interests include littoral rights. See Clerk's Docket No. 4381 at 16 and cases cited therein.

Plaintiffs' case cites, however, do not circumvent the Robins Dry Dock rule which requires actual physical impact before recovery is cognizable. Getty Ref. & Mktg. Co. v. M/T Fadi B, 766 F.2d 829 (3d Cir. 1985), considered the rights of an owner of riparian land within the context of Robins Dry Dock and is instructive on this issue.[7] In Getty, the Coast Guard ordered the M/T Fadi B to dock at a marine terminal upon discovery of defects in the vessel's hull. The marine terminal operator suffered no physical damage but sued for lost access to his dock on account of the Fadi B's negligence. The terminal operator argued as follows:

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[6] Littoral rights are "[r]ights concerning properties abutting an ocean, sea or lake rather than a river or stream (riparian). Littoral rights are usually concerned with the use and enjoyment of the shore." Black's Law Dictionary, 842 (5th Ed. 1979).

> [A]s an owner of riparian land it had the right of access to the navigable water immediately in front of its property and also a right of access to the whole body of navigable water connected with the water in front of this property; that although the riparian landowner does not own the water in front of his property and must share with the public, its right of access is a property interest that is an accessory to its land ownership. From these assertions appellant constructs the theory that it has suffered an invasion of this property interest by the negligence of the FADI B and that this invasion created liability.

Id. at 834.

In rejecting the terminal operator's argument, the court stated that "[h]owever innovative this theory may be . . . we are left with the brute fact that there was no physical damage to a person, chattel, or real property." Id. The court further stated that the arguments were inconsistent with the body of negligence law. See also In re Oriental Republic of Uruguay, 821 F.Supp. 934, 938 (D. Del. 1993) ("[T]he Robins rule precludes recovery by [claimant] of its economic loss damages because [claimant's] demurrage charges and change-in-schedule losses resulted not from the pollution damage which [claimant] sustained to its property, but, as in FADI B, from the inability of ships to gain normal access to claimant's terminal.") (emphasis added).[8]

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[7] A riparian owner is "[o]ne who owns land on bank of river, or one who is owner of land along, bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with river." Black's Law Dictionary, 1192 (5th ed. 1979).

The court finds that mere interference with littoral use, without physical oiling of shoreline property, does not satisfy Robins Dry Dock and such claims are not cognizable. On the other hand, owners of oiled property may have had their littoral rights impacted and would satisfy Robins Dry Dock. Exxon does not dispute this point and, in fact, "concede[s] for purposes of this motion that owners of waterfront property where adjacent shorelines were oiled do satisfy the physical impact rule." Clerk's Docket No. 4487 at 13 (footnote omitted).

With the above principles in mind, the court considers first claims based upon parcels of land that were not touched by oil from the Exxon Valdez oil spill. The owners of land not physically contacted by oil obviously have no possibility of a recovery for physical damage to their property and, on the above authorities, are precluded from pursuing a claim for economic damages. This category of property includes, but is not limited to, landlocked parcels. Because the owners of unoiled properties have no claim for physical damages, and therefore have no possible claim for economic damages, summary judgment is granted in favor of Exxon and against all land-owner plaintiffs whose property was not physically impacted by oil.

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[8] Demurrage charges are those charges related to the detention of a vessel beyond the allowed number of days for loading or unloading cargo. Black's Law Dictionary, 389 (5th ed. 1979).

The court addresses next the situation of properties which have suffered some physical contact with oil spilled from the Exxon Valdez. As to such properties, the plaintiffs are entitled to recover for such actual, physical damage as the land is demonstrated to have suffered.

Obviously, pure physical damage does not exhaust the possibilities for loss by landowners. For example, the presence of oil on a given parcel of property may or may not interfere with the owner's use of that property; and, if there is such interference, it may be of brief or long duration. Here, we deal with economic damages. These economic damages probably (although perhaps not necessarily) affect a larger portion of any given parcel of land than the area of actual impact.

The court has previously considered the geographic aspect of damages to land in an order regarding claims presented to the Trans-Alaska Pipeline Liability Fund (Fund). Case No. T92-1000, Order No. 20, Clerk's Docket No. 98. In that order, the court recognized that entire parcels of land or just the immediate shoreline might be affected, and that "common sense and the immense size of the parcels at issue in this appeal dictate that the entire land holding was not affected and therefore cannot be considered for a determination of damages." Id. at 17-18 (footnote omitted).

In Order No. 20, Case No. T92-1000, the court dealt with this same problem. The court affirmed a decision of the Fund which made determinations of the territorial extent of allowable economic damages. In doing so, the court acted in an appellate capacity, determining that the findings of the Fund were not clearly erroneous. As to these proceedings, the court's posture and role is very different. On motion for summary judgment, the court may address legal issues which do not depend for their resolution on disputed facts. Fed. R. Civ. P. 56(c).

Plaintiffs argue that they may recover for injury to their entire parcel of property as opposed to recovering only for oiled shorelines. Clerk's Docket No. 4381 at 17-22. In making their argument, plaintiffs fail to distinguish between physical damage and economic losses. We have dealt with the former in preceding paragraphs. We now address the territorial extent of potential economic losses as to property physically contacted by oil from the Exxon Valdez.

Having suffered physical contact with oil, a landowner, upon due proof, may recover economic losses which are caused by the oiling. A landowner may, for example, prove that he was deprived of one or more specific uses of his property for a certain period of time, and might establish the value of that lost usage. The landowner might establish interference with some ongoing use of his property (albeit a use that was not preempted by the presence of oil on the property). Thus, economic damages may have both a geographic and a temporal aspect. Interference with land use may be total or partial in either aspect. How much land is affected and for how long is a matter for proof. On motion for summary judgment, it is not possible for the court to determine for the parties the geographic or temporal extent of liability as to any particular parcel, unless there is no disagreement as to the evidence on these points. On the present record, it is not possible for the court to make these determinations because of factual disputes.

The difficulty of applying the foregoing guidelines for the determination of liability for economic damages is compounded by Exxon's motion to strike.[9]

As a general proposition, the court will not permit a party opposing a motion for summary judgment to contradict his prior deposition testimony by affidavit. Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). However, in Kennedy, the court also stated that:

> Certainly, every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence . . . . In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an earlier deposition.

Id. (citations omitted). Kennedy further noted that an affiant could have been confused at the deposition, could have lacked access to material facts, or could have newly discovered evidence.

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[9] The motion to strike is filed at Clerk's Docket No. 4549, plaintiffs opposed the motion at Clerk's Docket No. 4596, and Exxon replied at Clerk's Docket No. 4628. Exxon contends that many landowners have submitted affidavits which assert physical property damage in direct contradiction of earlier depositions which disavowed any such damage. These diverse positions of plaintiffs are not insignificant; they go to the heart of the plaintiffs' claims and their rights against Exxon.

Finally, Kennedy also suggests that a district court should not reject an affidavit without first conducting an evidentiary hearing to determine if the affidavit at issue was a "sham". Id. at 267. Given the immensity of this case and the number of landowner plaintiffs, the latter approach is not feasible. Upon review, the motion to strike is denied.

The court denies summary judgment as to landowners of oiled properties who seek economic damages directly related to the oiling of a property interest. However, these economic damages may not include damages based on "stigma" or "public fear", loss of marketability, or diminution in property value. These damage issues are addressed below.

Exxon argues that the plaintiffs cannot recover for diminution in the value of their properties because those claims arise from a "stigma" or "public fear", but not the actual oiling of a proprietary interest.[10]

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[10] Essentially, plaintiffs argue that their property has a "troubled reputation" resulting from the oil spill. Plaintiffs refer to their brief in opposition to Exxon's motion for summary judgment on claims of commercial fishermen based on price diminishment (Clerk's Docket No. 4165), in which they argue that:

> [T]he tortfeasor is legally responsible for the impact his actions had on the demand for plaintiff's [land], even though the harm is visited on the plaintiff through the intervening force of the impacted market.

Id. at 13. Plaintiffs also argued that the oil spill was the proximate and foreseeable cause of the drop in the demand for and price of their fish. Id. at 20. By analogy, plaintiffs herein argue that the oil spill resulted in the drop in demand for and

The court concludes that property owner claims (whether the property was oiled or not) based upon claims that a "stigma" or "public fear" depressed property values are not actionable. Such claims are too speculative and remote and are not reflective of damages caused by the oiling of property.[11]

Plaintiffs must prove that their economic loss was causally connected to the spilling of oil. Imtt-Gretna v. Robert E. Lee SS, 993 F.2d 1193 (5th Cir. 1993), cert. denied, 114 S.Ct. 880 (1994) ; Union Oil v. Oppen, 501 F. 2d 558 (9th Cir. 1974) ; In re oriental Republic of Norway, 821 F.Supp. 934 (D. Del. 1993); and Naviera Maersk Espana S.A. v. Cho-Me Towing,

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price of their land. The court's decision regarding commercial fishermen's claims of price diminishment was governed by Oppen, which specifically excludes commercial fishermen from Robins Dry Dock and allows the fishermen to pursue claims for lost profits. In the instant motion, the landowner plaintiffs must meet the Robins Dry Dock requirements to pursue their claims.

The fish-pricing dispute involves circumstances under which fish that were on the market for sale were either not sold or were sold at a depressed price. In this motion, plaintiffs have submitted evidence of only one landowner who had property on the market which did not sell because of the spill. Claimant Michael Bullock states in his declaration that on March 1, 1989, prior to the oil spill, he entered into a purchase agreement with Sam Devon for the sale of Country Club Estates on Kachemak Bay. The agreed sale price was $385,000.00. Two of the three tracts involved were oiled (tracts 2 and 4). Because of the spill, Mr. Devon rescinded the agreement on April 3, 1989. Exxon's motion for summary judgment is denied regarding Bullock's claim, and Bullock is entitled to pursue his claim for tracts 2 and 4 which were oiled by the spill.

[11] Of course, if a given property was not oiled at all, this kind of claim is even more remote and more speculative than that discussed in the following text.

Inc., 782 F.Supp. 317 (E.D. La. 1992). This the plaintiffs cannot possibly do. Alleged losses based upon "stigma" or "public fear" are inherently speculative and conjectural and do not "flow directly from the alleged physical damage to plaintiff's property". Naviera Maersk Espana S.A., 782 F.Supp. at 320. The court denied analogous commercial fishermen claims which were remote, speculative or conjectural.[12] Moreover, the alleged "stigma" or "public fear" damages are remote in the sense that there is no way of knowing when a particular parcel of land will in fact be placed on the market. While it is, of course, theoretically possible to develop a present value appraisal, any purported losses suggested by such an appraisal are not real when the property was not actually for sale. When a given property is actually placed on the market, the "stigma" or "public fear" which might currently exist could very well have totally dissipated. Moreover, all manner of future economic (supply and demand) factors, not presently known or knowable, will affect future sale prices of property. Again, the claims for diminution in value asserted by the landowner plaintiffs are too speculative, conjectural, and remote, and do not "derive[] directly from the plaintiff's physical property damage." Republic of Uruguay, 821 F.Supp. at 940. Being remote and conjectural, the claims are not cognizable under Robins Dry Dock because, Robins Dry Dock is "'essentially a principle of disallowance of damages because of remoteness'". Holt Hauling & Warehousing Sys., Inc. v. M/V Ming Joy, 614 F.Supp. 890, 896 (E.D. Pa. 1985). As stated in Oriental Republic of Uruguay, "[t]he Robins rule of preclusion prevents this unending chain of potential tort liability for economic losses by setting forth a bright line rule of limitation which discards traditional precepts of foreseeability. . . ." Oriental Republic of Uruguay, 821 F.Supp. at 939.[13] The court concludes that, as a matter of law, these alleged "stigma" damages are not damages caused by the physical effects of the Exxon Valdez oil spill,[14] and are not cognizable under Robins Dry Dock.

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[12] Order No. 188, Clerk's Docket No. 4707.

Exxon's motion for summary judgment is granted in part and denied in part to the extent explained in this order. Exxon's motion to strike is denied.

DATED at Anchorage, Alaska, this 8 day of June, 1994.

/s/
United States District Judge

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[13] Such "traditional precepts of foreseeability" include damage concepts discussed in Restatement (Second) of Torts §§ 928 & 929. Regardless, the situations discussed by the Restatement do not apply here. Section 929 of the Restatement contemplated recovery of depreciated market value when an oil spill destroyed the fertility of a field for several years. In the case at bar, the strip of rocky shoreline or beach was only effected at the time it was oiled, prospective damages to future use simply do not exist. Damages to marketability must be based on something more tangible than an unknown prospective buyer's potential fear of purchasing property because of the "stigma" associated with a once oiled strip of shoreline. of course, to the extent that a landowner could show the type of damages discussed in the Restatement, those damages would be recoverable, assuming they were directly caused by the Exxon Valdez oil spill. Neither the Restatement nor Robins Dry Dock will allow "stigma" damages, however.

[14] See supra n.11.

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
the) No. A89-0095-CV
the EXXON VALDEZ) (HRH)
) (Consolidated)
______________________)

SPECIAL VERDICT
FOR PHASE I OF TRIAL

Interrogatory No 1: Do you unanimously find from a preponderance of the evidence that defendant Hazelwood was negligent, as that term has been defined in the instructions, and that his negligence was a legal cause of the grounding of the Exxon Valdez on March 24, 1989?

Yes: X No: ___

Interrogatory No 2: Do you unanimously find from a preponderance of the evidence that defendant Hazelwood was reckless, as that term has been defined in the instructions, and that his recklessness was a legal cause of the grounding of the Exxon Valdez?

Yes: X No: ___

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that the Exxon defendants were reckless, as that term has been defined in the instructions, and that their recklessness was a legal cause of the grounding of the Exxon Valdez?

Yes: X No: ___

If you have completed all of the answers to the questions required of you by this verdict, please have your presiding juror sign the verdict and date it and return it to the court.

DONE at Anchorage, Alaska, this 13th day of June, 1994.

/s/ Ken S. Murray
Presiding Juror

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV
the EXXON VALDEZ) (HRH)
)
____________________) (Consolidated)
)
This Order Relates to All Cases)
____________________)

ORDER NO. 242

MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR NON-ECONOMIC INJURY

Exxon Corporation (D-1) and Exxon Shipping (D-2) (Exxon) have moved for summary judgment on plaintiffs' claims for non-economic injury.[1] Plaintiffs oppose the motion[2] and Exxon has replied.[3] Oral argument has not been requested and is deemed unnecessary.

In Order No. 190, the court granted Exxon's motion for summary judgment on Alaska natives' non-economic injuries.[4] The instant motion addresses non-economic injuries for the remaining plaintiffs. Such claims involve emotional distress and hedonic damages which include loss of quality of life and loss of enjoyment of life.

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[1] Clerk's Docket No. 5205.

[2] Clerk's Docket No. 5399.

[3] Clerk's Docket No. 5468.

[4] Clerk's Docket No. 4709.

Plaintiffs describe their claims as follows:

> First, numerous Plaintiffs bringing commercial fishing claims for economic losses are also asserting claims for loss of enjoyment of life, sometimes also referred to as lost quality of life . . . .
>
> Second, certain direct action commercial fishing Plaintiffs are asserting claims for negligent infliction of emotion distress arising from Defendants' reckless conduct . . . .

Plaintiffs' opposition at 2.

Plaintiffs argue that quality of life claims are recoverable under the maritime law of public nuisance applicable to commercial fishermen. Plaintiffs further argue that emotional distress claims are recognized under general maritime law principles.[5]

In considering the issues involved in this motion, the court will be guided by Robins Dry Dock v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings an injured person must have suffered direct physical harm to recover economic losses. A limited exception was created for commercial fishermen who may recover certain economic losses without physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974). Neither Oppen nor Robins Dry Dock specifically address noneconomic damage. Nonetheless, Robins Dry Dock offers guidance because the "Robins Dry Dock principle 'is essentially a principle of disallowance of damages because of remoteness . . . .'" Holt Hauling & Warehousing, Inc. v. M/V Ming Joy, 614 F. Supp. 890, 896 n. 13 (E.D. Pa. 1985) (citations omitted).

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[5] Plaintiffs also argue that individuals who suffered physical harm may recover under maritime law and general common law. Exxon withdraws their motion regarding 69 plaintiffs who have submitted affidavits claiming physical injuries. See Exxon's reply at 2 n.3 and affidavits attached to plaintiffs' opposition. The Jameson plaintiffs have requested a 75-day continuance to obtain additional affidavits from plaintiffs who Mr. Jameson claims have physical injury. This is not the first time that Mr. Jameson has requested leave to submit after-the-fact affidavits despite having five years to develop his case. As on the previous occasions, the court denies Mr. Jameson's request.

I. Loss of enjoyment of life under maritime nuisance.

In Order No. 190, the court considered whether Alaska natives could state a claim under federal common law or maritime nuisance. The court stated:

> [I]t is doubtful whether a claim for public nuisance can be asserted under federal common law or maritime law.[6] In Conner v. Aerovox, Inc., 730 F.2d 835 (1st Cir. 1984), cert. denied, 470 U.S. 1050 (1985), the court stated that "'the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the [Federal Water Pollution Control Act].'" Conner, 730 F. 2d at 842, (quoting Middlesex County

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[6] Although most courts distinguish between federal common law and maritime law, at least one court has suggested that "[t]o the extent that maritime law is judge-made, it can be viewed as simply one branch of federal common law." Matter of Oswego Barge Corp., 664 F.2d 327, 333-334 (2d Cir. 1981).

Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981)). Conner held that Sea Clammers encompassed "all federal judge-made law of nuisance whether maritime or general federal law." Conner, 730 F.2d at 842. See also, Louisiana v. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1030 n.13 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986) (the Supreme Court has apparently foreclosed a federal cause of action for public nuisance claims regarding obstruction of navigable waterways); Marquez-Colon v. Reagan, 668 F.2d 611, 614 n.2 (1st Cir. 1981) (the Supreme Court held in City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981) and Sea Clammers "that the federal common law of nuisance for interstate and coastal water pollution has been entirely preempted by the [FWPCA]"); Matter of Oswego Barge Corp., 664 F.2d 327, 338 n.13 (2d Cir. 1981) (suggesting that the Supreme Court understood in Sea Clammers that the FWPCA preempted both federal common law and maritime nuisance); Secko Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008 (E.D. La. 1993) (federal common law does not recognize a cause of action for public nuisance in a water pollution case). In Nat'l Audubon Soc'y v. Dept. of Water, 869 F.2d 1196, 1200 (9th Cir. 1988), the Ninth Circuit, while not addressing maritime nuisance, held that federal common law nuisance claims for water pollution are preempted by the FWPCA.

In the last analysis, what the Alaska natives seek is a recovery which is not

> founded upon any legal theory currently recognized by maritime law.

Order No. 190 at 8-9

The fact that the plaintiffs in the case at bar are commercial fishermen as opposed to Alaska natives does not change the court's analysis of maritime public nuisance. *Oppen* created a very narrow exception to the limitations imposed by *Robins Dry Dock*, and although *Oppen* permits commercial fishermen to recover limited *economic* damages without physical harm, it did not create a nuisance cause of action for commercial fishermen. This court has specifically limited *Oppen* to claims of lost profits of commercial fishermen, and will not extend *Oppen* to commercial fishermen's non-economic lifestyle claims. Like the Alaska natives, the commercial fishermen here seek "‘“a recovery which is founded upon any legal theory currently recognized by maritime law.”’" Order No. 190 at 9.[7]

II. Plaintiffs' claim for emotional distress.

In support of their claim that emotional distress damages are cognizable under maritime law, plaintiffs refer to the Jones Act, 46 U.S.C. § 688, which covers work-place injuries to seamen and incorporates the underlying Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 et seq.

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[7] Even if maritime law recognized a claim for public nuisance, the commercial fishermen have not enunciated a claim different in kind from that of the general public, an essential element of a public nuisance claim. The commercial fishermen's "special relationship" with the sea is not different from an Alaska Natives' relationship with the sea, or from a recreational fishermen, nature photographer, kayaker, or other recreational user's relationship with the sea. A commercial fishermen's relationship with the sea may differ in intensity from that of another member of the public, but that does not make the relationship different in kind. *See* Order 190 at 3-7.

In Consolidated Rail Corp. v. Gottshall, ___ U.S. ___, [illegible] USLW 4609, No. 92-1956 1994 WL 276652 (June 24, 1994), the Supreme Court held that in FELA cases, claims for emotional distress unaccompanied by physical injury are recoverable only if the "zone of danger" test is satisfied. Id. at *14.

> [T]he zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot."

Id. at *10 (citation omitted).

Plaintiffs in the case at bar have not shown that they can satisfy the "zone of danger" test. Accordingly, damages for emotion distress are not available.[8]

III. Alaska state law and TAPPA.

Plaintiffs argue that they can recover damages for emotional distress and hedonic claims under Alaska state law and the Trans-Alaska Pipeline Authorization Act (TAPPA). The court has held on numerous occasions that this case is governed by maritime principles and not Alaska state law or TAPPA. Regardless, the statutes upon which plaintiffs rely permit recovery for loss of economic damages as opposed to non-economic hedonic damages.

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[8] In any event, it is doubtful that emotional distress damages would be available under the remoteness principles of Robins Dry Dock.

IV. Conclusion

For the above stated reasons, Exxon's motion for summary judgment on plaintiffs' claim for non-economic injuries is granted.

DATED at Anchorage, Alaska, this 19 day of July, 1994.

/s/ [illegible]
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:	) Case No. A89-095 (HRH)
	) (Consolidated)
THE EXXON VALDEZ	) This Document Relates to
	) All Cases
	)

AMENDED STIPULATION REGARDING IMPACTS FOR PHASE III[1]

This stipulation is entered into solely for purposes of the Phase III federal jury trial, and for no other purpose. The parties agree that this stipulation shall not be used for any other purpose. This stipulation supersedes and replaces "Stipulation Regarding Impacts For Phase III" dated July 18, 1994. Subject to the foregoing, Sections I, II, III and IV of this stipulation may be read to the jury at the commencement of Phase III. Section V shall not be read to the jury.

I. The following Phase IIB claims for actual damages were resolved:

1. A class consisting of Alaska Natives made claims that their subsistence harvests were reduced as a result of the *Exxon Valdez* oil spill. Exxon has

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[1] Nothing in this Stipulation shall be concaved as a waiver of certain plaintiffs' right to be remanded to state court. Plaintiffs do not by this Stipulation submit to the jurisdiction of the federal court. Nor is anything in this stipulation to be deemed as a waiver by defendants of any defense of law or fact to any claim referenced herein or a consent to assertion of a barred or non-cognizable claim.

agreed to pay $20 million to the class on these claims.

II. The following claims for actual damages will be resolved in Phase IV proceedings:

1. Commercial fishermen in fisheries affected by the oil spill were unable to fish certain fisheries as a result of the *Exxon Valdez* Oil Spill, including pot shrimp, trawl shrimp, dungeness crab, brown king crab, tanner crab, king crab, halibut, sablefish, miscellaneous fin fish, miscellaneous shellfish, miscellaneous groundfish, smelt, scallops, and bait herring. Commercial fishermen participating in these fisheries contend their damages are $24,764,000. Defendants admit that there was some loss in each of these fisheries but contend that the actual damages were lower.

2. Commercial fishermen in the Lower Cook Inlet salmon seine and set net fisheries sustained losses due to closures as a result of the oil spill. Commercial fishermen in these areas contend that these damages for 1989 amount to $787,000. Defendants admit that there was some loss in each of these fisheries but contend that the actual damages were lower.

3. Commercial fishermen in fisheries affected by the oil spill contend that they have sustained losses because the prices at which their fishing vessels sold have been reduced as a result of the spill. Defendants deny that the *Exxon Valdez* Oil Spill caused a drop in the price of vessels sold and contend that the actual damages, if any, were less than the amount claimed.

4. Certain commercial fishermen from fisheries affected by the oil spill who sold their fishing permits

after September 1993 contend that the prices at which their fishing permits have sold have been reduced as a result of the spill. Defendants deny that the *Exxon Valdez* Oil Spill caused a drop in the price of these permits, and contend that the actual damages were less than the amount claimed.

5. Landowners (including certain Native Corporations), who own shoreside lands in the oiled areas of Prince William Sound, Kenai Peninsula and Kodiak contend that oiling of those lands by the *Exxon Valdez* Oil Spill resulted in damage of at least $130,000,000. Defendants assert that many of the lands involved were never oiled by oil from the *Exxon Valdez.* As to lands which were oiled, defendants admit that they are responsible for damages, if any, caused by the oil, but defendants contend that such lands have been, for the most part, cleaned up, and that any residual damages are temporary.

6. The Cook Inlet Aquaculture Association, Kodiak Regional Aquaculture Association, and Prince William Sound Aquaculture Corporation contend they sustained losses due to a reduction of the price paid for fish actually harvested in 1989, and state that these damages are $18,860,000. Defendants contend that the hatcheries' damages, if any, were less than the amount claimed.

III. The following claims for actual damages are to be resolved in the Alaska State courts:

1. The municipalities of Kodiak Island Borough, Larsen Bay, Old Harbor, Ouzinkie, Port Lions, and Cordova, contend that they have sustained losses due to the *Exxon Valdez* Oil Spill and state the damages they have suffered at issue in the present trial

are $ 8,784,567. Defendants contend that the damages suffered were less than $75,000.

2. Other municipalities including Seward, Valdez, Kenai, Kenai Peninsula Borough, Homer, Lake and Peninsula Borough, Chignik, Akhiok, City of Kodiak, and Whittier contend that they have sustained losses in an amount which is, at a minimum, equivalent to those municipalities presently in trial (in paragraph 1 above). Defendants deny that these municipalities were damaged by the *Exxon Valdez* Oil Spill or contend that the damages suffered, if any, were lower.

2. The Native Corporations of English Bay, Port Graham, Chenega, Chugach, Eyak, and Tatitlek contend that they have sustained losses from the oiling of their land due to the *Exxon Valdez* Oil Spill and state the damages they have suffered are $ 110,898,000. Defendants contend that lands far back from the shoreline and other lands that were not touched by oil were not damaged at all, and contend that the damage attributable to oiled lands amounts to about $1,500,000.

3. The Native Corporations of English Bay, Port Graham, Chenega, and Chugach, contend that they have sustained losses to archeological sites on their lands due to the *Exxon Valdez* Oil Spill and state the damages they have suffered are $35,571,000. Defendants deny that archeological sites were damaged by the *Exxon Valdez* Oil Spill.

4. Certain commercial fishermen in fisheries affected by the oil spill have claims in state court for losses they claim for the depressed sales price of their permits and vessels. The Exxon defendants dispute these claims.

5. The Native Corporations of Chugach and Port Graham own and operate seafood processing operations that were impacted by the *Exxon Valdez* Oil Spill. Exxon paid these processors $9,515,000 in settlement of their claims.

6. Certain commercial fish processors claimed that they were damaged as a result of the *Exxon Valdez* Oil Spill. Exxon paid these processors $113,500,000 in settlement of their claims.

IV.Members of Punitive Damage Class:

1. Each and every claimant entitled to recover damages from defendants for damage resulting from the *Exxon Valdez* Oil Spill is a member of the punitive damage class and is a plaintiff in this action for purposes of this Phase III. No other jury will award punitive damages to these plaintiffs in any other lawsuit.

V. Phase III Evidence

1. This paragraph shall not be read to the jury. No evidence of damages claimed by the plaintiffs or claimants identified in Parts I through IV hereof shall be offered or admissible in the trial of Phase III; rather the entire Phase III record as to the fact or amount of such damages shall consist of this stipulation and the Phase II record and verdicts. Nothing in this stipulation is intended or shall operate to limit argument or to preclude plaintiffs or defendants from introducing appropriate cross-examination or rebuttal evidence or questioning.

So Stipulated: Dated 26 July 1994

/s/

DAVIS WRIGHT TREMAINE
David W. Oesting
Co-Lead Counsel for Plaintiffs
Suite 1450
550 West Seventh Avenue
Anchorage, AK, 99501
(907) 276-4488

/s/

BOGLE & GATES
Douglas Serdahely
Lead Counsel for Defendants
Suite 600
1031 West Fourth Avenue
Anchorage, AK 99501
(907) 276-4557

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 27 day of July 1994.

/s/

UNITED STATE DISTRICT JUDGE
The Honorable H. Russel Holland

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
the EXXON VALDEZ) No. A89-0095-CV (HRH)
) (Consolidated)
)

SPECIAL VERDICT FOR PHASE II-A OF TRIAL

Salmon / 1989

Interrogatory No. 1: For the areas listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in 1989? You should answer separately for each area listed.

Answer:

Prince William Sound:	Yes	X	No	
Upper Cook Inlet:	Yes	X	No	
Kodiak:	Yes	X	No	
Chignik:	Yes	X	No	
Balboa-Stepovak:	Yes	X	No	

Interrogatory No. 2: For each area for which your answer to Interrogatory No. 1 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of salmon in that area in 1989 that was caused by the oil spill?

Answer:

Prince William Sound:	$ 7,689,714
Upper Cook Inlet:	$ 45,905,758
Kodiak:	$ 43,042,724
Chignik:	$ 5,052,400
Balboa-Stepovak:	$ 0

Setnetters' Catch / 1989

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of increased harvests of salmon by set net fishermen in Upper Cook Inlet in 1989?

Answer: Yes X No ___

Interrogatory No. 4: If your answer to Interrogatory No. 3 is "yes", please state how many additional salmon were caught by set net fishermen in Upper Cook Inlet in 1989 as a result of the oil spill.

Answer: $ 3,242,254

Pink Salmon / Prince William Sound Area / 1990-95

Interrogatory No. 5: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of pink salmon by plaintiffs in the Prince William Sound area? You should answer separately for each year listed.

Answer:

1990:	Yes	___	No	X
1991:	Yes	___	No	X
1992:	Yes	X	No	___
1993:	Yes	X	No	___
1994:	Yes	___	No	X
1995:	Yes	___	No	X

Interrogatory No. 6: For each year for which your answer to Interrogatory No. 5 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of pink salmon in that year?

Answer:

1990:	$ 0
1991:	$ 0
1992:	$ 11,277,125.53
1993:	$ 11,111,200.00
1994:	$ 0
1995:	$ 0

Sockeye Salmon / Upper Cook Inlet Area / 1994-95

Interrogatory No. 7: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Upper Cook Inlet area in 1994? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Upper Cook Inlet area in 1994, then your answer to this interrogatory should be "no".)

Answer: Yes ___ No _X_

Interrogatory No. 8: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Upper Cook Inlet area in 1995? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Upper Cook Inlet area in 1995, then your answer to this interrogatory should be "no".)

Answer: Yes ___ No _X_

Interrogatory No. 9: For each year for which your answer to Interrogatory Nos. 7 and 8 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction in their harvest of sockeye (red) salmon in Upper Cook Inlet in that year?

Answer:

1994:	$_0_
1995:	$_0_

Sockeye Salmon / Kodiak Area / 1994-95

Interrogatory No. 10: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Kodiak area in 1994? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Kodiak area in 1994, then your answer to this interrogatory should be "no".)

Answer: Yes ___ No _X_

Interrogatory No. 11: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Kodiak area in 1995? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Kodiak area in 1995, then your answer to this interrogatory should be "no".)

Answer: Yes ___ No _X_

Interrogatory No. 12: For each year for which your answer to Interrogatory Nos. 10 and 11 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of sockeye (red) salmon in the Kodiak area in that year that was caused by the oil spill?

Answer:

1994: $_0_

1995: $_0_

Herring / 1989

Interrogatory No. 13: For the areas listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of herring by plaintiffs in 1989? You should answer separately for each area listed.

Answer:

Prince William Sound: Yes X No ___

Lower Cook Inlet: Yes X No ___

Kodiak: Yes X No ___

Interrogatory No. 14: For each area for which your answer to Interrogatory No. 13 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of herring in that area in 1989?

Answer:

Prince William Sound: $ 15,872,720

Lower Cook Inlet: $ 188,400

Kodiak: $ 585,480

Herring / Prince William Sound Area / 1993-94

Interrogatory No. 15: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of herring by plaintiffs in the Prince William Sound area? You should answer separately for each year listed.

Answer:

1993: Yes X No ___

1994: Yes ___ No X

Interrogatory No. 16: For each year for which your answer to Interrogatory No. 15 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of herring in that year?

Answer:

1993:	$ 7,021,593
1994:	$ 0

Salmon Prices / 1989

Interrogatory No. 17: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1989 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink:	Yes	X	No	
Sockeye (Red):	Yes	X	No	
Chum:	Yes	X	No	
King (Chinook):	Yes	X	No	

Interrogatory No. 18: For each salmon species for which your answer to Interrogatory No. 17 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1989?

Answer:

Pink:	$ 28,807,647.59
Sockeye (Red):	$ 67,594,619.28

Chum:	$ 22,620,650.91
King (Chinook):	$ 672,504.91

Salmon Prices / 1990

Interrogatory No. 19: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1990 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink:	Yes		No	X
Sockeye (Red):	Yes		No	X
Chum:	Yes		No	X
King (Chinook):	Yes		No	X

Interrogatory No. 20: For each salmon species for which your answer to Interrogatory No. 19 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1990?

Answer:

Pink:	$ 0
Sockeye (Red):	$ 0
Chum:	$ 0
King (Chinook):	$ 0

Salmon Prices / 1991

Interrogatory No. 21: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1991 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink: Yes ___ No X

Sockeye (Red): Yes ___ No X

Chum: Yes ___ No X

King (Chinook): Yes ___ No X

Interrogatory No. 22: For each salmon species for which your answer to Interrogatory No. 21 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1991?

Answer:

Pink: $ 0

Sockeye (Red): $ 0

Chum: $ 0

King (Chinook): $ 0

Herring Prices

Interrogatory No. 23: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of the decline in prices paid for herring caught by plaintiffs?

Answer:

1989: Yes X No ____

1990: Yes ____ No X

1991: Yes ____ No X

Interrogatory No. 24: For each year for which your answer to Interrogatory No. 23 is "yes", what sum of money will reasonably compensate the plaintiffs for the decline in prices paid for herring caught by plaintiffs in that year?

Answer:

Prince William Sound:	1989:	$ 5,831,429.61
	1990:	$ 0
	1991:	$ 0
Cook Inlet:	1989:	$ 2,683,913.23
	1990:	$ 0
	1991:	$ 0
Kodiak:	1989:	$ 1,454,617.16
	1990:	$ 0
	1991:	$ 0
Chignik:	1989:	$ 0

Value of Fishing Permits

Interrogatory No. 25: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in the value of plaintiffs' limited entry fishing permits?

Answer: Yes X No ___

Interrogatory No. 26: If your answer to Interrogatory No. 25 is "yes", what sum of money will reasonably compensate plaintiffs for any decline in value of plaintiffs' limited entry fishing permits?

Answer: $ 9,375,242

DONE at Anchorage, Alaska, this _____ day of July, 1994.

____

Presiding Juror

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
The EXXON VALDEZ) No. A89-0095-CV (HRH)
) (Consolidated)

SPECIAL VERDICT
FOR PHASE III OF TRIAL

Interrogatory No. 1: Do you unanimously find from a preponderance of the evidence that an award of punitive damages against defendant Hazelwood is necessary in this case to achieve punishment and deterrence?

Answer: Yes X No ____

Interrogatory No. 2: If your answer to Interrogatory No. 1 is "yes", what amount of punitive damages do you find to be necessary for those purposes?

Answer: $ $5,000.00

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that an award of punitive damages against the Exxon defendants is necessary in this case to achieve punishment and deterrence?

Answer: Yes X No ____

Interrogatory No. 4: If your answer to Interrogatory No. 3 is "yes", what amount of punitive damages do you find to be necessary for those purposes?

Answer: $ 5 Billion

DONE at Anchorage, Alaska, this 16th day of August, 1994.

/s/ Ken S. Murray
Presiding Juror

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:)
) Case No. A89-0095-CV
The EXXON VALDEZ) (HRH)
) (Consolidated)
)
This Order Relates to)
All Cases)
)

STIPULATION AND [~~PROPOSED~~] ORDER CLARIFYING DATE FOR FILING OF POST-TRIAL MOTIONS

WHEREAS, through their First Amendment to the third Amended Revised Trial Plan (Docket No. 5382), adopted by this Court on June 22, 1994, the parties set forth certain dates for the filing of Rule 50 and 59 motions;

WHEREAS, in so doing, the parties intended such motions to be governed by the provisions of the Federal Rules of Civil Procedure, including Rule 6(a), pertaining to the computation of time under the Rules;

NOW, THEREFORE, IT IS HEREBY STIPULATED AS FOLLOWS:

1. The First Amendment to Third Amended Revised Trial Plan is clarified as provided herein; and

2. The parties' Rule 50 and 59 post-trial motions pertaining to verdicts returned in Phases I, II, and III of this proceeding shall be filed by close of business on Friday, September 30, 1994.

BOGLE & GATES

Dated: September 21, 1994

By:/s/ Douglas J. Serdahely
Douglas J. Serdahely
Liaison Counsel for
Defendants and Co-Member
of Defendants' Coordinating
Committee

DAVIS WRIGHT
TREMAINE

Dated: September 21, 1994

By: s/ David W. Oesting
David W. Oesting
Co-Lead Counsel for
Plaintiffs

ORDER

IT IS SO ORDERED.

DATED this 26 day of September, 1994.

/s/ H. Russel Holland
THE HONORABLE H. RUSSEL HOLLAND
UNITED STATES DISTRICT COURTJUDGE

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
the EXXON VALDEZ) No.A89-0095-CV
) (HRH)
This Order Relates to All Cases) (Consolidated)
)

ORDER NO. 268

JOSEPH HAZELWOOD'S MOTION FOR JUDGMENT AS A MATTER OF LAW (PHASE I ISSUES)

Joseph Hazelwood has filed a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure.[1] Plaintiffs oppose the motion[2] and Hazelwood has replied.[3] Oral argument has not been requested and is deemed unnecessary.

According to Rule 50:

> [(a)(1)] If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on

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[1] Clerk's Docket No. 5955.

[2] Clerk's Docket No. 6043.

[3] Clerk's Docket No. 6100.

> that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> ...
>
> (b) ... Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.

Fed. R. Civ. P. 50. Pursuant to Rule 50, Hazelwood argues that there is insufficient evidence to support the jury's Phase I verdict that Hazelwood was both negligent and reckless.

I. Standard for judgment as a matter of law

Judgment as a matter of law:

> [I]s proper when the evidence permits only one reasonable conclusion as to the verdict. The jury's verdict must be supported by substantial evidence in order to stand. We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. [Judgment as a mater of law] is improper if reasonable minds could differ over the verdict.

Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir. 1987) (citations omitted); See George v. City of Long Beach, 973 F.2d 706, 709 (9th Cir. 1992), cert. denied, 113 S. Ct. 1269 (1993) ("[s]ubstantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence") (citations omitted); Glover v. BIC Corp., 6 F.3d 1318, 1330 n.5 (9th Cir. 1993) (the court must consider all evidence and not just evidence favoring the nonmoving party). In Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990), the Supreme Court stated:

> [I]n considering a motion for [judgment as a matter of law], the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor").

Id. at 554-55 (citations omitted). See Moore v. Local Union 569 of the Int'l Bhd. of Elec. Workers, 989 F.2d 1534, 1537 (9th Cir. 1993), cert. denied, 114 S. Ct. 1066 (1994) (a motion for judgment as a matter of law "is proper when the evidence permits only one reasonable conclusion as to the verdict.") (citations omitted); Dean v. Trans World Airlines, Inc., 924 F.2d 805, 810 (9th Cir. 1991) (a motion for judgment as a matter of law "is appropriate only when the evidence, viewed in the light most favorable to the nonmoving party, could not reasonably support the verdict.") (citations omitted). See also Vaughn v. Ricketts, 950 F.2d 1464, 1468 (9th Cir. 1991); Cockrum v. Whitney, 479 F.2d 84, 85 (9th Cir. 1973).

To grant Hazelwood's motion would deprive plaintiffs of the jury's determination of the facts; thus, such motions are "granted cautiously and sparingly." 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2524 at 252 (1995). The court "must view the evidence most favorably to [plaintiffs] and give [plaintiffs] the benefit of all reasonable inferences that may be drawn from the evidence". Id. at 256-59. If the court finds evidence sufficient to support the jury's verdict, then Hazelwood's motion must be denied. Id. at 253-54. As noted, the court will not weigh the evidence, make credibility determinations, or substitute its judgment for that of the jury's. Id. at 255-56.

II. Jury instructions on negligence and recklessness

The jury received the following instruction regarding whether Hazelwood's conduct was negligent the night of the grounding:

> Negligence is the failure to use reasonable care. Reasonable care is that amount of care that a reasonably prudent person would use under similar circumstances. Negligence may consist of doing something which a reasonably prudent person would not do, or it may consist of failing to do something which a reasonably prudent person would do. A reasonably prudent person is not the exceptionally cautious or skillful individual, but a person of reasonable and ordinary carefulness.

> In this case, you must decide whether defendant Hazelwood used reasonable care under the circumstances.

Phase I Jury Instruction No. 21.

Upon finding Hazelwood acted negligently, the jury also found that Hazelwood's negligence was a legal cause of the grounding. Regarding legal cause, the jury was instructed as follows:

> A legal cause of an occurrence is an act or failure to act which is a substantial factor in bringing about the occurrence. In order to determine that particular conduct was a substantial factor in bringing about the grounding of the Exxon Valdez, you must find by a preponderance of the evidence that it is more likely true than not true that:
>
> (1) the grounding would not have occurred but for that conduct; and
>
> (2) the conduct was so important in bringing about the grounding that a reasonable person would regard it as a cause and attach responsibility to it.
>
> This does not mean that the law recognizes only one legal cause of an occurrence, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause an occurrence; and in such a case, each may be a legal cause.

Phase I Jury Instruction No. 22.

The following instruction was given regarding recklessness:

> In order for conduct to be in reckless or callous disregard of the rights of others, four factors must be present. First, a defendant must be subjectively conscious of a particular grave danger or risk of harm, and the danger or risk must be a foreseeable and probable effect of the conduct. Second, the particular danger or risk of which the defendant was subjectively conscious must in fact have eventuated. Third, a defendant must have disregarded the risk in determining how to act. Fourth, a defendant's conduct in ignoring the danger or risk must have involved a gross deviation from the level of care which an ordinary person would use, having due regard to all the circumstances.
>
> Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

Phase I Jury Instruction No. 28.[4]

III. Substantial evidence regarding Hazelwood's conduct[5]

(a) Hazelwood left the bridge

Hazelwood argues that substantial evidence does not exist to support a finding that his conduct was either negligent or reckless the night of the grounding. Hazelwood argues that a reasonable person would not have foreseen any risk in leaving the bridge in the command of Cousins and that leaving the bridge did not create a grave danger or risk of harm. Hazelwood argues that his departure from the bridge was not a gross deviation from appropriate standards of conduct and that there was no evidence that he was subjectively conscious of a grave risk of harm.

It is not disputed that Hazelwood turned the Exxon Valdez out of the traffic lane to avid ice, headed the ship into the direction of Bligh Reef, gave certain navigation instructions to Third Mate Cousins, and left the bridge. Several minutes later, the supertanker ran aground.

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[4] Hazelwood devotes several pages of his brief to the curious argument that maritime law uniformly rejects punitive damages. Hazelwood's argument is directly contrary to Protectus Alpha Navigation Co., Ltd. v. North Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985), which holds that "[p]unitive damages are available under the general maritime law." Id. at 1385 (citations omitted).

[5] The court has reviewed the relevant facts in pretrial proceedings, during the trial, and in post-trial motion practice. All the facts need not be repeated here, although pertinent facts will be discussed when warranted.

Cousins was to turn back into the traffic lane when the vessel came abeam of Busby Island light. The turn should have commenced two minutes after Hazelwood left the bridge, but Cousins did not engage the turn until approximately 8½ minutes after Hazelwood left the bridge and 6½ minutes after the Exxon Valdez came abeam of Busby Island light. By that time, it was too late to avoid running aground at Bligh Reef.

The jury heard evidence that Cousins was a highly regarded mate who had been on the bridge an previous Prince William Sound voyages. The jury also heard evidence that Hazelwood carefully instructed Cousins on when and how to make the turn at Busby Island and that Cousins reviewed the chart and radar images before Hazelwood left the bridge. Hazelwood presented evidence that he would not have left the bridge had Cousins not consented. For these reasons, Hazelwood argues that a reasonable person could not have foreseen the danger nor believed that a significant risk of harm existed.

The jury also heard evidence that the conning instructions were vague, although Hazelwood argues that he purposely allowed Cousins certain discretion. The jury heard evidence that Hazelwood and Cousins referenced a different spot as the point where the turn was to commence. The jury heard evidence that Cousins had never been left alone when heading toward a reef and that helmsman Kagan was known to be unreliable. Evidence was submitted that Hazelwood should have checked with Cousins after two minutes when the turn had not commenced. The jury also heard disputed evidence on whether Cousins was fatigued and whether there was a pilotage requirement for the specific waters. Additionally, the jury heard disputed evidence on whether it was the Master's duty to remain on the bridge during the entire Prince William Sound transit.

The evidence must be considered in the light most favorable to plaintiffs. Credibility determinations, weighing of the evidence, and the drawing of legitimate inferences are jury functions. Given applicable standards for deciding a motion for judgment as a matter of law, and the above evidence, in particular that the turn was several minutes late and that supertankers respond slowly to the helm, the court finds that a reasonable jury could have found that Hazelwood was both negligent and reckless. Hazelwood knew that Bligh Reef was a "very nasty spot", yet he remained off the bridge even though the vessel was several minutes late in turning. At the very most, Hazelwood has shown that it is possible to draw two inconsistent conclusions from the verdict, but that is not enough to grant judgment as a matter of law.[6] The evidence was sufficient to support a verdict that Hazelwood negligently and recklessly left the bridge and that leaving the bridge was a legal cause of the grounding.[7]

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[6] The parties dispute whether Hazelwood adequately informed the Coast Guard of his intentions when he left the traffic lane. The manner in which Hazelwood notified the Coast Guard did not cause the grounding, though the jury may have considered it in determining whether Hazelwood was intoxicated.

[7] The parties also offered disputed evidence over whether Cousins was fatigued and, if so, whether Hazelwood left a fatigued Cousins on the bridge in violation of the "six hour

(b) Alcohol impairment

It is not disputed that Hazelwood consumed alcohol on March 23, 1989. The amount he drank is uncertain, but it was the jury's responsibility to judge the credibility of witnesses who allegedly saw Hazelwood drink. The jury heard evidence that Hazelwood did not appear intoxicated, and that he behaved appropriately both before and after the grounding.[8] On the other hand, there was evidence that Hazelwood's blood alcohol level was .061 at 10:50 a.m. on March 24, 1989, and .241 at the time of the grounding. Hazelwood disputed the blood alcohol evidence, but it is the jury's function to weigh the evidence and draw legitimate inferences therefrom.

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rule". 46 U.S.C. § 8104. The evidence regarding fatigue is sufficient to allow reasonable minds to reach inconsistent conclusions.

The parties also dispute whether Hazelwood violated Exxon policy when he left the bridge. Hazelwood argued that Exxon policy permitted him to use his discretion regarding when he should be on the bridge. Plaintiffs offered evidence that at least two officers were required to be on the bridge. When all of the evidence is viewed in the light most favorable to plaintiffs, the jury could have found that Hazelwood was negligent and reckless the night of the grounding regardless of how it considered Exxon policy on manning the bridge.

[8] After Cousins belatedly turned the vessel, he reported to Hazelwood the presence of ice in the traffic lanes. Plaintiffs presented evidence that Hazelwood should have returned immediately to the bridge and that his failure to do so is evidence of alcohol impairment. Hazelwood argues that Cousins had assured him that he could handle the situation. The evidence allows reasonable minds to reach inconsistent conclusions on whether Hazelwood's failure to return to the bridge upon the report of ice in the traffic lanes establishes alcohol impairment.

Hazelwood challenged the validity of the blood test, offering evidence that there were breaks in the chain of custody and threats to the integrity of the specimens. Dr. Peat of ChemWest, the laboratory which tested the specimens, testified that the blood samples had hemolyzed, although sometime after the tests were made.[9] Plaintiffs submitted evidence that the specimens were not compromised despite evidence of mishandling. Here again, the jury had the opportunity to weigh the evidence and draw legitimate inferences from the facts. In viewing the evidence in the light most favorable to the plaintiffs, the most that Hazelwood can show is that reasonable minds might reach two inconsistent conclusions. That alone is insufficient to grant a motion for judgment as a matter of law.

The jury also heard disputed evidence on whether Hazelwood was alcohol dependent. Hazelwood argues that plaintiffs did not present substantial evidence that he was an alcoholic. However, the jury heard evidence that he entered an alcohol rehabilitation program, participated in Alcoholics Anonymous, and that his wife attended Al-Anon. There was evidence that Hazelwood lied about drinking and had a faulty memory after drinking. There was also evidence that Hazelwood relapsed after treatment and drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers. When viewed in the light most favorable to plaintiffs, the most that Hazelwood could establish is that reasonable minds could reach two inconsistent conclusions on whether he was alcohol dependent.

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[9] The court considered this issue in detail in denying Exxon and Hazelwood's motion for new trial based on newly discovered evidence (validity of blood tests). Order No. 265.

The evidence was sufficient to support a jury verdict that Hazelwood's alcohol impairment on March 23, 1989, was negligent and reckless and a legal cause of the grounding.[10]

IV. Conclusion

The court cannot ignore the heavy burden which Hazelwood must meet to warrant granting a motion for judgment as a matter of law. As the court has noted, "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, . . . and all justifiable inferences are to be drawn in [plaintiffs'] favor'". Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55 (1990) (citations omitted). Upon consideration of the above standard, Hazelwood cannot establish that the only possible conclusion is that Hazelwood's conduct was neither negligent nor reckless and the legal cause of the grounding. At the very most, Hazelwood has only shown that reasonable minds could reach two inconsistent conclusions. When reasonable minds could differ over the verdict, then judgment as a matter of law is improper. Venegas v. Wagner, 831

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[10] At trial, plaintiffs argued that Hazelwood violated the "four hour rule". 33 C.F.R. § 95.045(a). The rule states that a crew member should not perform duties within four hours of consuming alcohol. Hazelwood argues that plaintiffs did not have any evidence to show that he was impaired by alcohol and, therefore, that he could not have violated the four hour rule. There was substantial evidence, however, for the jury to find that Hazelwood was impaired by alcohol quite apart from the question of whether he violated the four hour rule.

F.2d 1514, 1517 (9th Cir. 1987). The jury's verdict regarding Captain Hazelwood was supported by substantial evidence, and Hazelwood's motion for judgment as a matter of law (Phase I issues) is denied.

DATED at Anchorage, Alaska, this 27th day of January, 1995.

/s/ ____________________

United States District Judge

cc: Lloyd Benton Miller
Douglas Serdahely
David Ruskin

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ) Case No. A89-095 Civil (HRH) (Consolidated)

THIS DOCUMENT RELATES TO ALL CASES)

AMENDED JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict on each of three phases of trial.

IT IS ORDERED AND ADJUDGED that:

1. As compensatory damages, the members of the subclasses listed on Exhibit A and the direct action plaintiffs listed in Exhibit B are awarded as against defendants Exxon Corporation (D-1), Exxon Shipping Company (D-2) and Joseph Hazelwood (D-7), jointly and severally, the total sum of $19,590,257.00.

2. For pre-judgment interest on the award of compensatory damages, the members of the subclasses listed on Exhibit A and the direct action plaintiffs listed in Exhibit B are awarded as against defendants Exxon Corporation (D-1), Exxon Shipping Company (D-2) and Joseph Hazelwood (D-7), jointly and severally, the total sum of

$37,971,043.91.

3. The mandatory punitive damages class (consisting of all persons or entities who possess or have asserted claims for punitive damages against defendants Exxon Corporation (D-1) or Exxon Shipping Company (D-2) that arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill) is awarded punitive damages as follows:

A. against defendant Joseph Hazelwood (D-7), the sum of $5,000.00.

B. against defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2), jointly and severally, the sum of $5,000,000,000.00.

4. The awards set forth in paragraphs 1, 2 and 3, above, shall bear interest from and after September 24, 1996, in accordance with 28 U.S.C. § 1961.

5. Plaintiffs shall recover their costs of this action, with the exception of costs attributable to Phase IV.

6. All claims of all parties not otherwise adjudicated in paragraphs 1, 2, 3, 4 and 5, above, are dismissed.

DATED this 30th day of January, 1997.

/s/ Michael Hall
Michael D. Hall
Clerk of the Court
By: /s/
Deputy Clerk

Approved for entry

/s/ H. Russel Holland
Hon. H. Russel Holland
United States District Judge

*Costs taxed in favor of plaintiffs and against defendants in the amount of $415,354.66. 1-30-97 tm

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:)
) Case No. A89-095-CV
The EXXON VALDEZ) (HRH)
) (Consolidated)
)
THIS DOCUMENT)
RELATES TO ALL)
CASES)
)

DECLARATION OF SAMUEL J. FORTIER

Samuel J. Fortier declares as follows:

1. I am admitted to practice before this Court in these proceedings, and am an attorney for Plaintiffs. I make this Declaration of my own personal knowledge, and if called to do so, I could, and would, testify competently to the facts set forth below.

2. I have personal knowledge of the TAPL Fund proceedings from representing the Native corporations, Chenega Corporation, Port Graham Corporation, and English Bay Corporation, before the Fund. I note from my own personal knowledge that thousands of dollars were expended retaining scientists, appraisers and archeologists. The Native Corporations, together with their consultants and lawyers, also participated in a day-long presentation of evidence in Newark, New Jersey before retired Judge John Gibbons (The TAPL Fund Administrator), Fund lawyers and Fund consultants.

3. Exxon made its own appearance before the

Fund and argued that the land damages claims were by and large meritless and the Native Corporations' claims for damages to cultural sites were frivolous.

4. Following the Fund Administrator's awards to the Native corporations (then totaling over $20 million dollars) the Native Corporations appealed the decisions to this court in 1992. Exxon sought to intervene, and following motion practice, the court denied Exxon's motion.

5. Subsequently, following the 1994 trials, the TAPL Fund sued Exxon in order to recover claims subrogated to it upon payment of such claims, including the Native Corporations' claims. In December 1994, shortly before Christmas, Exxon sued the Native Corporations and virtually every other successful Fund claimant, asserting, *inter alia* that claimants were liable to the Fund, and that Exxon was not so liable. With respect to the Native Corporations, Exxon also asserted that they had fraudulently misrepresented their damages to the Fund.

6. In addition, Exxon also sent letters to each of the three Native Corporations instructing each not to distribute any of the funds recovered from the TAPL Fund to Native shareholders. Exxon asserted that it had a lien on such funds. That letter was submitted within a week after the Native Corporations were served with the third-party complaint, described in ¶ 6, above.

7. The third-party litigation was finally resolved in February 1996, when the Native Corporations and the Fund entered into a settlement in which the Native Corporations agreed to pay the Fund a portion of punitive damages.

8. I hereby declare under penalty of perjury that

the foregoing is true and correct. I understand that this Declaration is made subject to the provisions of 28 U.S.C. § 1746, relating to unsworn declarations.

DATED this 16 day of July, 2002.

s/ Samuel J. Fortier
Samuel J. Fortier

APPENDIX Y

TAPAA LEGISLATIVE HISTORY

For the Court's convenience, the following legislative history materials relating to the consideration and passage of the Trans-Alaska Pipeline Authorization Act, which are cited in Plaintiffs' Memorandum, are attached:

No.	Document
1.	U.S. Dep't of the Interior, Final Environmental Impact Statement, Proposed Trans-Alaska Pipeline (1972) (excerpts)
Proposed Trans-Alaska Pipeline: Hearings Before the Department of Interior:	
2.	Statement of Governor William Eagan (excerpts)
3.	Statement of ADF&G Commissioner Wallace Noerenberg (excerpts)
4.	Exhibit 56(a): Letter of Cordova District Fisheries Union Chair Knute Johnson
5.	Exhibit 56(b): Statement of Pr. Chehalis Packers, Inc. Superintendent Ken Roemhildt
6.	Exhibit 56(c): Cordova District Fisheries Union News Release & Telegram of Seward Chamber of Commerce Board Chair Linne Bardardson
7.	Exhibit 143: Letter of Janet O'Meara

TAB 1

UNITED STATES DEPARTMENT OF THE INTERIOR

FINAL

ENVIRONMENTAL IMPACT STATEMENT
PROPOSED TRANS-ALASKA PIPELINE

VOLUME 1 0F 6

INTRODUCTION AND SUMMARY

PREPARED BY A SPECIAL INTERAGENCY TASK FORCE

FOR THE

FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT

IN

FULFILLMENT OF SECTION 102(2)C

OF THE

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

1972

Summary Sheet

( ) Draft (X) Final Environmental Statement

U.S. Department of the Interior

1. Type of Action: (X) Administrative ( ) Legislative

2. Brief Description of Action: Applications from Alyeska Pipeline Service Company for a 48-inch oil pipeline right-of-way across Federal lands in Alaska

between a point south of Prudhoe Bay on the North Slope and Port Valdez, a port on the south coast. The company would design, construct, operate, and maintain the 789 mile long pipeline system.

3. Summary of Environmental Impact and Adverse Environmental Effects: Environmental impact would result from the construction, operation, and maintenance of the proposed oil pipeline system (including the accompanying haul road), of a gas transportation system of some kind, from oilfield development, and from operation of the proposed tanker system. Because of the scale and nature of the project, the impact would occur on abiotic, biotic, and socioeconomic components of the human environment far beyond the relatively small part (940 square miles out of 572,000 square miles of land area) of Alaska that would be occupied by the pipeline system and oilfield. The impact paths between the project and the affected parts of the environment would be of varying complexity and length, and would involve linkage factors that are not all well known.

Of the impact effects that would occur, some, like those that would be associated with the wilderness intrusion and public access north of the Yukon River, could be considered either beneficial or adverse, depending on the value framework used. Some effects would occur on socioeconomic parts of the environment which many would classify as beneficial. Most of the remaining impact effects would in some way decrease the existing quality of the parts of the environment affects and would in that sense be adverse. Such effects would occur on both natural physical systems and on the superposed socioeconomic systems.

Some impact effects are unavoidable and can be evaluated with some certainty. Other effects would result from the occurrence of a threatened event which impacts the oil transportation system; these cannot be evaluated with as much certainty.

The principal unavoidable effects would be those disturbances of terrain, fish and wildlife habitat, and human environs during construction, operation, and maintenance of the oil pipeline, haul road, oil field, and of the gas pipeline that would probably follow; the effects of the discharge of effluent from the tanker ballast treatment facility into Port Valdez and of some indeterminable amount of oil into the ocean from tank cleaning operations at sea; and those associated with increased human pressures of all kinds on the environment. Other unavoidable effects would be those related to increased State and Native corporation revenues; accelerated cultural change of the Native populace; and the extraction of the oil and gas resource.

Changes in stable terrain caused by construction and maintenance procedures could produce rapid and unexpected effects, including slope failure, modifications of surface drainage, accelerated erosion and deposition, and other terrain disturbances as a result of the thawing that would follow destruction of the natural insulating properties of tundra vegetation. Placement of gravel pads and berms would especially affect surface drainage. The excavation of borrow materials and pipeline ditch in and near flood plains and stream beds would also cause some changes in stream erosion and deposition. About 83 million cubic yards of construction material, mostly gravel, would be required. The general noise, commotion, and destruction of local habitat could cause many species of wildlife to leave the construction sites, which amount to an area of about 60 square miles for the oil pipeline.

Socioeconomic effects during construction would include accelerated inflation; increased pressures on existing communities for accommodations and public services; and job opportunity for perhaps 25,000 persons at peak times (including multiplier effects), but unemployment would probably continue to be relatively high.

The main operational disturbances would be heat loss and from the hot-oil pipeline and resulting changes in permafrost when the ice present (particularly if in segregated masses) thaws and causes possible instability and differential settlement; some barrier effects of aboveground oil pipeline sections on large mammal (especially caribou) migrations in the Brooks Range, Arctic Coastal Plain, and Copper River Basin areas and similar effects of any aboveground sections of gas pipeline that would eventually be built; and adverse but unquantifiable effects on the marine ecosystem of Port Valdez and perhaps Valdez Arm and Prince William Sound proper from the discharge of an estimated 2.4 to 26 barrels of oil per day from the ballast treatment facility at the terminal and on the marine ecosystem in general from discharge of any indeterminate amount of oil from tank cleaning operations at sea. These last effects would in turn affect the fishing industry to some unquantifiable extent.

Other main operational effects would include the gradual conversion of about 880 square miles of the

North Slope wildlife habitat to an area with widely spaced drilling pads, roads, pipelines, and other structures with accompanying adverse effects on the tundra ecosystem; the many diverse effects on wilderness, recreational resources (including hunting and fishing), and general land use patterns that would result from increased public access to the relatively inaccessible region north of the Yukon River; acceleration of the cultural change process that is already underway among Alaska Natives and some adverse modification of local Native subsistence resource base as a result of secondary effects; and State revenues of about $300 million per year from extraction of the oil and subsequent expenditures of those revenues for public works and activities throughout Alaska. Immediately after the end of construction unemployment would probably increase.

The main threatened environmental effects would all be related to unintentional oil loss from the pipeline, from tankers or in the oil field. Oil losses from the pipeline could be caused by the direct effects of earthquakes, destructive sea waves, slope failure caused by natural or artificial processes, thaw plug instability (in permafrost), differential settlement of permafrost terrain, and bed scour and bank erosion at stream crossings. Any of these processes could occur at some place along the route of the proposed pipeline. Oil loss from tankers could be cased by accidents during transfer operations at Valdez and at destination ports like Puget Sound, San Francisco Bay, and Los Angeles, and by tanker ship casualties due to collision, grounding, ramming, or other causes.

The potential oil loss from pipeline failure cannot be evaluated because of the many variables involved, but perfect no-spill performance would be unlikely during the lifetime of the pipeline. Various models of oil loss from the tanker system indicate that an average of 1.6 to 6.0 barrels per day could be lost from the whole system during transfer operations and an average of 384 barrels per day or about 140,000 barrels per "average" year could be lost from tanker casualties. This modeled amount would occur in incidents of undetermined size at unknown intervals and at unknown locations. This is considered to be a maximum or "worst case" casualty discharge volume.

Oil spilled from the pipeline as a consequence of one of the threats mentioned, could, depending on location, volume, time of year, and other factors, result in adverse effects on all of the biota involved; not all of the linkage factors are know, but vegetation, waterfowl, and freshwater fisheries could all be affected and in turn affect Native subsistence use to some unquantifiable extent.

Oil spilled in tanker casualties or transfer operations would affect the marine ecosystem to an extent that would be determined by many variable factors. The salmon and other fishery resources of Prince William Sound would be especially vulnerable to such spills. Over the long term, however, persistent low-level discharge from the ballast treatment facility and tank cleaning operations at sea could have a greater adverse effect than could short-lived larger spills.

The probable eventual construction and maintenance of a gas pipeline would, if it were not in the oil pipeline corridor, result in a separate corridor with some of the same effects described for the proposed oil pipeline corridor.

4. Alternatives Considered:

A. Alternatives available to the Secretary: granting, denial, and deferral.

B. Alternative routes and transportation systems: 1) Pipelines from Prudhoe Bay to alternate ice-free ports in southern Alaska Redoubt Bay, Whittier, Seward, Haines; 2) Marine transport systems ice-breaking tankers and subsurface tankers; 3) Pipelines to terminal ports on Bering Sea: offshore and overland; 4) Tans-Alaska-Canada pipelines: coastal offshore and onshore routes to Mackenzie River delta and up the valley to Edmonton; inland route across eastern Brooks Range to Fort McPherson and up the Mackenzie valley to Edmonton; and across central Brooks Range (same as part of proposed route) to Fairbanks, Big Delta, and east along Alaska Highway and other corridors to Edmonton; 5) Railroad and highways: Alaska Railroad extension from Prudhoe Bay to southern Alaska port and a new trans-Alaska-Canada railroad route and highway system development; 6) Other oil transportation schemes: land, sea, air, and in other energy forms.

* * *

be offset somewhat by the improved economic status of Natives employed in pipeline-related activities. Natives in areas far from the project would be less adversely affected economically but would feel a rise in prices primarily during the period of construction.

The threat of adverse impacts on the Native subsistence resources would come primarily during the operational stage of the proposed project. These could stem from (1) damage to subsistence resources resulting from losses oil, (2) increased recreational activities and other competition on lands close to the transport corridor, or (3) possible shifts in migratory patterns of caribou.

The greatest threat would be that of potential oil spillage, especially in a major river. Local water supplies, fish and wildlife harvests, and transport corridors could be adversely affected. Such impacts on the resource base, depending on the extent of damage and on the extent of Native dependence upon the subsistence base in the affected area, could be detrimental to the livelihood of the local population. An accidental spill could be much more significant in the relatively well populated Yukon River watershed than in the Copper and Lowe River systems, where the reliance on a subsistence economy is less, both in terms of numbers of villages and numbers of Natives.

Commercial Fisheries. - - For many Alaska communities fish are the sole product produced locally and sold outside the area. For these communities, the commercial fishing industry is the principal base that supports the remainder of the local economy. The economic impact of the pipeline upon commercial fisheries would likely occur in three principal ways: (1) biological effects causing reduced catches, unmarketable rates, or closure of fisheries due to oil pollution; (2) physical effects, such as gear losses and interruptions in fishing activities caused by tanker traffic; and (3) diversion of capital and labor.

The salmon harvest south of Prince William Sound to California was worth about $25 million to the fishermen in 1969 and it is likely that this resource would suffer some damage from population associated with the proposed project. The State of Alaska has estimated that the maximum financial loss to salmon fishermen resulting from maximum toxic effects of oil pollution in Valdez Arm could amount to 400,000 per year. Damage would be most likely to occur in the approaches to Prince William Sound, Puget Sound, and San Francisco Bay, where out-migrating feeding salmon would be most abundant and where accidental spillage rates could be highest. Harvest of other stocks of fish that spawn or rear in estuarine systems traversed by the tankers could also be affected. Herring eggs and larvae appear particularly vulnerable to the effects of oil pollution and production from Valdez Arm could be affected by chronic oil pollution associated with the terminal operation. The effects of project operations upon the current and potential harvest of other fin-fish resources cannot be estimated because of the low level of existing information.

Tainting due to spills of crude oil have caused extensive damage to harvests of oysters and clams in many areas. The persistence of the oily taste varies considerably, but a crude spill could close an area or at least an entire season. Even though tainting of a fishery product might occur infrequently and affect only a localized area, a single bad experience could adversely affect marketing of similar fishery products from adjacent areas over an extended period of time. Such an indirect effect, resulting in loss of market advantage, could be more damaging to the fishermen and processor than extensive direct mortality of the resource. Markets once lost for this reason might be difficult to regain.

Crude oil spills can result in closure of both sport and commercial crab fishing, and where the oil settles on the sea bottom, the period of the closure may be extended. It is likely that the commercial and recreational harvest of Dungeness crabs in Port Valdez would be lost as a result of normal terminal operations.

The harvest of clams, oysters and Dungeness crabs south of Prince William Sound have annually yielded about $17 million. It is likely that the local losses of these fisheries would occur as a result of the marine transport of oil, although the extent of these losses cannot be predicted.

The tanker traffic through Prince William Sound and movements by other vessels associated with the operation of the marine terminal would interfere to some extent with fishing operations. Such interferences would be more severe in a tanker traffic corridor, tanker anchorages, the swinging area for pilot transfers, and in Port Valdez. Fishing operations in Prince William Sound include seining, trolling, longlining, drift and set gill netting, and pot fishing. The establishment of a

* * *

UNITED STATES DEPARTMENT OF THE INTERIOR

FINAL

ENVIRONMENTAL IMPACT STATEMENT

PROPOSED TRANS-ALASKA PIPELINE

VOLUME 3

ENVIRONMENTAL SETTING BETWEEN PORT VALDEZ, ALASKA, AND WEST COAST PORTS

PREPARED BY A SPECIAL INTERAGENCY TASK FORCE

FOR THE

FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT

1972

* * *

reviewed below.

Prince William Sound

Historically, the principal fishery in the Prince William Sound area has been for salmon. More than 300 watersheds are utilized by salmon for spawning along the 3,000 miles of coastline on islands and mainland in this area. Immediately adjacent on the east of the Sound, and included in this discussion, the deltas of the Copper and Bering Rivers extend along the coast for about 50 miles. The economy of this area depends almost entirely on commercial fishing, the processing of the catch, and related activities. Fishermen here were paid nearly $7 million for their catches in 1969, exclusive of halibut (Alaska Department of Fish and Game, 1969b). The estimated value of products made from these landings amounts to about $13.0 million and totaled more than $90.0 million during the past decade. Exploratory fishing data and past harvest records indicate that presently underutilized and unutilized species could sustain harvests estimated to be worth an additional $4.2 million to $11.4 million to the fisherman (State of Alaska, 1971, p. 31-34).

In Prince William Sound proper, pink salmon usually comprise about 75 percent of the annual salmon catch, whereas chum and sockeye salmon usually account for about 15 percent and 10 percent of the total respectively (Noerenberg, 1961). Catches in recent years have averaged about 3.8 million salmon of all species, but this figure could be increased by about three-quarters of a million fish by suing catch data from the years prior to the 1964 earthquake which destroyed significant amounts of inter-tidal spawning area used by pink and chum salmon (Myren, 1971, p. 40). Pink salmon production in Prince William Sound does not have the marked * * *

TAB 2

DEPARTMENT OF INTERIOR

In the Matter of

Proposed Trans-Alaska Pipeline

Place: Washington, D.C. Pages: 1 thru 250
Date: February 16, 1971 Volume:

* * *

one voice at these hearings and for that reason, I would ask you to place my statement in the record and permit the Governor of Alaska to speak for Alaska here today.

STATEMENT OF THE HONORABLE WILLIAM A. EGAN,

GOVERNOR OF ALASKA

GOVERNOR EGAN: Thank you, Senator Stevens.

Mr. Secretary, just a few short years ago, the Congress of the United States conferred on the people of Alaska, with their solemn consent, the sovereign responsibility of statehood. It did so not only in recognition of the need for social, political and economic self-government in the territory, but in acknowledgment of the wisdom of the people resident in Alaska in the determination of proper and wise management of public land.

As a part of the compact upon which Alaska became a state of the United States, the United States transferred to the State of Alaska the right to select 103 million acres of land out of the 365 million acres which comprise the total acreage of the state.

In accepting this grant, the State and its people, by the constitution adopted by us in 1956 in anticipation of statehood, disclaimed all right or title in or to any property, including fishing rights, the right of title to which may be held by an Indian, Eskimo or Aleut, or community thereof, as that right or title is defined in the act of admission.

* * *

Alaskan route, and ill-timed, because of its far greater environmental complications, its economic disadvantages and unavoidable adverse geo-political implications.

The Valdez pipeline travels through a zone experiencing much more recent serious seismic disturbance than the Canadian route. However, the dangers to a carefully planned pipeline from seismic disturbance should not be exaggerated either. The pipelines that pass from the Kenai gas fields to Anchorage were unaffected by the great earthquake that nearly tore Anchorage asunder on Good Friday seven years ago. That was the most violent disturbance in the history of North America. We know what earthquakes can do and we expect that the technical stipulations will ensure that the terminal facility is constructed to withstand earthquakes of the magnitude of the 1964 tremor.

The real environmental concern we had to assess was whether an all-pipeline route posed a lesser hazard than a combined pipeline-tanker route.

In considering this question, we had to evaluate the record of the tanker industry worldwide.

Several factors have led us to consider tanker transportation acceptable. First, as I have already mentioned, I expect practices in the Alaska trade to be first, not last or average, in world trade in their respect for safety and ecological standards.

I have already mentioned our strengthened ballast * * *

TAB 3

* * *

very real way and we appreciate your presentation. Please be assured it will receive full consideration.

Thank you.

HEARING OFFICER MESCH: Do you want your statement as an exhibit?

Let's mark Mr. Anderson's statement as Exhibit No. 3

(Exhibit No. 3 was marked.)

HEARING OFFICER MESCH: The next group of witnesses are representatives of the State of Alaska and since I have no names as such, will the first witness please come forward and state his name and identify himself for the reporter.

STATEMENT OF WALLACE H. NOERENBERG, COMMISSIONER DEPARTMENT OF FISH AND GAME, STATE OF ALASKA

COMMISSIONER NOERENBERG: Mr. Chairman, my name is Wallace H. Noerenberg. I am the Commissioner or Head Administrative Officer of the Department of Fish and Game of the State of Alaska. I hold a B.S. degree in fisheries from the University of Washington, College of Fisheries, and have had 23 years of experience with Alaskan fish and game resources.

I might say I am the first of seven witnesses for the State of Alaska who will give short oral summaries of their written reports which will be submitted.

My department is one of the nation's largest State fish and game agencies with a current fiscal year budget exceeding $10 million. The professional biological and * * *

* * *

The individual pled guilty and was fined $700.

A contractor at one of the construction camps was arrested and fined for dumping raw sewage into one of our pristine streams in violation of 16.05.870 of the Alaska Statutes. This violation was detected June 12, 1970, at the construction camp on the Kuparuk River, north of the Brooks Range on the Arctic Slope of Alaska. The camp was using a 4" sewer pipe to transport raw sewage to the river. Water samples revealed a high pollution rate. The company was fined $1,000, which is the maximum under this statute, and was ordered to take steps to remedy pollution at the Kaparuk River.

To base the assumption of acceptable damages on strict adherence to rules, regulations or stipulations is presenting a false picture. It would be more to the point to base a final assumption upon an "acceptable level of compliance".

Next, I am going to impacts on fish and wildlife. The choice of Prince William Sound as the terminus will require new and stronger measures on oil spill control. There are important fish and wildlife resources there which must be protected from spill damages.

The fish and wildlife resources of Prince William Sound are of major importance to Alaska and the nation. Presently the economic basis of the principal settlements, Cordova, Valdez and the native village of Tatitlek are almost entirely dependent upon these resources. Recent evaluations of income from commercial operations in the fisheries alone indicated average values to fishermen of $4 million per year and first wholesale values of products produced of $9.9 million per year. Estimates of the comparable value of recreational fisheries, hunting and trapping activities are not precisely known, but would value at hundreds of thousands of dollars per year.

Now, the commercial salmon fishery of the area is the dominant factor in the area's economy. The section immediately adjacent to the proposed Valdez pipeline terminal; i.e., Valdez Arm and Port Fidalgo are extremely critical elements in salmon production for the Sound and State as a whole. As much as 13 percent of the pink salmon and nine percent of the chum salmon caught in the entire Alaska fishery have been produced in this NE section of the Sound in some recent years. Salmon are found in the local marine environment nearly 12 months of the year -- thousands of feeding immature king salmon mid-winter, hundreds of thousands of adult pink, chum, coho and red salmon migrants in the June-September period and hundreds of millions of fry and fingerling salmon during late spring and summer months. Extremely important is the fact that in excess of 70 percent of the eggs deposited by salmon adults in the streams are placed in the intertidal zone which twice each day are flooded by the fiord tidal waters to be used by the proposed tanker operations.

Char, cutthroat, trout, herring and various ground fishes are also important elements in the Sound's fish populations. Shellfish resources of moderate importance include shrimp, oysters, king, tanner and dungeness crab. These, as well as the abundant claim resources, would be greatly affected by large spills or chronic small incidents.

Big game species, such as brown bear, black bear, Sitka black-tail deer and wolverine are dependent upon the littoral zone in this area. During severe winters with heavy snowfall, deer primarily subsist upon food which is deposited upon open tide-swept beaches.

Furbearing animals, such as land otter, mink, weasel and wolverine are also critically dependent upon the littoral zone for winter survival. All of these species could be seriously jeopardized by pollution which might effect either the habitat, primary food sources, or food chain organisms, which these animals depend upon. There are conservatively 1,000 to 1,500 sea otters using the kelp beds of the Sound, which lie from a few yards to 1/8 mile off the beaches, although sea otter pods are frequently seen three-four miles offshore in many areas of Prince William Sound.

Waterfowl are year round residents of this area and spend much of their time each day searching the tideline for food. The immediately adjacent Cooper River Delta is an * * *

TAB 4

UNITED STATES

DEPARTMENT OF THE INTERIOR

TRANS-ALASKA PIPELINE HEARINGS

Supplemental Testimony

Volume VII

Exhibits 40 - 68

USDI - TAPS HEARINGS - 2/71
SUPPLEMENTAL TESTIMONY
EXHIBIT 56(a)

Cordova District Fisheries Union

Headquarters: Box 939, Cordova, Alaska
Seattle Office: 34 Union Street

February 24, 1971

Secretary Rogers Morton
U.S. Department of the Interior
Washington, D.C.

Dear Secretary Morton:

The Cordova District Fisheries Union has been very worried about the threat of oil pollution in Prince William Sound in the Gulf of Alaska with the marine transportation of oil from Valdez to the state of Washington.

The Cordova fisherman feel that marine shipment of oil from Prince William Sound to Washington will decimate the fisheries. It is only a matter of how long it will take for the fisheries to be decreased--especially the pink salmon which spawn in Prince William Sound.

Frequently we hear of oil tanker collisions and oil spills from offshore platforms. It is apparent by the now available studies of oil pollution impact on marine life that damage to fish and wildlife is a result of such spills. The environmental impact study mentions briefly such likely damages. We feel that there are too many unknowns about the results of oil spills and the possible disastrous consequences of such pollution on marine life.

Because of our concern, we took action at a meeting on Thursday, February 18, 1971 as follows:

a. We favor the passage of SCR-8 because it is in the economic interest of the entire state to know about comparative costs and possible benefits to the state of Alaska regarding a trans-Canadian pipeline route.

b. We oppose an oil terminus at Prince William Sound because of the proven hazards of oil transported by tankers.

c. This organization is not opposed to removal of oil from Prudhoe Bay. As a matter of fact, we want the oil to go all the way to continental U.S. by pipeline. We are opposed to partial shipment by pipeline and partial shipment by oil tanker.

The Cordova District Fisheries Union felt that we should give you a written statement of our reasons for the action we felt was necessary to take.

We would appreciate your support.

Respectfully yours,

CORDOVA DISTRICT FISHERIES UNION

s/ Knute A. Johnson
Knute A. Johnson, Chairman

TAB 5

USDI - TAPS HEARINGS - 2/71
SUPPLEMENTAL TESTIMONY
EXHIBIT 56(b)

STATEMENT DELIVERED AT THE BUREAU OF LAND MANAGEMENT HEARINGS,

Anchorage, Alaska - February 26, 1971

I am Ken Roemhildt, Superintendent of Pt. Chehalis Packers, Inc., a salmon and crab processing plan in Cordova.

I'm here today to speak in opposition to a Valdez pipeline terminus, or to one anywhere on Prince William Sound. Let me emphasize right from the start that I am not against the pipeline itself; only against the probably detrimental effects that a Valdez terminus would have on the fishing industry in Prince William Sound.

My objections fall into three major categories:

1. Lack of study of the problems associated with the marine transport of oil.
2. Probable adverse effects on the fishing economy of Prince William Sound and Cordova.
3. The possibility of alternate routes.

And now to detail my objections:

1. Lack of study of marine transportation problems. Your preliminary Environmental Impact Study is good, as far as it went. Unfortunately, the scope of its investigations stopped at the tank farm in Valdez, just where many of the really serious problems begin. As former Secretary of the Interior Hickel and others

have suggested, marine transportation of petroleum products is ten times as hazardous as transport by pipeline.

For instance, we all know that there will be loading spills at Valdez; there is no way to avoid them. Even if the surface accumulations of oil are cleaned up, and no one is guaranteeing that they can be, what effects will dissolved hydrocarbons or the oil that goes to the bottom have on the marine environment?

Or as another example, safe navigation of Prince William Sound, with its normal stormy weather, high winds, large tidal variations and numerous hazards to navigation cannot be assured. If tankers can collide beneath the Golden Gate Bridge or oil barges run aground at West Falmouth, Massachusetts, then a catastrophe of this nature could and undoubtedly will happen in Prince William Sound.

I understand from remarks made Wednesday that a study of these problems is being planned. I hope that it is comparable in depth to the study of the overland portion of the route.

2. Probable adverse effects on the fishing economy of Prince William Sound and Cordova.

Cordova's economy is solely dependent upon the fishing industry. Any adverse effect that marine transportation of oil may have on the Prince William Sound fishery will have a marked effect on Cordova's economy.

The Prince William Sound fishery is a substantial one, one that has been a consistent producer, and a consistent contributor to the State's economy for many years.

Pt. Chehalis Packers last year purchased raw fish products from 442 fishermen at a raw fish cost of nearly $2,000,000. In addition, we employed up to 100 cannery workers at our busiest times, with our payroll approaching $400,000. And Pt. Chehalis is only one of four major and several smaller canners in the Cordova area. Obviously this economy is a substantial one and more importantly, one that is based upon continually renewable resources.

As has been stated before, the effects of oil pollution on Prince William Sound's marine environment haven't been studies yet, but it seems that certain assumptions can safely be made.

First, pink salmon, the Sound's most economically important specie, spawn to a large extent in intertidal zones. Fry are also known to spend extended periods of time in intertidal zones. Consequently, they could easily be effected by an oil spill through eggs or fry being killed directly by the oil. Or should a spill occur when no eggs or fry are present, oil pollution of these intertidal zones, ineffective clean up or possible residues of clean up operations could all render an area unfit for future spawning. If a change in the silt content of a spawning bed can make it an inhospitable area for spawning, oil pollution can certainly do the same.

Second, crabs and clams are also a mainstay of our fishing economy. As bottom dwellers, these species will undoubtedly be hard hit, since many of the oil dispersants now in use only serve the purpose of sending the oil to the bottom, where both it and the oil can only do harm.

Third, we heard testimony on Thursday that a tanker holding area is being considered east of Knowles Head and Johnstone Point. This happens to be the exact area where the bulk of Cordova's Tanner or Snow Crab comes from. It isn't hard to see that thousand foot tankers and crab fishing aren't compatible in this area. The snow crab operation is a relatively new one, developed by my company and fishermen in an attempt to stimulate Cordova's otherwise dormant wintertime economy. The practical effect of this operation has been to put about $350,000 cash money into Cordova's wintertime economy, to reduce unemployment, and to provide income for fishermen, who as a group, are not eligible to draw unemployment.

Fourth, what effects will oil pollution have on the canning industry? Will we be forced to test every fish to determine that it is safe to can or freeze? Will costs be added to the already high price of our products because of oil pollution?

I might add here that it seems strange that the State Department of Fish and Game hasn't testified on the effects of oil pollution on fisheries. It is quite likely that they would have, had general knowledge been optimistic about oil's effect on marine life.

Many other unanswered (or even unasked) questions remain.

What recourse would fishermen and processors have against the oil people should a major disaster completely wipe out the Prince William

Sound fishery?

Simply, it boils down to this: We in the Prince William Sound fishery stand the chance of losing our livelihood either all at once or by slow strangulation. Cordova stands the chance of becoming a ghost town.

3. Alternate routes.

From previous testimony, it appears clear that there are several alternate routes; trans-Canada pipelines or a pipeline to Seward to mention only a few. This has been covered before by much more knowledgeable men than myself so I will pursue it no further at this time.

To recap:

I am not opposed to the pipeline itself, but only to a pipeline terminus in Prince William Sound.

My reasons are these:

1. No study has been made of marine transportation problems.

2. It will adversely affect Prince William Sounds fishery and economy.

3. Alternate routes are available.

Thank you very much, gentlemen, for your kind attention.

TAB 6

USDI - TAPS HEARINGS - 2/71
SUPPLEMENTAL TESTIMONY
EXHIBIT 56(c)

CORDOVA DISTRICT FISHERIES UNION
CORDOVA, ALASKA

NEWS RELEASE

Cordova fishermen Thursday afternoon voted overwhelmingly to support Senator Hammond's SCR 8 and indicated their intent to pursue any and all action necessary to protect and preserve their economic livelihood.

Thursday night the fishermen held an open public meeting in the high school gymnasium to inform all the citizens of Cordova of the seriousness of the problem of transferring hugh quantities of oil from pipeline to tanker and possible consequences of transporting this oil through Prince William Sound along the Pacific coast to Puget Sound. The possible hazards to the fishing industry was discussed should the oil be transported by the proposed routs. More than half the adult population of Cordova attended this meeting and many of them express their fear for the survival of the fishery resource in this area. A local businessman commented, "The only thing that could get a bigger turn-out than this could be another dock fire."

Ross Mullins, acting chairman of the public meeting, said the environmental impact data report devotes only a half page to Prince William Sound and dealt inadequately with the ramifications of the transfer of such quantities of oil from pipeline to tanker on the nearby coastal area. The fishermen are not against the pipeline, but we feel that there are too many unknowns about the results of oil spills, Mullins said. "Why add another potential polluter to an area of our environment about which very little is known?"

A Coast Guard Representative, speaking at the meeting, estimated oil tanker traffic at Valdez would be comparable in tonnage to what now passes through Rotterdam, Holland. "Valdez Arm presents some very serious navigational problems," Mullins said. An estimated 1400 tankers per year would be loading in Valdez, the Coast Guard representative said. There would be two tankers loading at all times.

Aside from the possibility of a calamitous tanker accident, fishermen and environmentalists have expressed worry about the inevitable day to day spillage at Valdez which, while amounting to far less than one per cent of the total volume transferred would still be significant, Mullins said.

Mullins quoted from an article in January, 1971 issue of the FISH BOAT saying: Max Blumer, an oceanographer at the Woods Hole Oceanographic Institute, Woods Hole, Mass., told the Technical Conference on Pollution and Its Effects on Living Resources and Fishing (sponsored by the United Nations Food and Agriculture Organization held in Rome in December that no effective method currently exists for neutralizing the up to 10 million tons of oil spilled annually in the world's oceans. He also said there is no known way to neutralize the toxic effect on all forms of marine animals. Blumor said the only way to avert further pollution of the ocean environment and to preserve it's resources as a source of protein-rich food is to prevent the spillages from taking place at all.

Attorneys George Dickson of Anchorage and James Fisher of Kenai were asked to attend the meeting because of their extensive background in environmental matters. Dickson noted a spill in Prince William Sound "is a very different thing than say the Santa Barbara area. A spill can do tremendous amounts of damage particularly in colder northern areas. If the oil got into the spawning grounds of the Copper River and Valdez Arm, it would probably cause enormous irreparable damage, Dickson said. "The fishermen of Cordova shouldn't be concerned about opposing great industries," the fishermen are going on record as being on the side of the future."

At the Thursday night meeting more than 300 signatures were affixed to a petition in support of SCR 8. This measure asks for a comparative analysis of the benefits of the proposed trans-Alaska pipeline and possible alternate Canadian route.

TELEGRAM

HCA Alaska
Communications, Inc.

SEWARD ALASKA 1050A AST

ROSS MULLINS CHAIRMAN PIPELINE COMMITTEE, CORDOVA DISTRICT FISHERIES UNION CORDOVA, YOU HAVE MY PERSONAL WHOLEHEARTED SUPPORT REGARDING RESOLUTION. WE FEEL THAT FURTHER STUDY REGARDING ALTERNATE ROUTES IS ABSOLUTELY NECESSARY, THE CONSIDERATION OF A MAJOR SPILL IN THE VALDEZ AREA WOULD CAUSE INCURABLE DISASTER TO THE RICH FISHERIES AND WILDLIFE AT THE PRINCE WILL SOUND AREA. I WILL BRING THIS MATTER TO THE ATTENTION OF THE SEWARD CHAMBER OF COMMERCE BOARD OF DIRECTORS AT TODAY'S MEETING.

[illegible] CHAIRMAN BOARD OF DIRECTORS SEWARD

CHAMBER OF COMMERCE

TAB 7

UNITED STATES
DEPARTMENT OF THE INTERIOR
TRANS-ALASKA PIPELINE HEARINGS

Supplemental Testimony

Volume X

Exhibits 124 - 161

USDI - TAPS HEARINGS - 2/71
SUPPLEMENTAL TESTIMONY
EXHIBIT 143

Janet V. O'Meara
800 So. Lane St., #1
Anchorage, Alaska 99504

March 7, 1971

Director,
Bureau of Land Management
Department of Interior
Washington, D.C. 20240

Attention: 320

Gentlemen:

I wish to express my appreciation for the opportunity granted to express my views on the proposed Trans-Alaska Pipeline project and the Environmental Impact Statement covering that project.

I oppose the pipeline as presently conceived, for several reasons. Foremost among these reasons is the intention of the Alyeska Pipeline Service Co. to terminate the line at Valdez. After arrival in Valdez, the oil will then be shipped by tanker through Prince William Sound, across the Gulf of Alaska, and along the coast of Southeast Alaska, British Columbia, and Washington, to ports in "the Lower 48."

It is my opinion that such an operation would be extremely, and critically, damaging to the marine environment and to the sports and commercial fisheries of the area. Of course, damage to the commercial fisheries would result in loss of income for the people of the coastal areas. who are almost totally dependent upon fishing for their livelihood.

That such damage will result is almost guaranteed, despite protests to the contrary advanced by proponents of the pipeline. One has only to read the newspaper--almost any newspaper, on almost any day--to find reports of one oil disaster after another. Oil spills have become so common as to be almost the rule rather than the exception. Suffice it to say that when oil is transported by tanker the odds are very high that a spill will occur, at some time or another.

Even if spills were not so common, the mere possibility of a spill which could so disastrously affect the lives of so many people would, it seems to me, prohibit the transport of oil across ours seas--particularly where alternatives exist. In the present instance alternatives do exist--the pipeline can be routed through Canada, perhaps along an existing right-of-way; the Alcan Highway. I have heard it said that the Canadian route may not really be a true alternative inasmuch as Canada has made no proposal to our government which would make this possible. It seems to me that in this instance it is up to our government to make the proposal and open negotiations with Canada. Certainly, if it were Canada seeking a route through the United States, we would expect her to make the proposal to us.

That we exhibit reluctance to do this indicates to me the grossest lack of concern for the lives of coastal residents and protection of the environment.

Even if spills were not so common as we know them to be, we are still faced with the storage tanks at Valdez and the ballast treatment facilities. With regard to the storage area we are told that it is of no consequence that Valdez and Prince William Sound are areas of heavy earthquake activity. We are told that since the terminus is to be located on bedrock, no damage would occur should there be an earthquake--even of the magnitude of that which leveled Valdez in 1964. This argument is hardly reassuring. An earthquake is generally more than just a "quake"--many times an earthquake results in uplifting or lateral sliding of bedrock. If the bedrock forming the foundation of the pipeline terminus at Valdez uplifts or slides, obviously the storage area will not remain undamaged. No, in that event damage would occur, and a massive spill of oil into Valdez Bay would probably result. Surely no guarantee can be given that any quake in the Valdez/Prince William Sound area would not result in the uplifting or sliding of bedrock. No responsible geologist would make such a claim.

As regards the ballast treatment facility--this is an ecological disaster all by itself. Initially, the facility plans to dump about 175 tons of oil (in the form of treated ballast water) per year into Valdez Bay. Estimated discharge at full development could reach 700 tons of oil per year. This will be legal under federal and state law because the standards are based on parts per litre. The size of the operation determines the amount of oil to be "dumped". While the massive amounts of oil will be "legal," it is obvious that they will also be extremely damaging to the marine ecology of the area.

Even if the problem of ballast treatment were solved--by using ships with separated tanks, for instance--the possibility of spills remains a problem. There can be no guarantee that spills will not occur. They will occur. The only question is how many, how often, and how large.

It seems incredible to me that a tanker operation is even being casually considered, in light of the disastrous effects of such operations on our fragile fisheries.

Our world is in the throes of a population explosion so critical that we may never recover. We are gobbling up our agricultural areas at an alarming rate, just to make room for our increasing numbers. It has been calculated that "the growth of the population is now so rapid that the multitude of humans is doubling every 35 years" Ehrlich, Paul, "The Population Explosion: Facts and Fiction", a sermon delivered at Grace Cathedral, San Francisco, Sept. 1, 1968. If we are to survive our population must be fed, but how can this be accomplished? That this is a major problem is evidenced by the fact that some 2 billion people today are undernourished, and that somewhere between 4 and 10 million people starve to death each year. Ehrlich, Paul, "Population Explosion: Facts and Fiction," ibid. Thomas R. Malthus, the economist, has stated that while food production increases in arithmetical progression (1, 2, 3, 4, 5, 6), population increases in geometrical progressior (1, 2, 4, 8, 16, 32). Paddock, William & Paul. Famine 1975!, p. 39

I have previously indicated that much of our agricultural land is being lost to the urban sprawl. To verify that this is so, one need only look at California--one of the world's richest agricultural areas--and observe the way cities such as Los Angeles and San Francisco have voraciously swallowed up surrounding farmland. The orange groves of Los Angeles are a thing of the past. One the Los Angeles River Delta, where the topsoil was 1000 feet deep, truck farms have given way to row after row of neat little nondescript houses--the suburb Westchester. The San Fernando Valley, previously an area of small but productive farms, has become yet another victim of the urban malignancy. And the growth of cities such as this has not stopped.

The question remains--How are we going to feed our rising population? Our vast agricultural surpluses are a thing of the past. Since our agriculture is already highly efficient, it is doubtful that we can massively increase production. How are we going to feed our people? One traditional answer has been the sea--"We will farm the sea." Let us look, then, at the sea.

We know that the greatest fisheries of the world are confined to the continental shelves Carson, Rachel, The Sea Around Us, p. 65, -- our coastal regions. This region, upon which our hope for the future is based, is the very region over which the oil tankers would travel. That is taking quite a chance with our future, it seems to me.

We also know that our fisheries are dependent upon microscopic green plants which are known as phytoplankton.

The enormous importance of the

> phytoplankton to the economy of the sea cannot be too strongly stressed. The phytoplankton forms the base of nearly all the food chains. It is vitally important to all the harvests of the sea, whether these be the food fisheries, sponge fisheries, whaling, or sealing. Plants alone can manufacture food from such inorganic chemicals as the minerals and gases. But they can do this only in the presence of light . . . .
> Deacon, G.E.R., Oceans, p. 108

Since our fisheries are dependent upon phytoplankton, and since phytoplankton is dependent upon light, what happens when the ocean surface is coated with oil? Of course, the oil does not remain on the surface--some of it sinks, poisoning all within its reach. In either case, the result is the same--a major break in the food chain, and a disaster to our fisheries. If we are to depend upon our seas to avert mass famine, does it make sense to gamble with them and allow the operation of oil tankers in these vulnerable areas. It would seem that the better course would be to eliminate tanker traffic wherever possible--whatever the cost to private industry.

To summarize my point, I oppose the proposed pipeline and the Environmental Impact Statement because I feel they are incomplete--they both end at the sea. I feel further, in-depth, consideration should be given to an all-land pipeline.

Very truly yours,

s/

Janet V. O'Meara
(Mrs. Michael O'Meara)

JOINT APPENDIX

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95- **No. 07-219**

FILED
DEC 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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[Pages 1495 - 1582]

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APPENDIX Z

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH HAZELWOOD)
)
Defendant.)
)

Case No. 3AN-S89-7217 Cr.
Case No. 3AN-S89-7218 Cr.

VERDICT I

We, the jury, find the defendant, Joseph
Hazelwood ,________, Not Guilty of criminal
guilty not guilty
mischief in the second degree as charged in the indictment.

DATED at Anchorage, Alaska, this 22nd day of March, 1990.

/s/
Foreman of the Jury

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH HAZELWOOD)
)
Defendant.)
)

Case No. 3AN-S89-7217 Cr.
Case No. 3AN-S89-7218 Cr.

VERDICT II

We, the jury, find the defendant, Joseph
Hazelwood ,________, Not Guilty of operating
guilty not guilty
a watercraft while under the influence of intoxicating liquor as charged in Count I of the information.

DATED at Anchorage, Alaska, this 22nd day of March, 1990.

/s/
Foreman of the Jury

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH HAZELWOOD)
)
Defendant.)
)

Case No. 3AN-S89-7217 Cr.
Case No. 3AN-S89-7218 Cr.

VERDICT III

We, the jury, find the defendant, Joseph
Hazelwood ,________, Not Guilty of reckless
guilty not guilty
endangerment as charged in Count II of the information.

DATED at Anchorage, Alaska, this 22nd day of March, 1990.

/s/
Foreman of the Jury

APPENDIX AA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

vs

EXXON CORPORATION AND EXXON
SHIPPING COMPANY,
Defendant.

No. A90-015 CRIMINAL

CHANGE OF PLEA
OCTOBER 8, 1991
PAGES 1 THROUGH 86

PROCEEDINGS

October 8, 1991

THE CLERK: All rise. His Honor the court, the United States District Court for the District of Alaska is now in session. The Honorable H. Russell Holland presiding. Please be seated.

THE COURT: Good morning ladies and gentlemen. We have set this morning the consideration of a proposed change of plea in case A90-15 Criminal, the United States of America v. Exxon Corporation and Exxon Shipping Company.

We also have for consideration civil cases A-91-82 and 83, which are respectively, United States of America v. Exxon Corporation and State of Alaska v. Exxon Corporation. Because these matters are interrelated, we will be considering both of them at the same time.

Those of you who are standing in the back, I understand this is an uncomfortable situation. We took a hard look at whether we should move somewhere else in the building this morning, and it's kind of a push. If we move to another courtroom, we haven't got room for the attorneys that need to participate in this matter. And if we stay here it is uncomfortable for some of you. I'm afraid the facts of life are that I need these lawyers this morning somewhat more than I need the audience. We appreciate your all being here and your interest in this matter, but I think it best if we stay here where the lawyers have sufficient room to maneuver and work.

In preparation for today's hearing, I have considered a number of filings that have been made by the parties. We received a Notice of Intent to Change Plea on behalf of Exxon Corporation and Exxon Shipping Company. We've received and considered a proposed plea agreement with appendices. We've received a government memorandum in aid of sentencing. We received a joint sentencing memorandum on behalf of Exxon Corporation and Exxon Shipping Company. We've received a joint memorandum in support of the agreement and consent decree, which is proposed for cases A91-82 and 83 civil.

I have received a couple of pieces of miscellaneous correspondence, which are substantially of the same ilk as the public comment that we took earlier, and that hasn't been available to all counsel. With that introduction, let's take appearances, first from the government, if you please.

MR. DEMONACO: Yes. Your Honor, for the government, the Assistant Chief, Environmental Crime Section. To my right is Barry M. Hartman, who is the Acting Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice. And to his right is Charles E. Cole, Attorney General, State of Alaska. To Mr. Cole's right is Mark Davis. He is a Special Assistant United States Attorney for the district of Alaska. And behind us here at counsel table, we have Gregory Linson, who is with the United States Department of Justice, Environmental Crime Section; Eric Nagle; Mark Harmon, likewise, trial attorneys, U.S. Department of Justice, Environmental Crime Section. William Brighton, who is the Assistant Chief of the Environmental Enforcement Section of the United States Department of Justice, who is the lead counsel of the civil litigation. And to his right is Greg Tillary, who is with the State of Alaska, Attorney General's Office.

THE COURT: Mr. Lynch?

MR. LYNCH: Your Honor, for Exxon Corporation, Mr. Edward J. Lynch and Charles W. Matthews; Exxon Corporation John Clough and Patrick Lynch. And present in court today is Mr. Rawl, Chairman and Chief Executive Officer of Exxon Corporation.

MR. NEAL: May it please the court. James F. Neal, representing Exxon Shipping Company. With me is Mr. Bob Bundy. And present in court today is the president of Exxon Shipping Company, Mr. Agustus Elmer.

THE COURT: Inasmuch as the defendants have filed a notice of their intent to change plea, we will proceed directly to the confirmation of that intent. As I did previously, I would like to take up Exxon Corporation first.

Would you administer the oath to Mr. Rawl, please.

(Oath administered)

MR. RAWL: I do.

EXAMINATION OF MR. RAWL

BY THE COURT:

Q Mr. Rawl, inasmuch as you have been placed under oath, I need to instruct you that you must answer the questions I put to you truthfully. If you should fail to do so, you could possibly be prosecuted for perjury. Do you understand that?

A I do, Your Honor.

Q Would you tell me your age, please, sir?

A Sixty-three years old.

Q And what is the extent of your formal education?

A I've got a B.S. degree in Petroleum Engineering.

Q What is your position with Exxon Corporation?

A I'm the Chairman of the Board and Chief Executive Officer.

Q Now, we have previously received and filed corporate resolutions having to do with your authority to be here and speak for your company this morning. To your personal knowledge, sir, are those resolutions still in effect?

A I believe we have another resolution, Your Honor, which . . .

Q Might I have that, please.

(Please)

MR. LYNCH: If Your Honor will give me a moment, I'll get them out of the briefcase.

THE COURT: Sure.

(Pause)

THE COURT: The resolution appears to be satisfactory, and it will be filed with the clerk of the court. I'm satisfied that Mr. Rawl is authorized to proceed in this matter.

Q Mr. Rawl, have you received and reviewed a copy of the charges which were brought against Exxon Corporation in a federal grand jury indictment?

A Yes, Your Honor, I have.

Q Have you reviewed those charges with counsel?

A Yes, sir, I have, Your Honor.

Q Do you understand the charges?

A Yes, I do.

Q Do you have any questions about them?

A No, Your Honor, I do not.

Q Are you entirely satisfied with the representation that Exxon Corporation has received from counsel in the course of these proceedings?

A Yes, Your Honor, I am.

Q. Have you personally reviewed the terms and conditions of the proposed plea agreement which is dated September 26, 1991?

A Yes, Your Honor, I have.

Q Have you reviewed that agreement with the attorneys?

A Yes, Your Honor, I have.

Q And on behalf of the corporation, are you in accord with all of the terms and conditions of that plea agreement?

A Yes, Your Honor, I am.

Q Do you understand that confirmation of that plea agreement could conceivably have an impact on civil litigation that is pending against Exxon Corporation?

A Yes, Your Honor, I do understand that.

Q Mr. Rawl, has anyone made any promises or entered into any agreements about the disposition of this case -- the criminal case -- other than what appears in the plea agreement?

A No, Your Honor, they have not.

Q Has anyone threatened you or coerced you in any way to induce you to execute that agreement on behalf of the corporation?

A No, Your Honor, they have not.

Q The plea agreement contains certain

information concerning Count III of the Indictment, Mr. Rawl. That's the count that charges a violation of the Migratory Bird Treaty Act. That information has been reviewed by me. That information was supplemented at the last hearing we had with the following information that I would like to recite to you at this time, for the purpose of seeing whether you agree with it or not.

At that time I was told that approximately 11 million gallons of crude oil were spilled from the Exxon Valdez on March 24, 1989. That thereafter that oil entered Prince William Sound in the Gulf of Alaska. I was told that as of September 20, 1989, 36,429 dead migratory birds were collected at various locations in the Sound and in the Gulf of Alaska. I was told that 22 migratory birds were selected as representative samples of the total number of birds collected, and that these were examined by the United States Fish and wildlife pathologists, who determined the causes of death.

If this matter were to go to trial, the government would contend that it could prove that Exxon Corporation spilled oil from the Exxon Valdez, and that that oil killed the 22 migratory birds.

Now, do you have any disagreement with those factual representations?

MR. LYNCH: Your Honor, if I may respond.

THE COURT: Mr. Lynch.

MR. LYNCH: I think that the statement read last time indicated that the oil was spilled, owned by Exxon Corporation, but that Exxon Corporation did not spill the oil. And with that clarification, the basis of the plea is that the oil was being carried by Exxon Shipping Company under contract when the freight was spilled, and owned by Exxon Corporation.

THE COURT: Actually, Mr. Lynch, I was reading from the transcript of that last hearing. But I accept that modification, that the oil was owned by Exxon Valdez -- was owned by Exxon Corporation, inasmuch as it is consistent with my other knowledge of the case.

Q (Mr. Rawl by The Court:) Mr. Rawl, with that modification, do you have any disagreement with the facts as they have been recited here?

A No, Your Honor, I don't.

THE COURT: Again, at the previous hearing Mr. DeMonaco recited for us that the maximum fine under the Migratory Bird Treat Act is a fine of $10,000.00, subject to possible augmentation under the Alternative Fine Act. And it is a matter of some contention, I think, still, whether that Alternative Fine Act does or doesn't apply.

Mr. Lynch, I understand that question is being laid aside, is that correct?

MR. LYNCH: That's correct, Your Honor, under the terms of the agreement.

Q (Mr. Rawl by The Court:) For you, Mr. Rawl, I need to ask: do you understand that if Exxon were to go to trial it could possibly be exposed to not just the $10,000.00 fine, but possibly to a very substantial augmentation of that fine, based upon losses that were occasioned in connection with the Valdez accident. Do you understand that?

A Yes, Your Honor, I do.

Q Two other aspects of sentencing need to be brought to your attention at this time, Mr. Rawl. This is a case where the court will be considering a restitution requirement, and certain obligations to undertake to provide for the restoration of Prince William Sound following the Valdez accident.

You need also to be aware of the fact that I am required by law to impose a special assessment in this case in the amount of $25.00 per misdemeanor count. I believe that item is not mentioned in the plea agreement. Do you understand that you are subject to a $25.00 special assessment?

A Yes, Your Honor, I am.

Q As I indicated previously, although this case occurred after the passage of the law which gave rise to the sentencing guidelines, as a practical matter, this case is being handled more or less outside of the guidelines, because at the present date there are no guidelines promulgated by the Federal Sentencing Commission, which apply to environmental crimes. However, I will be having substantial reference to, and have had reference to the sentencing factors which federal law dictates that I should consider in imposing sentences in criminal cases.

Mr. Rawl, because the case against Exxon involves an agreed sentence, and will also involve the dismissal of certain charges if the plea agreement is accepted, you are advised that in the event that I should reject the plea agreement, Exxon Corporation will be entitled to withdraw any plea that you might offer at this time. Do you understand that?

A Yes, I do, Your Honor.

Q Mr. Rawl, even at this stage of the proceedings, there are certain rights available to Exxon Corporation, which will still apply unless they are waived or given up by you. I am going to be reciting certain of those rights for you, and at the end will inquire as to whether or not you are prepared to waive or give up those rights.

Exxon Corporation, in this case, has the right to a trial by jury; it has a right to be represented by counsel; it has the right to see, hear and have its attorneys cross examine the governments witnesses.

Exxon Corporation would have the right to present a defense against the charges to call witnesses on behalf of the corporation, and to require the presence of those witnesses, using the court's subpoena powers, even if those witnesses did not wish to voluntarily come forth.

All of these rights are available to Exxon at this stage of the proceedings. However, it is your right, if you wish to go forward with the plea agreement, to waive or give up those rights.

Does Exxon Corporation wish to waive and give up the right to a jury trial and these other rights that I have explained to you.

A Yes, Your Honor, we do.

Q If this case were to go to trial, and if Exxon were to be convicted by a jury, Exxon would have a right to appeal that conviction to the Ninth Circuit Court of Appeals. If you offer, and if I accept a plea of guilty on behalf of Exxon Corporation, there is, as a practical matter, no right of appeal from the conviction that results from that offer and my acceptance of it. Do you understand that?

A Yes, I do, Your Honor.

Q Even though there are no guidelines applicable to this case, it is my assumption that if some party were of the view that my sentence were illegal, they probably could appeal that sentence due to the present state of the criminal law.

One final thing that I need to take up with you, Mr. Rawl. It is normally a case in a criminal matter that we require a presentence report. That report is often as beneficial to the defendant as it is to the prosecution. It is my inclination, based upon what I know about this case, not to order a presentence report. Do you have any objection to that?

A No, Your Honor, I do not.

Q At this time, Mr. Rawl, how does Exxon plead to the charge that it violated the Migratory Bird Treaty Act as charged in Count III of the Indictment. Is Exxon Corporation guilty or not guilty?

A Exxon pleads guilty, Your Honor.

THE COURT: Okay. Based upon what I have ascertained in response to my questions, and in this instance, based, also, upon the substantial knowledge that I have of this case from memoranda that have already been filed by counsel as I related at the outset, I am satisfied that there is an independent factual basis for the charges brought against Exxon Corporation. I'm satisfied that Mr. Rawl is lawfully and properly authorized to offer a plea of guilty on behalf of Exxon Corporation. I'm satisfied that that plea of guilty is being voluntarily offered to the court.

I will, therefore, accept the plea of guilty in connection with the charges brought against Exxon Corporation under the Migratory Bird Treaty Act. And Exxon is at this time adjudged guilty of that offense, subject to the right to withdraw its plea of guilty in the event that I reject the plea agreement.

We will turn now to Exxon Shipping, Mr. Elmer. If you would administer the oath to Mr. Elmer, please.

THE CLERK: Please raise your right hand.

(Oath administered)

MR. ELMER: Yes, I do.

EXAMINATION OF MR. ELMER

BY THE COURT:

Q Mr. Elmer, what is your age?

A Fifty-one years old, sir.

Q And what is your position with Exxon Shipping Company?

A Director and President of the company.

Q Mr. Elmer, do you understand that inasmuch as you have been placed under oath, you are obligated to answer my questions truthfully. If you should fail to do so, you could possibly be prosecuted for perjury?

A Yes, I do, Your Honor.

Q Is there a separate corporate authorization or resolution in connection with Exxon Shipping, or is the prior resolution still in effect?

A We believe the prior resolution is in effect, Your Honor. We do have a copy here if you wish to reference it.

Q No. It was filed with the court previously, and I was satisfied previously that Mr. Elmer was authorized to speak on behalf of Exxon Shipping Corporation. And inasmuch as he is today in the same position that he was with the company previously, I am satisfied with his authority to speak here for the company.

Mr. Elmer, have you received on behalf of Exxon Shipping, and have you reviewed a copy of the charges brought against that company by the federal grand jury?

A Yes, I have, Your Honor.

Q Do you have any question about those charges?

A No, Your Honor.

Q Have you reviewed the same with counsel?

A Yes, I have, Your Honor.

Q Are you fully satisfied with the representation which your company is receiving from counsel in these proceedings?

A Yes, I am.

Q Have you previously reviewed, and are you familiar with the terms and conditions of the plea agreement which we have under consideration. It's dated September 26, 1991?

A Yes, I am.

Q And you reviewed that with counsel?

A Yes, sir.

Q Mr. Elmer, has anyone made any other or different promises or assurances or any other agreements with respect to the disposition of the case, as to Exxon Shipping, other than what appears in that plea agreement?

A No, Your Honor.

Q Has anyone in any fashion attempted to threaten or coerce Exxon Shipping Company into entering the plea agreement?

A No, Your Honor.

Q It's entirely voluntary?

A Yes, Your Honor.

Q Mr. Elmer, was the case with your co-defendant -- there are certain factual matters represented to me in the plea agreement. Are those facts that are in the plea agreement true and accurate to your knowledge?

A Yes they are, Your Honor.

Q At the previous hearing I received from counsel for the government, some information about the maximum fines applicable to Exxon Shipping Corporation, if it were to go to trial. It's my understanding that under the Clean Water Act a maximum fine, without enhancement of $200,000.00 is possible, and that under the Refuse Act, a like fine of $200,000.00, without augmentation, is possible. And finally, that under the Migratory Bird Treaty Act, a maximum fine of $10,000.00 could be imposed.

Here, again, there is a provision in federal law for the augmentation of those fines, based upon loss to victims, which could very substantially increase the amount of the fines.

THE COURT: Mr. Neal, I understand that Exxon Shipping and the government have agreed as to your client also that we would side step any adjudication of the questions that we have as to whether the Alternative Fines Act does or does not apply.

MR. NEAL: That is correct, Your Honor.

THE COURT: Thank you.

Q (Mr. Elmer by The Court:) The net effect of this, Mr. Elmer, is that you understand that Exxon Shipping Company is exposed to a fine of the magnitude expressed in the plea agreement. You understand that that is what you are exposed to?

A Yes, Your Honor.

Q Based upon your understanding of the plea agreement, Mr. Elmer, is it clear to you at this stage of proceedings that your company can be exposed to a very substantial restitution requirement as a result of these proceedings?

A Yes it is, Your Honor.

Q Do you also understand that your company is exposed to a $25.00 special assessment in connection with each of the three offenses?

A Yes, Your Honor.

Q Mr. Elmer, inasmuch as the plea agreement with respect to Exxon Shipping, also calls for a specific sentence, and calls for the dismissal of certain charges. You should understand that if you offer, and if I accept a plea of guilty to the charges in Counts I, II and III of the Indictment, and if I should subsequently reject the plea agreement, you would be entitled to withdraw from any plea that you enter at this time. Do you understand that?

A Yes, I do, Your Honor.

Q As I also explained to Mr. Rawl, your company has, even at this stage of the proceedings, the right to go to trial, and all of the other attendant rights that I explained to Mr. Rawl. Do you understand that you have those rights at this time?

A Yes, I do, Your Honor.

Q Do you understand that if you offer, and if I accept a plea on this case, that you will, in substance, have given up those rights?

A Yes, I do, Your Honor.

Q And is it your company's desire at this time to waive or give up those rights?

A Yes, it is, Your Honor.

Q You understand that if Exxon Shipping Company were convicted by a jury, it would have the right to appeal that conviction to the Ninth Circuit Court of Appeals. But that if you offer, and if I accept a guilty plea, as a practical matter, there is not effective appeal right. Do you understand that?

A Yes, I do, Your Honor.

Q I think I asked you this, but I want to make sure I covered it. Have you personally reviewed the factual statement that is contained in the plea agreement concerning this case?

A Yes, I have, Your Honor.

THE COURT: Mr. Neal?

MR. NEAL: Your Honor, there is a -- I don't believe the factual basis for Exxon Shipping is in the plea agreement.

THE COURT: Oh, it's in a separate . . .

MR. NEAL: Yes, sir.

THE COURT: It's in a separate filing, isn't it?

MR. NEAL: And I think Mr. DeMonaco has that. It has been reviewed with Mr. Elmer.

THE COURT: Mr. DeMonaco?

MR. DEMONACO: Your Honor, if it pleases the court, I have photocopies of what was submitted to the court in March. I have some copies.

THE COURT: All right. Thank you. Would you give one of them to Mr. Elmer, please, so we can make sure that he has seen this document.

Q (Mr. Elmer by The Court:) Mr. Elmer, we have handed you the March 21, 1991 government's statement of factual basis, which we had in the courtroom with us when you were here back in April. Do you recall having seen that statement of facts at that time?

A Yes, I do, Your Honor.

Q And you are still familiar with it?

A Yes, Your Honor, I am.

Q All right. And are the facts which are set out in that government's statement of factual basis true and correct to your knowledge?

A Yes, they are, Your Honor.

Q Thank you. Turning now to the matter of a presentence report, Mr. Elmer. That presentence report, as I have indicated, is often helpful for the court in sentencing, both for the defendant and for the government. Based upon my considerable prior exposure to this case, I am inclined to dispense with any requirement that there be a presentence report in this case. Do you have any objection to my doing that?

A No, I do not, Your Honor.

Q Mr. Elmer, on behalf of Exxon Shipping Company, and with respect to Count I of the Indictment which charges a violation of the Clean Water Act, is Exxon Shipping guilty or not guilty?

A Exxon Shipping pleads guilty.

Q With respect to Count II, the charges of violation of the Refuse Act, is Exxon Shipping Company guilty or not guilty?

A Guilty, Your Honor.

Q With respect to Count III, which charges a violation of the Migratory Bird Treaty Act, is Exxon Shipping Company guilty or not guilty?

A Guilty, Your Honor.

THE COURT: I am satisfied from what I have heard with respect to Exxon Shipping Company this morning, that there is an independent factual basis for the charges brought against that company under the Clean Water Act, the Refuse Act and the Migratory Bird Treaty Act. I am satisfied that the change of plea that has been offered on behalf of the company is done with proper corporate authority. I am satisfied that the defendant is knowingly and voluntarily offering the plea of guilty to these three charges. I will therefore accept the pleas of guilty to those three charges. And Exxon Shipping Company is, at this time, adjudged guilty of the charges brought in Counts I, II and III of the grand jury indictment.

(Pause)

With respect to the matter of presentence reports, I am satisfied that there are good reasons to dispense with the preparation of a presentence report in this case. The defendants are corporate organizations. While these reports are very helpful and informative with respect to individuals, it is my belief that they are not quite so useful when it comes to dealing with the corporate entities. I believe I have acquired the information that I need for sentencing in the course of working with this matter, and from the memoranda that Counsel have supplied.

(Pause)

Counsel, as I have indicated repeatedly already, I guess I have reviewed all of the memoranda that has been filed by counsel on behalf of their respective clients. However, it is my inclination at this time, subject to hearing from you briefly a little bit further to proceed at this time with the matter of the decision that I must make on whether or not to accept or reject this plea agreement. Obviously, I am in a considerably different position than I was four or five months ago when the matter was first before me. And subject to hearing from counsel, I am somewhat inclined at this point to proceed with giving you a decision on that matter.

Mr. DeMonaco, I turn to you first.

MR. DEMONACO: Thank you, Your Honor.

Your Honor, counsel, may it please the court. The United States, Alaska, Exxon, and Exxon Shipping Company have entered into substantial comprehensive settlements that resolve all criminal and civil litigation between the federal and state governments, and the defendants arising out of the Exxon Valdez oil spill.

The settlements, which have a combined value of more than 1 billion dollars are contained in the plea agreement and the consent decree lodged with this court. The government believes that the settlements are fair, just and in the best interest to the public, when viewed in light of the sentencing factors contained in Title 18 and the case authorities.

The plea agreement strives to settle the criminal litigation with pleas of guilty and a criminal sentence consisting of a fine in restitution. The amount of the sentence actually required to be paid within 30 days conviction, is 125 million dollars, with the bulk of the money earmarked for use in Alaska for restoration of the areas affected by the oil spill.

This oil spill was a catastrophe, and was also an environmental crime. The criminal remedy should likewise, in substantial part, be environmental in nature. That is, 100 million dollars to be paid in restitution, to be used exclusively in this State of Alaska for restoration of Prince William Sound and the Gulf of Alaska. The restitutionary components of a sentence for an environmental crime cannot be understated. The environment, as a victim, must be aided quickly through efforts funded by restitutionary payments.

The remaining amount of the sentence actually required to be paid is 25 million dollars. Of this amount, 12 million dollars is for violation of the Migratory Bird Treaty Act. Consequently, by operation of law, this total amount will be deposited into the North American Wetlands Conservation Fund, pursuant to the North American Wetlands Conservation Act, to carry out wetlands conservation projects throughout North America, of this country, Canada and Mexico.

Consequently, of the 125 million dollar sentence that is actually to be paid, 112 million dollars will go directly toward aiding the environment for this environmental offense.

In addition to being tough, the plea agreement is also fair. It addresses more than punishment. It takes into consideration the substantial efforts made by Exxon to rectify the consequences of their conduct by paying for oil spill clean-up efforts and engaging in other post spill responsible action at a cost of about 2.5 billion dollars. These actions by Exxon were important to us, as the United States Government, in helping us exercise discretion to achieve a fair and just recommended disposition of this criminal case.

When these actions are considered in light of the sentencing factor that calls for the sentence to promote respect for the loss, the acceptance of the plea agreement will heighten the business community's, and the public's awareness of the respect of the laws designed to protect the environment. The fine is assessed at an amount of 150 million dollars, which means that standing alone, the facts and circumstances that gave rise to this violation warrant a fine of that magnitude. It is only because of Exxon's voluntary efforts, their cooperation with the investigation and prosecution of this case, and other responsible actions set forth in the plea agreement in the sentencing memorandum submitted to this court by the government, that makes remission or forgiveness of a substantial portion of the fine reasonable.

Cooperation was substantial at all times and all phases of the investigation in the prosecution. This is important to a prosecutor. I have been a prosecutor both in state and federal courts for more than 15 years. Cooperation is routinely taken into consideration by the prosecution, and the courts, in imposing a just sentence. We did so in exercising our discretion in this matter as well.

As a sentencing factor that speaks to the need of the sentence to afford adequate deterrence to criminal conduct, clearly, a sentence of 125 million dollars of money actually required to be paid. It must be paid within 30 days of the date of the conviction, satisfies this factor, and should deter future corporate carelessness. There is no question that Exxon has paid dearly for this oil spill. In addition to spending about 2.5 billion dollars in response to the spill, it is also committing to pay in excess of 1 billion dollars pursuant to these comprehensive settlements. As a result, the total amount of the penalties, compensatory payments, and other voluntary expenditures will exceed 3.5 billion dollars. It is hard to imagine more adequate deterrence for negligence, but unintentional conduct.

In considering whether to impose a fine, Congress suggests that the court consider three factors. The first is the size of the organization. In this case, there is no question that Exxon is one of the world's largest and most profitable corporations.

The second factor is, any measure taken by the organization to discipline any employees responsible for the offense. Here, Captain Hazelwood was fired. He was fired for using alcohol within four hours before assuming duty, and for leaving the bridge of the vessel during a hazardous maneuver. The third mate at the time of the grounding was disciplined by being reassigned to the status of an able-bodied seaman for his role in the grounding.

The last factor relates to any measure taken by the defendants to prevent a recurrence of the offense. Here Exxon revised its substance abuse policy substantially. Persons who had or are found to have a substance abuse problem will not be permitted to work in a safety sensitive position.

In addition, Exxon has taken steps to eliminate fatigue of the crew, by creating the position of loading mate in the ports of Valdez and in San Francisco.

Exxon will spend 1.6 billion dollars in 1991 on capital projects to enhance environmental safety performance, apart from the expenditures relating to the spill. And in addition, they have spent more than 40 million dollars to improve vessel operating safety, personnel training, and oil spill capability.

Another factor for the court to consider is to avoid unwarranted sentence disparities among defendants guilty of similar conduct. The only other case that approaches this one is Ashland Doyle (ph)*. I was also the prosecutor in that case, and began that when I was an Assistant United States Attorney in Pittsburgh. As far as the facts of that case are concerned, there was approximately 4 million gallons of oil that spilled out of a container of oil at a tank farm near Pittsburgh, Pennsylvania. It was a catastrophic rupture of the container.

And about 700,000 gallons of oil made its way into the Monogahela River and went over locks and dams shortly after it entered the river, and emulsified with the water. And it travelled downstream, past the city of

Pittsburgh itself, and eventually through five states, causing tremendous human suffering and a tremendous human impact, where the water supplies were closed, schools were closed, churches were closed, and businesses were closed.

Ashland Oil sought to plead nolo contendere in that case, and we vigorously opposed that. The court accepted nolo contendere and we went to the sentencing hearing. The sentencing hearing was litigated. There was not an agreed upon sentencing. We, as the government, requested a fine -- multi-million dollar fine in nature. Ashland requested that the fine be somewhere between $200,000.00 to $400,000.00, without application to the Alternative Fines Act.

The judge in the case, Judge Diamond, ruled that the lower amount of the fine was insufficient, and said that the fine would be between 2 million to 4 million dollars. We asked for a multi-million dollar fine in that case and we received a multi-million dollar fine in that case, and we received a multi-million dollar fine in that case, for the conduct that was the nature of that indictment in that violation.

Both cases involved negligent conduct. Exxon, obviously several times larger than Ashland, and the spill here was many more times larger than the Ashland spill. Thus it's appropriate here that the fine be proportionately larger than that in Ashland. But we believe the fine, both in the assessed amount and the actual amount, is justified in light of all the circumstances of this case, and it is not disproportional. We believe this fine is adequate, both in the way it's assessed and both in the way that there is the actual payment required to be paid, when in comparison to other cases of similar magnitude. And, of course, Ashland is really the only case that comes close of similar magnitude of a matter that we brought as a criminal prosecution in the Department of Justice.

And the last factor I wish to address is the need to provide restitution. And here the plea agreement provides for 100 million dollars in restitution, and up to 1 billion dollars in the civil settlement. In addition, the defendants have paid more that 300 million dollars to third parties in settlement claims. And we believe that the agreed upon disposition will satisfy the loss to the environment and will avoid the time consuming complex and uncertain task of assessing unrestituted losses to the governments.

The alternative to this comprehensive settlement is years of litigation with an uncertain result. And the best example of protracted litigation is the case of the Amoco Cadiz, which is an oil spill of about 62 million gallons off the northern coast of France. Thirteen years after the spill the case is still being litigated. If upheld on appeal, the damages paid will be about 115 million dollars. This oil spill was about six times the size of the Exxon Valdez.

The governments urge that there be restitution now for the areas affected by the oil spill, and it should not await years of legal battles over damages and liabilities. The plea agreement provides an immediate infusion of money needed to continue the work of restoring the Prince William Sound and the Gulf of Alaska. While the consent decree provides money over the long term to insure that the restoration work can continue over time to heal the damages caused by the Exxon Valdez oil spill.

When viewed in light of the sentencing factors, the facts in this case, and the conduct of the defendants following the spill justify, and in fact, cry out for an agreed upon disposition of the criminal case. We recognize as this court's role and independently reviewing a plea agreement in light of the factors suggested by Congress. We ask that you approve the plea agreement, recognizing that this part of the comprehensive settlement with the defendants that will put an end to the criminal and civil complex litigation and getting much needed money to the environment now, as opposed to years of litigation with uncertain results.

We look to this settlement, Your Honor, as a comprehensive settlement. It's a criminal component and a civil component, and it's hard to believe that we would do one without the other. Because what we are getting on the consent decree is a very important consideration for us as to what we are seeking in restitution on the criminal side. And likewise, when we put the whole package together, we believe it's in the public's best interest to settle this case in this matter to get the much needed money into the Prince William Sound and Gulf of Alaska now, as opposed to years from now after litigation. And we would urge the court to approve the plea agreement, as well as to enter judgment on the consent decree.

With me, Your Honor, at counsel table is Barry Hartman, who is the Acting Assistant Attorney General of the Environment and Natural Resources Division. And he is here to present to the court how this plea agreement fits into our environmental enforcement program.

In addition, I would like to call on Mr. Cole after Mr. Hartman finishes. Mr. Cole is the Attorney General for the State of Alaska, to present the State's views of this proposed comprehensive settlement. We have worked closely with the State from the very beginning of this investigation, and their views are extremely important to the decisions that we have reached in reaching the settlements with Exxon and Exxon Shipping Company.

And then following Mr. Cole, I will conclude our presentations and answer any questions the court may have regarding our position. At this time I would like to call upon Mr. Hartman to make a presentation to the court.

THE COURT: Mr. Hartman?

MR. HARTMAN: Thank you, Your Honor;

may it please the court. The court is faced today with the difficult and important task of evaluating the acceptability of this plea agreement and the proposed consent decree, which are both unprecedented in nature, as Mr. DeMonaco has explained.

The Department of Justice is currently litigating approximately 20,000 cases around the country involving the environment. This is by far and away the biggest. And my purpose here, briefly, is to share with the court why the Department of Justice, as well as the client agencies we represent, and, indeed, the United States government believes acceptance of these proposals will substantially contribute to our efforts to address environmental offenses, both civilly and criminal, throughout the country, and particularly in Alaska. And indeed, why, in this case, the plea agreement would be appropriate to accept, and a civil consent decree to approve.

As we approach environmental enforcement cases, we found, from our experience, that they are different from other cases, particularly in the criminal context, for two reasons.

First and foremost is the need in many environmental cases to address the environmental consequences of what may be illegal conduct. Unlike other economic crimes of which this court is well aware, we can't simply pay interest 20 years down the road to make up for the losses. In environmental cases it is crucially important that we address the consequences of the conduct immediately.

I have with me today for the court's interest, if it desires, letters I recently received from the Secretary of Transportation, the Secretary of interior, as well as high-ranking officials at the Environmental Protection Agency, the Department of Agriculture, and the Department of Commerce, all urging the court to take that particular issue into account as it considers the plea agreement today. We must address the environmental consequences sooner rather than later.

And secondly, unique to the area of environmental enforcement is the novelty of the issues which are involved. The court mentioned the Alternative Fines Act as being one issue. These issues will, no doubt, as they become litigated around the country, take years to resolve. And those years will be spent at the cost of dealing immediately with substantial environmental consequences. Today the court has the opportunity to deal with that environmental consequence immediately.

So where, then, does this case fit in our national environmental enforcement program. As the court knows, as part of our plea agreement we attached information relating to our criminal enforcement program, and in connection with our civil case, we attached information relating to our civil enforcement program. And indeed, we submit to the court, that the consequences today, just like the consequences of the spill, are off the charts.

The court can see from the attachments that were provided, that the proposed plea agreement is greater than all the fines in the history of environmental enforcement. The proposed civil consent decree dwarfs -- dwarfs . . .

THE COURT: Time out. Turn the other way. I know what they look like, because I've got hand copies of them. Let the folks in the back see what you've got there.

MR. HARTMAN: The proposed civil consent decree, as Your Honor knows, dwarfs civil remedies previously imposed in environmental cases. For example, whereas last year, in 1990, we recovered 11 million dollars for natural resource damages in cases. This case is up to 1 billion dollars. It was serious consequences, and we believe the case justifies the result.

Finally, Your Honor, we ask the court to seriously consider the effects in the State of Alaska. As Mr. DeMonaco indicated, the State of -- we worked quite closely with the State of Alaska in this case. We do not, Your Honor, have the luxury of simply picking a number out of the air and saying this is the appropriate number. The Department of Justice is committed to dealing with the facts and applying the law as we see it. And we believe, when we do that in this case, one can see the results compared to other cases, which we think are appropriate.

But with respect to the State of Alaska, the importance of this case, I think, cannot be understated. We have worked quite closely with Attorney General Cole. Quite frankly, Your Honor, without his support, without his views and his insights and participation, we probably would not be here today.

Based on that, Your Honor, we request that the court consider and approve the plea agreement and civil decree. And at this point I would like to call on Attorney General Cole to present the State's view. Thank you very much.

MR. COLE: If the court please, and counsel. This morning I appear here on behalf of the State of Alaska, the victim of the offenses to which the defendants have today pleaded guilty. I appear here at the request of Governor Hickel and as Attorney General of the State of Alaska, vested with the statutory and common law authority possessed by that office.

In addition, I appear here, I believe, on behalf of the overwhelming populous of the State of Alaska, which supports this criminal plea agreement and the civil settlement.

Now, how do I say, you know, Charlie Cole, Attorney General speaks for the people of the State of Alaska here today. Well, I have my own way, Your Honor, of taking a little informal poll of how the people of this state feel about this settlement. You know, travel in the airplane, go to the coffee shop, meet people along the jogging trails, if I say so, in bars, in restaurants, you know. But I talk to the people in traveling, in department stores. And I have a real good sense of what the people out there in the state feel about this criminal plea agreement, and about the civil settlement. They are the great middle class of this great state. They don't write letters, they don't comment to the press, but they're just the people who live in this state and contribute to its greatness. And I feel very strongly that the people out there support this criminal settlement and this civil settlement.

Now, I don't want to repeat here what Mr. Demonaco and Mr. Hartman have said about the criminal plea agreement. And their remarks, I think, have been full and on the mark. But I do want to say this with respect to the views of the State of Alaska, with respect to this criminal plea agreement.

Very important from the State's standpoint is that 100 million dollars of this plea agreement will be used for the restoration of the damage to the natural resources, and for, perhaps, other purposes in the State of Alaska.

Now, I know there are those who urge a greater fine; 200 million, 300 million, whatever. But the state as the victim, wants to see the damaged natural resources in this state restored. I assure the court that if this plea agreement is not accepted and approved by this court, that the State will lose its last opportunity to obtain funds from this criminal proceeding to be used to restore these damaged resources. The State has a deep vested interest in that purpose, of course. I mean, 200 million dollar fine; 150 million dollar fine could be put into the federal treasury, and perhaps used to buy a landing gear for a B-2 bomber, but what does that do for the Alaskan environment. And that is the consideration that the victim, the State of Alaska, today, urges this court to bear in mind when it decides whether to accept this plea agreement.

Now, next, is 150 million dollar fine sufficient to give pause to those who skirt the line concerning the protection of the natural resources in the state. Governor Hickel and I, and I believe the people, firmly are of the view that it is. It's a base line number, and a number which the State can hold up to whether polluters -- that this is the fine which you face, 150 million dollars, and that certainly should be sufficient, the State believes, to give pause to those who do not show the proper regard for the Alaska environment.

Now, so much for the State's views about the criminal plea agreement. I want to say a word about the civil settlement.

You know, it sort of reminds me, Your Honor, of years ago, perhaps in elementary school, when we used to fight a lot. I don't mean the court. Speaking for myself. But here's the thing, Your Honor. You know, as I recall it was a number of years ago, but there were always those who stood on the sidelines and said, "I'll hold your coat; I'll hold your glasses. I mean, why don't you two guys go fight."

You know, and, of course, you know, being young, and so forth, I perhaps took undue urging there, and, you know, would get in there and engage in fisticuffs, you know, as it were. You know, it would go on until, you know, either I or my adversary had vested in skinned knuckles, and recipient shiners, and a bloody nose, and eventually one learned a little bit. Then these people standing on the side lines would say, "Well, nice fight. You know, here are your glasses and here are your coat", and we would limp home, and, you know, be back to fight again another day.

But -- so it's not unlike that in this present setting. There are those who say: Why don't you two heavy weights go fight. United States, Exxon, the State of Alaska, and, you know, we'll sit on the side lines and sand bag you. Not enough money, they say. So do they offer to get into the fray and to put up the 25 million dollars a year which the State of Alaska is footing the bill for to proceed with this civil litigation? I hear none of them say: Here is a million or 5 million dollars to support the prosecution of these claims. They simply urge the State to foot this bill. Now the court knows that the State has expended over 85 million dollars out of the State treasury in connection with this oil spill. And we are continuing to spend a reasonable estimate of 25 million dollars a year.

Now, the court can do the math for its own view as to how long this case is going to take, but certainly it is going to go on for years, we know. And soon the State will have 150 million, 175 million, 200 million dollars into this proceeding. And there becomes a limit, Your Honor, to which responsible public officials can continue to spend public funds in the prosecution of this claim at that rate.

Now, so to with respect to those who say: This is not enough money. I mean, you should get billions more. And, you know, guys like Governor Hickel and Charlie Cole -- I mean, they are irresponsible, they're hiding out, unable to face the personal responsibility. Well, let me assure the court that that is utterly irresponsible -- utterly irresponsible.

The State has carefully examined its damages. The State has studied ad nauseam the admissibility of contingent valuation studies. I personally have read over 1,000 pages of, you might say, esoteric articles on contingent valuation, admissibility, and its reliability. And some favor it, some don't. But those detractors never, I notice, when they criticize the amount of this settlement, that accompany their comments with the citation of authorities supporting the admissibility before this court of contention valuation studies. Nor do they comment on the reliability of that testimony, and how it will stand up in the face of vigorous cross examination.

The State has considered those elements.

The State has made studies, Your Honor, about the cost evaluation and testimony of birds, and bald eagles, and whales, and the lawsuit, sport fishing in the area. There's been exhaustive studies done, which I personally have reviewed. So we have a very good feel for the amount of recoverable damages in the court of law.

And let me say this with respect to those detractors: I see not one of them, Your Honor, who are prepared to guarantee, my letter of credit, if you wish, that the governments will not receive less if they proceed to trial. Then they recover under this settlement.

You know, it's like we used to say, maybe it's time to put your money where your mouth is. No one says, we will absolutely guarantee that this money will be recovered. They do not.

So we urge the court to approve that civil settlement. I know the court asked us to be brief, so I'm going to conclude my remarks now. But I want to say this: Chief Justice Burger, Chief Justice Renquist, the Court of Appeals for the Ninth Circuit, this court, constantly harps on the fact that lawyers litigate too much; they're not problem solvers. All they want to do is make money and, you know, send a lot of discovery, and prolong litigation so they can make money. And they exhort counsel to settle cases and work towards settlement, problem solvers.

Now, that's what these lawyers have done. They've worked hard. I, among them, professionally evaluating their cases, supported by teams of some of the finest lawyers in the country. And they've represented their clients well. We've done what the courts asked. We've reached a fair, and just, and reasonable, and responsible settlement. And I urge the court, on behalf of the State of Alaska, and Governor Hickel, to approve those agreements. Thank you.

THE COURT: Before you sit down, Mr. Cole.

MR. COLE: Yes, sir.

THE COURT: A couple questions. I read the newspapers, just like everybody else does. You've alluded to some of the mutterings that have been in the papers about these proposals already, but there are some others that you haven't mentioned. Have you . . .

MR. COLE: They make my blood boil, Your Honor, I must say.

THE COURT: Well . . .

MR. COLE: But I . . .

THE COURT: Simmer down for a minute. Are you, based on your own evaluation, or your staff's evaluation, sure to a reasonable legal certainty, that the State of Alaska and Exxon are legally bound to this civil settlement agreement?

MR. COLE: Yes. No equivocation there, Your Honor.

THE COURT: Second question. And this just gets to some of the muttering that I have heard that has made me uneasy about where the restitution money is going to go. Are you satisfied to a reasonable legal certainty, that this restitution money, if I approve that agreement, will get where it is agreed to go, to restoration rehabilitation, and so forth, of Prince William Sound, as opposed to being drained off somewhere else and spent somewhere else.

MR. COLE: Is the court talking about the civil settlement agreement?

THE COURT: I'm talking about the civil settlement.

MR. COLE: Let me say this, Your Honor, because I am pleased to respond to that. By the grace of Governor Hickel, I am one of the three State trustees, along with John Sander and Carl Rosier. The court will notice, as it reads the civil settlement agreement, that the six trustees comprised of three state trustees and three federal trustees, must act unanimously.

Now, I want to say, when we went back and redid this memorandum of agreement between the United States and the State, there was a stout discussion between the State and the federal government as to whether those six trustees must act unanimously. The State said they must act unanimously, sort of the proverbial bottom line.

And I personally represent to this court, as long as I remain Attorney General of the State of Alaska -- as long as I remain one of these trustees, I guarantee that that money will be used to the restoration of the Prince William Sound, and it isn't going to be drained off. That's one of the reasons I want to remain as a State trustee. Because, you know, it's time for the studies and the damage assessment to sort of come to a conclusion and to get on to physical efforts of restoring that sound. And I know Commissioner Sander and Commissioner Rosier agree totally with the commitments I have just made to this court.

Now, could I say one more thing, Your Honor. Thank you. There are these people who say: well, I mean, this is just a warmed over agreement that you had last March in the civil arena. There's no more money. It's essentially the same agreement. Sure. But what's happened since last March in September. I mean, the fish came back to Prince William Sound. I mean, how are we supposed to say to Exxon: Well, we want more money now that the fish have come back. They say: Well, it's just like we told you in the first place.

So, you know, there was heavy discussion as to whether that settlement amount would remain the same.

And the State said -- Governor Hickel said: Not one penny less. And that's why the agreement is as it is today, Your Honor.

Does the court have more questions? Thank you.

THE COURT: Yeah. You suggested it already. The money that comes from the criminal settlement -- the plea agreement provides that there will be a gross payment of 100 million dollars for restitution, half of it being paid to the State and half of it being paid to the federal government. Does that State 50 million dollars go into the general fund?

MR. COLE: No.

THE COURT: Where does it?

MR. COLE: Well, in view of the Attorney General, it goes into a special fund, to be used solely for the restoration of Prince William Sound, et cetera, et cetera. But in addition to that, Your Honor, as the court will observe as it reads that provision carefully, there was provision made for the possibility, should the legislature and the governor, acting jointly, wish to use those moneys to fund in part an oil spill research center. But those monies do not go into the State x-checker, but must be used solely, by decree of this court, if you will, should the court prove this agreement. Only in that fashion.

THE COURT: Is it your opinion that that decree, if I sign it, will survive a challenge by legislators that they ought to be able to get into and spend that money the way they think it should go?

MR. COLE: Well, it's my firm opinion that they will not have that -- what I may call, "luxury". And it will be resisted firmly by the Attorney General, in any event, where effort is made to use the money in that fashion. I would imagine this court might summon the

Speaker of the House, the President of the Senate, and have a word with them if they don't have a clear recognition on the limitations of those funds. I would, you know, be pleased to have a quiet word with them in that regard.

I personally know the power of this court and the need to obey its orders. Thank you, Your Honor.

MR. DEMONACO: Your Honor, in conclusion, as one court has noted, a consent decree is a highly useful tool for government agencies, for it maximizes the effectiveness of limited law enforcement resource, by permitting the government to obtain compliance with the law without lengthy litigation. The same could be said for a plea agreement in a complex criminal case. For the reasons set forth in our memorandum in aid of sentencing, and the memorandum in support of the consent decree, the oral presentations of the Assistant Attorney General Hartman, and Attorney General Cole, and on behalf of the people of the State of Alaska and the United States of America, we strongly urge the court to approve the criminal plea agreement and enter judgment on the civil consent decree. Thank you.

THE COURT: Mr. Lynch?

MR. LYNCH: Your Honor, we have filed a joint memorandum, and if the court will permit, Mr. Neal will address the majority of those issues. And if there is some left ever item, we may ask to supplement his remarks.

MR. NEAL: May it please the court. I'm Jim Neal. I represent Exxon Shipping Company. I'm speaking on behalf of both for the moment, and will endeavor not to be repetitive, but I'm afraid I will. This may be the last chance that I get to talk about this. And I'm kinda like General Cole, I'm an old rat around the barn; tried a lot of cases, as General Cole has. And this case is not a lay-down hand for either side. There are a lot of issues. I think this court said one time that the legal issues in this case are unprecedented. And no one really knows how this case, either the civil or the criminal case, might come out.

Exxon is giving up, what I view to be, a great many arguments that it could make over a period of years, including the, I think, substantial argument that the Alternative Fine Act does not apply to non-economic crimes. And if it does not apply, then I will speak to a minute of what the fines could be in this case.

I want to talk very briefly about four or five subjects. And one I want to talk about is the Exxon family. I am not a silk stocking lawyer. I was born on a 100 acre farm in Tennessee. Over the years I, as a prosecutor -- as Bob Kennedy's special assistant, as a United States Attorney, as the Watergate prosecutor, as defense counsel for more decades than I want to remember. I've represented scores, if not hundreds, of persons -- entities charged with crime. I prosecuted scores, if not hundreds of people.

Our client is big, there's no doubt about that. But somehow in this country, bigness is equated, not with success, not with hard work. I have never been associated with people who work as hard as the Exxon employees do. I thought I got up early in the morning on the farm. I mean, they brought me back to those days by getting me up early. I want to talk a minute about, while, yes, Exxon is big, it is a good corporate citizen. And let me talk about, just for a moment, the point that Exxon's commitment to the environment, did not begin only after the spill from the Exxon Valdez.

I would like to point out something that may not be generally known or considered. Exxon Corporation -- and I'm talking about it, Your Honor, because there is a legal issue here. When I say "Exxon", I'm talking about Exxon, its subsidiary corporations, its family. Aside from the expenditures relating to the spill, Exxon has averaged more than 1 billion dollars a year in environmental expenditures during the 1980s. Research or environmental and safety problems of Exxon now account for annual expenditures of 160 million dollars. Fully, 25% of Exxon's total research expenditures. Another indication of a commitment to the environment.

Since 1987, before the spill, Exxon reduced its discharges reported on the EPA toxic release inventory by 25%, and has voluntarily committed to reduce by 50% by 1995, substances the EPA has identified as high priority. Now, I want to point out, we're not talking about illegal discharges now. We're talking about something that can be done, but should, if you are a good corporate citizen, try to reduce these.

Exxon, early adopted, and has continuously updated its environmental toxic substance and safety policies. Exxon has pledged to abide by the environmental codes of conduct of the American Petroleum Institute and the Chemical Manufacturers Association. That's without regard to the grounding. May it please the court. Since the grounding -- and I think this is important. When I was a prosecutor, and I think that Mr. Demonaco will agree with me -- it was very -- we can't prosecute all the offenses in this country. And what we have to have is, if someone makes a mistake -- if someone makes a mistake, there has to be encouragement to that individual or that company to come forward and say, "I made a mistake and I will do my best to rectify it."

Indeed, Your Honor, the sentencing guidelines that I will get to in a minute, that will apply to organizations, at least in some areas, recognize that one great important thing in the area of crime and punishment, is if the entity committing the crime steps forward and accepts responsibility.

As Your Honor knows, in individual guidelines, that is one of the first things mentioned, acceptance of responsibility. And second is, doing something to repair the harm.

Right after the spill occurred -- and I don't know where people have been -- it didn't say this. Somebody says: well, they're arrogant, or, this and that. Mr. Rawl stepped forward, publicly, with thousands of copies of letters distributed, going on television and said, we are sorry -- we are sorry, and we will remedy the wrong. And I have the material here if the court would like to see it.

Exxon, in 1990, after the spill, contributed 50 million dollars to fund, with contributions with others, the establishment of an industry response capability for dealing with large scale oil spills. As Mr. DeMonaco said, since the spill, Exxon has spent more than 40 million dollars to improve vehicle operating safety, personnel training and oil capability.

For 1991 alone, Your Honor, excluding expenditures connected with the Valdez matter, Exxon will spend 1.6 billion dollars on capital projects designed to enhance environmental and safety performance. Since the spill, Your Honor, defendants have expended more than 30 million in additional clean-up costs, since the filing -- and this has occurred since the filing in March of the previous plea agreement.

In sum, with the multitude of lawsuits still pending, the defendants have paid, and with the civil settlement, agreed to pay an amount totalling more than 3.5 billion dollars as a result of this spill, Part of this is in the settlement of claims of 12,600 separate claimants, that Exxon has gone, seen a validity to their claim; paid the claim without these individuals or entities having to go to court. The 3.5 billion, may it please the court, is almost equal to the entire total worldwide income of Exxon Corporation, including affiliates, for the year 1989. It is approximately 70% of its total annual worldwide income for the year 1988, and for the year 1990. Nobody can fairly conclude that any corporation would accept this magnitude of expenditures simply as the cost of doing business.

And before I leave this port, let -- it's hard for me to talk about Exxon being a criminal in this matter. This spill occurred because of mistakes, no question about it. But this spill basically occurred because a master left the bridge at the wrong time in Prince William Sound.

That master who left that bridge was required to read and sign a bridge navigation and organizational manual that says, "You will stay on the bridge in Prince William Sound." Moreover, that master who left that bridge at the wrong time was being paid approximately $90,000.00 a year, for six months work. That master was paid extra -- as a matter of fact, $350.00 extra for a trip through Prince William Sound, because he held a Prince William Sound pilotage endorsement. Sure, we made a mistake. But it's hard to speak of conduct like that in the common terms of criminal.

Now, one thing this court said, and I'll move on. One thing this court said the last time, very appropriately, that unlike dealing with individuals, I have no guidelines -- no sentencing guidelines prepared and promulgating by the Sentencing Commission who studies this, unlike the court and unlike the rest of us, full time. I have no guidelines to guide me.

Since the filing of that last plea agreement, the sentencing commission has come out with guidelines. And those guidelines will be effective, unless rejected by Congress -- they will be effective on November 1, 1991.

Now, it is true, at the present time, those guidelines do not cover environmental crimes. But what is important here, they cover a multitude of other crimes by organizations, and the spirit of those guidelines, it seems to me, can be instructive to the court. And I would like to talk about two or three things of those guidelines -- and I'm pretty sure the court is aware of this, because the court is going to have to deal with those guidelines very soon.

One of the things that those guidelines say, that pecuniary loss to a victim -- we talked about the Alternative Crimes Act, of how that could enhance the statutory punishment. Those guidelines say that pecuniary loss to a victim should not be used in calculation of the fine, unless the conduct is intentional, knowing, or reckless. And we are not pleading, and would not plead, to any conduct involving intent, knowing, or reckless.

Now, if you don't use that, then, Your Honor, you can apply these guidelines that have now been submitted to Congress. And without using pecuniary loss to the victim, the entire fine in this case, for both corporations combined under those guidelines, would be 3 million dollars. Moreover, those guidelines suggest that the court should not impose both fine and restitution for misdemeanors.

Now, the reason I'm not giving citations, Your Honor, this is in the sentencing memorandum, and the court can check on the accuracy of my statements. The guidelines suggest the court should not impose, both fine and restitution for misdemeanors. These defendants are pleading to misdemeanors. Moreover, those guidelines say, that if the defendants have paid, or agree to pay remedial cost that greatly exceed gain -- and, my gosh, there is no gain here -- downward departure from that fine formula of 3 million dollars may be warranted. And I quote, in such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrences. Those don't bind this court, and these don't require this court to accept this plea agreement. But I think, unlike the last time, Your Honor, those are helpful to the court in seeing what is going on, and seeing what this Sentencing Commission thinks in principal, and that's all I'm suggesting, not that they bind the court. But those principals weren't there the last time.

Now, there is one thing I want to say that has concerned me a great deal, and I want to take this opportunity to state it. Mr. Rawl had a press conference at the time of the last plea agreement. And what was picked up was, Mr. Rawl's statement that, well, the amounts that we are agreeing to pay will not affect, or will not substantially affect the projects we have going on, and the earnings for 1991, that sort of thing. What they want was not picked up -- what was not picked up -- and I have the transcript here if the court would like. What was not picked up was Mr. Rawl's further statement was, that the reason that I could say that, is because we have deducted, for the year 1989, 2.6 billion dollars and charged those against earnings.

Now, the current plea agreement just briefly provides for imposition of a fine and compensatory payments of 250 million dollars. The imposed fine is 50% larger than the previous one. The compensatory payment is 100% larger than the previous one, and we are, in fact, paying -- total amount being paid is 25% larger than the previous plea agreement. And it is being -- as the court would say, it is being directed to the victim to the harm.

The instant plea agreement then provides for 150 million to be paid, and these payments -- these payments -- 125 million to be paid, I'm sorry. These payments, together with the payments made and to be made, total approximately 3.5 billion dollars.

As this chart shows, Your Honor, the total fines -- fines, restitution and forfeitures of all criminal environmental cases for the eight year period, 1983 through 1990, inclusive, total 56 million dollars. We are paying approximately two and a half times, in this one case, that involves simple negligence. We are paying two and a half times. The total amount of fines, forfeitures and restitution obtained by the United States government for an entire eight year period.

Two other cases I would like to mention, because, as Your Honor knows -- and I will stop. Two other cases I would like to mention, because this court has to be concerned with disparity in sentencing. Indeed -- indeed, this whole sentence guideline -- the Sentence Reform Act of 1984, and all these guidelines that most of us are depressed by, because you have to go back and be a mathematician again to understand it. But the whole guiding point of the guidelines was, we are concerned about disparity in sentencing, that may be going on in federal courts across the country, and so the guidelines were passed.

In talking about disparity of sentencing, of course, we put on the chart -- and I just mentioned that -- two other cases, let me point out to the court to consider.

Recently Phillips Petroleum agreed to settle wilful -- wilful violations. Now this court knows, in the Ninth Circuit, the term "wilful" means a voluntary intentional violation of a known legal duty. We are pleading to simple negligence. But Phillips Petroleum recently agreed to settle wilful violations of OSHA regulations which resulted in the deaths of 23 workers for 4 million dollars.

In January of this year Arco Chemical Company paid less than 3.5 million dollars to settle charges of, quote, "serious", quote, OSHA violations which killed 17 workers.

Last month, on September 6, 1991, Sperry and Unisys corporation pleaded guilty to eight felony counts, including bribery of United States government officials, conspiracy to defraud the United States, filing false claims against the United States, and wire fraud, and they were fined 4 million dollars and agreed to pay up to 163 million in restitution.

May it please the court. I understand that the Sound is well on its way to recovery. On behalf of both Exxon Corporation and Exxon Shipping and the lawyers who have worked very hard, diligently, and in good faith on this, and believe that this is appropriate resolution of these matters, and far preferable to years and years of litigation in which only the lawyers would win. And therefore, we urge the court to accept the criminal plea agreement, and the civil settlement agreement. Thank you very much, Your Honor.

THE COURT: One minute.

MR. NEAL: Yes.

THE COURT: One of the statutory factors that 18 USC 3572 sets out for my application or consideration in imposing fines, has to do with the question of whether or not fines can be passed on to consumers. This is something that, when we took comments before, I heard a fair amount about.

MR. NEAL: Yes, sir.

THE COURT: Can you address that for me?

MR. NEAL: I will address it. I meant to address it, and Mr. Lynch was prepared to address that. I could go ahead or have Mr. Lynch do that.

THE COURT: Whoever.

MR. NEAL: Why don't I have Mr. Lynch do it, Your Honor, because he has been a major part of this.

THE COURT: That's fine. That's fine.

MR. LYNCH: Your Honor, as to both of the defendants, but particularly as to Exxon Corporation, it is a participant in an extremely competitive industry. It does not control a large share of that industry, and it has no power to raise prices unilaterally. Accordingly, in the payment of sums so large and material as this, it has essentially no alternative, but to accept that as a cost against earnings. Basically a fine imposed on the shareholders and equity holders, because there is no capability to pass on the added cost, not only of the fines that Your Honor would impose under this agreement, but also the many other costs which all have been referred to in this case. Those fines, and those penalties, and those costs have all flowed back to the shareholders and the equity holders of

Exxon Corporation, because there is no ability to pass them on.

If you raise the price of your gasoline to an uncompetitive level, you simply make business for your competitors, and Exxon does not have, and has not attempted to pass such fines on to the public, Your Honor.

THE COURT: Mr. Lynch, Mr. Neal, do either of your clients wish to address the court? Each has the right of allocution in this court. And incidentally, I am taking this up in a point somewhat out of order from usual. But I am doing so because we are dealing with an agreed sentence here.

What your clients might say after I decide whether or not to accept the plea agreement is sort of a moot point with an agreed sentence. So I'm turning to you now to say, if there is anything the clients wish to say, now is the time?

MR. RAWL: Your Honor, I will just repeat what I've repeated many times before, and Messieurs Neal and Lynch said basically, that there is no question to anyone. I am sure that we regretted that spill very much. We feel like, that through the application of our technology and our people, and a heck of a lot of money, that we've done all we could possibly do at this point to get this cleaned up and to take care of the people that came forward with claims, and so forth.

We face a number of other issues, obviously, and I just wanted the court to know that we appreciated the opportunity to discuss this matter today and to give our attorneys enough time to cover this in some detail.

But in terms of the case, we understand what the guilty pleas mean in this case, and I appreciate your making that clear to us. That's all I have to say, Your Honor. Thank you.

MR. NEAL: Mr. Elmer has advised me -- we'll advise the court that he has nothing further to add.

THE COURT: Is that the case, Mr. Elmer?

MR. ELMER: Yes, sir. Thank you.

THE COURT: We have been going at this almost two hours. Let's take about 10 minutes, and when we reassemble I'll make some decisions on this matter. We'll be in recess for 10 minutes.

THE CLERK: This court stands at recess for 10 minutes.

(Off record - no notes provided)

(On record - no notes provided)

THE CLERK: All rise. His Honor the court, the United States District Court, is again in session. Please be seated.

THE COURT: I suppose it's only fitting that as I got to the point in the corridor where I was directly behind where I'm sitting right now, I was handed a fax that has to do with this case. It's from a congressman by the name of Frank J. Garrini (ph), who purports to speak on behalf of one of the committees of Congress -- apparently the House Ways and

Means Committee, although the fax copy is pretty poor -- the quality is pretty poor.

The substance of the communication is that he would have the court defer, or his committee would have the court defer action on the matter that we have under consideration at this moment, in order that committees have sufficient time to analyze and comment on the proposed settlement before I rule on its adequacy.

Quite frankly, folks, it comes too late. We've all spent too much time and too much effort getting to this moment today to not go forward with the matter.

I have determined to accept and approve both the criminal plea agreement and the civil settlement which has been reached by the parties in the two environmental damage cases, A91-82 and 83.

Having reached that conclusion, during the course of this morning, I've only had a few minute to think of what to say about that decision. To those of you who worked so hard on it, probably no explanation is necessary or even very useful. To some who denounced the agreements, I suspect before they had any way of even knowing the full import of them, I suspect no explanation that I could give would be adequate.

However, I think we have a lot of people who fall in the middle here who are truly interested in this case and are truly interested in how and why the court reaches decisions that it reaches in matters such as this.

So for their benefit, and this will take a little bit of time -- but for their benefit, I am going to review and make some comments upon the sentencing factors that I am obligated to take consideration of in imposing a sentence.

I am to consider the nature and circumstances of the offense. I suspect everyone already knows my basic underlying view of that situation. It's been well described here this morning. The Exxon Valdez oil spill was a complete utter disaster, which I previously characterized as being off the chart.

In this same regard I am to consider the history and characteristics of the defendant. I didn't have sufficient information on that in April, frankly. I feel comfortable now with the information that I do have. Obviously Exxon Corporation is very large. It has been very profitable. But what is now very clear to me, is that Exxon has also been a good corporate citizen. It is sensitive to its environmental obligations. Indeed, although it wasn't mentioned publicly today, Exxon Shipping is reported to me, through the memoranda, to be an award winning enterprise, as regards the safety of its vessel operations. I've taken that into consideration.

Perhaps the most important characteristic though, in terms of what we have to do here today, is the fact that immediately after the spill, Exxon stepped forward with both its people and its pocketbook and did what had to be done under difficult circumstances, because it's now quite apparent that the wherewithal to really do the job was something less than would have been desired. Nonetheless, they stepped forward and did the necessary to get the clean-up underway immediately. And perhaps most surprising of all, because it is really quite unique, Exxon stepped forward and started paying private claims to the tune of about 300 million dollars at this point.

And it's my information that at least some, maybe many of those settlements, were kind of open-ended, in that plaintiffs weren't, in all instances, required to sign off absolutely and forever that they weren't ever going to present another claim.

It's really quite extraordinary for any defendant to step forward and start paying parts of claims before they are in a position to wrap up all the claims.

Moving on. Sentencing needs to reflect the seriousness of the offense and promote respect for law. In some sense, it needs to punish, it needs to deter.

I have come to the conclusion that largely due to the nature of this accident -- and I so characterize it on purpose -- punishment and deterrence are of lesser importance in this case. We have a defendant that has both, before and after the incident, plainly acknowledged its duties, its responsibilities. And I'm confident if, perish the thought, there should be another problem, that this company would step forward again and do what it had to do.

I think deterrence and punishment is important, but in this case I am satisfied that we have a defendant that understands that it made a mistake, and will do its utmost to prevent another one.

While some have characterized it as smoking mirrors, the structure of the plea agreement in this case is important. As some, maybe all of you know, the agreements provide for a gross fine of 150 million dollars, and then it provides for very substantial remittance of that fine. That's a little unusual. As a matter of fact, it's a lot unusual.

But in terms of deterrence -- I speak now of deterrence with respect to others, more so than with respect to Exxon. That structure of the fine is important. Because what it says to others in the industry, is that you can expect fines that are off the chart in response to oil spills that are off the chart.

But it also says to those others in the industry, if you accept and live up to your legal responsibilities, as far as clean-up is concerned; as far as all of the other damage control that has to follow an incident like this -- if you do those things, you will get credit for it.

I think the structure of this sentence contains an appropriate amount of punishment; it contains an appropriate element of encouragement for respect for the law, especially insofar as it makes provision for a very heavy fine, the likes of which has almost never been seen in this country, and yet there is some relief for a defendant who has -- which has honored its legal responsibilities as far as cleanup.

I am to consider the avoidance of disparity in sentences. There is not a whole lot that can be said about this in this case, frankly. We have an environmental disaster, and insofar as Exxon's financial results for the year 1989, this case has imposed a financial disaster upon them. And in some very rough sense, that is as it ought to be. I see no problem with disparity where a most serious environmental accident is addressed with fines which are almost without comparison.

Perhaps the most important consideration in sentencing in this case -- well, not perhaps -- in fact, it is the most important consideration -- is the matter of restitution. Restitution is important here -- of vital importance, because of the rehabilitation that has to take place in Prince William Sound.

Now, some of you have probably noticed, with respect again, to the fine structure here, that when you cut through the details, the fine imposed by the plea agreement that I have under consideration right now, is actually 25 million dollars less than the fine that I had under consideration before, in terms of net amounts. Why would I go for that? Well, it's very simple. Mr. Cole alluded to it.

Dollars that I impose as fines go to the

United States Treasury. Dollars that are obligated to be paid as restitution, in simple terms, go to the victim. In this instance, go to the state and federal governments for rehabilitation of Prince William Sound.

It is in my view far better, as a practical matter, to lighten up on the fine by 25 million dollars, and in the process have not 25 million dollars more, but 50 million dollars more to go toward restitution.

To the extent that I had concerns about the dollar amounts involved in the criminal case alone, and I expressed those concerns before, a 25% increase in the net dollar cost is, to me, significant. Some have suggested that the fine, looking just at that, is really insignificant, and that the increase is insignificant.

Addressing that increase in particular, I consider a 25% increase in the amount to be paid, looking just at the criminal case, to be significant. If someone were to tell me that the federal income tax rate that I am obligated to pay was going to increase from a base level of -- what is it now, 33% or something like that -- to 58%, I would think that my taxes went up a whole lot. And, in fact, the dollars out would go up a whole lot. I don't understand the suggestion that a 25% increase in the amount of the fine in this case is insignificant.

But to be completely candid about it, I'm sure what is going on here is that there are those who are really of the opinion that the total net fine, plus restitution, is not enough, and is, in their view, insignificant in the light of this case.

My response to that, frankly, in terms of what I am doing, is the chart that you saw. Criminal sentencing is to accomplish the purposes that I am discussing with you at this point. But amongst those is not revenge. And I suspect that some who want the fines piled on are more interested in revenge than they are in restitution and rehabilitation. The focus ought to be on the latter.

It is, in terms of my decision making, very, very important that the gross amount of the dollars to be paid by Exxon on account of these offenses is way, way more than everybody else who was prosecuted for similar offenses in the eight years preceding this incident.

Locking just at the criminal case, I think the punishment fits the crime. Also on the subject of restitution, I recognize, as do all of the parties, that the 100 million dollar restitution payment in connection with the criminal proceedings alone, is probably not sufficient; it won't get the job done. It was a considerable concern to me when this matter was in front of me last April, that the civil settlement seemed to be falling apart. And as we all know now, it did at that point stumble and fall.

I was concerned about being in somewhat of a box if I had approved the previous criminal plea agreement. And then the rest of the anticipated and needed restitution were to fail for some reason. Now nobody has talked about it here today. I suppose nobody really wants to talk about it. But being very realistic about it, the 900 million dollar settlement of the civil case is more than just the agreement to pay "x" dollars for the wrong, the accident, the spill.

Nothing about this case is simple. The incident itself was not as simple as it has often been reported to have been. And as a consequence, and not surprisingly, there have been claims made against the State of Alaska, and there have been claims made against the federal government. And while nobody has talked about it, those claims are being settled. The 900 million dollars, plus the possibility of another 100 million dollars is a product of a number of things. The most important of which is the evaluation of the cost of rehabilitation of Prince William Sound. But the cold hard truth of the matter is that there is a lot more to that settlement than just rehabilitation. The lawyers recognize that. I recognize it, and I accept what has come out of the civil negotiations as a responsible and prudent job of balancing all of the risks of loss and of gain for all of the parties with, I am satisfied, the over-arching concern for rehabilitation of Prince William Sound.

With it reasonably sure at this point that the 900 million dollars, plus the possibility of another 100 million dollars for presently unknown risks; with that available, and with the restitution provided in the criminal plea agreement, I am satisfied that both are adequate to provide restitution.

Now just to quickly get through the rest of the factors that I am required to consider, I must consider the income and resources of the defendant. I've already mentioned that situation. I am satisfied that the overall payout on account of this incident is commensurate with Exxon's resources. I am to look at burdens that fines and restitution place on the defendant. I've done that. I'm satisfied that they are appropriate. I am to look at losses incurred by others. That's what I talked the most about.

And finally, I am to consider the ability of a defendant to pass costs of fines on to consumers. As a side note on that subject, I really had no doubt what Mr. Lynch would tell me this morning. Quite coincidentally, I was in a position to attend a basic economics seminar last March, I guess it was, and not surprisingly, perhaps, the kind of economic considerations that we have been talking about here today and that are involved in the matter of whether these fines can be passed on, came up in the course of that seminar.

I am satisfied that the petroleum industry in this country is, in fact, sufficiently competitive. That it is unlikely that Exxon can pass a significant portion of the fines or restitutionary obligations in this case on to the consumers.

As I indicated at the outset, the plea agreement is approved. In the criminal case the agreement and consent decree will be approved in the civil case. What I need to do next is really the concluding judicial function of this matter to impose sentence. I have a couple of questions about that.

Mr. DeMonaco, do you have something?

MR. DEMONACO: Yes, Your Honor. We have proposed a judgment form for the court for its review, as well as a judgment for entry of the civil consent decree.

THE COURT: Let's have a look. (Pause) With respect -- I'm looking at the civil order first. (Pause) I have signed both the judgment in case A91-82 and A91-83 approving the agreement and consent decree. I want to add a footnote to that. It may have seemed as though I was baiting Mr. Cole just a bit on this matter of where the money was going to go. And I was, and I did it on purpose. And I want you all to know that I'm not able to monitor this kind of thing, but I expect you all to do the monitoring. And quite frankly, I expect to see people back here if the money that flows from the disposition of these three cases is not going where I expect it to go, based upon the terns of these agreements.

(Pause)

Counsel, I'm not sure that the judgment that you propose for the criminal case goes quite far enough. My concern is this: I think probably we need to enter a judgment which doesn't incorporate things by reference. Let me suggest to you what I see as an appropriate formal disposition of the criminal case, and tell me if anyone has a problem with it.

As to Exxon Corporation, that company has been found guilty of a violation of the Migratory Bird Treaty Act, 16 United States Code, Section 603 and 707(a), as charged in Count III of the Indictment. Tentatively, for your consideration, Exxon is fined 25 million dollars, of which some 20 million is remitted, such that the net fined Exxon is 5 million dollars, plus a $25.00 assessment. I'm laying aside the restitution obligation for just a second.

As to defendant Exxon Corporation, Counts I, II, IV and V of the indictment would be dismissed.

As to Exxon Shipping Company, that firm has been found guilty, and adjudged guilty of one each violation of the Clean Water Act, 33 USC 1311(a) and 1319(c)(1)(A). The Refuse Act, 33 USC 407 and 411. And the Migratory Bird Treaty Act, 16 USC 703 and 707(a).

As to those three counts of conviction, the court would impose a fine of 125 million dollars, and would remit 20 million dollars, for a net total fine as to all three counts of 20 million dollars.

And I feel constrained under the plea agreement to make some sub-allocation of that payment. This is where I feel perhaps I need some input. Going back to the Exxon judgment, it's my supposition that by operation of law, the 5 million dollar net fine would go into the special fund that is created by the Migratory Bird Treaty Act, and I don't think I need to say anything about that. But it seems to me that I probably need in the judgment to provide a breakout as between Counts I and II, or, the one hand, and Count III on the other hand. And as I understand it, the agreement is, that of the 20 million dollars, 7 million dollars would be allocated to Count III, the violation of the Migratory Bird Treaty Act. Now, the question, then, is, do I need to make any further allocation in your view as between the fine on the other two counts. Is there any point in that?

MR. DEMONACO: No, Your Honor, not on behalf of the government. The disposition of the money for Counts I and II will go to the same place, with the U.S. Treasury, the Victim's Crimes Act, the VCA account. We leave it to the court's discretion as to the amount to be allocated for each offense, Counts I and II. Whether it all be on Clean Water and suspended on Count II, or just equally divided.

THE COURT: My inclination was to divide it up, 7, 6, and 7.

MR. DEMONACO: That's fine, Your Honor. That's fine with the government.

THE COURT: Does defense counsel have any problem with that?

MR. NEAL: I have no problem with that, Your Honor.

THE COURT: All right. Finally, then, it is my tentative view that as to the restitution obligation, that it be the judgment of the court that the defendants are jointly and severally liable and shall pay restitution in the amount of 100 million dollars. Payable, one-half to the State of Alaska, and one-half to the United States of America within 30 days. Is that formulation of the restitution obligation satisfactory under the plea agreement?

MR. DEMONACO: Yes, Your Honor.

MR. COLE: Your Honor, may I address the court on that?

THE COURT: Yes.

MR. COLE: I would like to have the scope of that restitution set out in full in the agreement. And as I recall, it's set out in the plea agreement. So there is no misunderstanding on the part of anyone as to the scope of what those restitutionary funds may be used for. That was a carefully negotiated provision.

THE COURT: The plea agreement -- and I'm looking at page nine -- says: such monies are to be used by the State of Alaska and the United States, exclusively for restoration projects within the state of Alaska, relating to Exxon Valdez oil spill. And then there is some more.

MR. COLE: Yes, I would like that . . .

THE COURT: I would be very happy to include that expressed language in the judgment.

MR. COLE: I would be pleased if the court would see fit to do that, Your Honor.

THE COURT: Defense counsel, any thoughts on this formulation of the judgment?

MR. NEAL: No, Your Honor.

THE COURT: Mr. Lynch?

MR. LYNCH: Your Honor, no problem with that formulation.

THE COURT: All right.

MR. COLE: May I say just a public word about that, Your Honor. I wanted to call the court's attention specifically to this sort of addendum to the standard definition of restoration. And point out that that includes, quote, "long term environmental monitoring and research programs directed to the prevention, containment, clean-up and amelioration of oil spills.

And I call the court's attention to the fact that that was a carefully negotiated provision, to give some flexibility to the use of the two 50 million dollar payments. Because, as you know, the governor has spoken in those terms of the desirability of studying oil spills, and could make a contribution to not only the environment of Alaska relating to oil spills, but also, you know, the entire United States.

THE COURT: Judgment will then be entered against Exxon Corporation in the terms that I tentatively announced. The same will happen as to Exxon Shipping Company. And as to Exxon Corporation, Counts I, II, IV and V are dismissed. As to Exxon Shipping

Company, Counts IV and V are dismissed.

That will be the judgment of the court, with the additional language concerning the restitution payment. Is there anything further that we need to do, Mr. DeMonaco?

MR. DEMONACO: Yes. Your Honor, pursuant to Rule 42 of the Federal Rules of Criminal Procedure, I have a formal motion for the court to dismiss Counts I, II, IV and V, Exxon; Counts IV and V, are Exxon Shipping.

THE COURT: Probably the form judgment will do that, but I'll sign it just to make sure you're covered on it.

All right. I have signed the dismissal order as to the criminal counts. I have not signed the proposed judgment with respect to the criminal case, because I will be entering a separate judgment of my own that reflects the exact terms and allocations of the fine that I have discussed with counsel.

MR. NEAL: That will be consistent with your remarks just a moment ago, you mean?

THE COURT: Yes, sir. And if it isn't, I'm sure you will call my attention to it.

MR. DEMONACO: Your Honor, and I've just been reminded to also request the court to sign a consent decree. We prepared a separate motion here on the civil side, but there is also a place for the court to sign the decree as well.

THE COURT: I will do that. I haven't a clue as to who has it or where it is right now, but I do recollect that there was provision for a signature on it. If the clerk would find the original of the consent decree and get it to my chambers, I will sign the last page of that document, also.

Anything further, gentlemen?

MR. DEMONACO: No, sir.

THE COURT: Counsel, I want to thank you for your efforts on this case. I am absolutely certain that but for all of your efforts, we wouldn't have gotten here today. I am equally convinced that but for your efforts, all of your respective clients would have spent millions and millions of dollars -- sums of money that I just can't hardly comprehend, on the defense of this litigation.

I was told when I started working these cases that I would retire before they were finished. And at that point I had 12 years to go, I think. I have to tell you, I sort of changed my mind as I got into it and became concerned that I might retire before all of it was over. It may yet happen, but I am pleased and I compliment you on your efforts to get a very large segment of this litigation behind us -- behind you all, so that instead of making work for me, you can make work for someone else, in doing something really profitable in cleaning up Prince William Sound.

MR. NEAL: It seems to me that Prince William Sound won and the trial lawyers lost, Your Honor. I've got to figure out what I'm going to do for the next two or three months.

THE COURT: I'm sure you will find a way. We will be in recess for a few minutes, and then I have a trial starting.

THE CLERK: This court now stands at recess. (off record - no notes provided)

END

APPENDIX AB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-0095-CV
	)	(HRH)
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	
This Order Relates to All Cases	)	
	)	

ORDER NO. 254

AMUSSEN PLAINTIFFS' MOTION TO REMAND CASE NO. A94-0209 CV

The Amussen plaintiffs (Amussen) have filed a motion to remand case no. A94-0209 CV to the Alaska Superior Court, from which it was removed.[1] Exxon opposes the motion[2] and Amussen has replied.[3] Oral argument was not requested and is deemed unnecessary.

On December 22, 1993, Amussen filed a complaint in Alaska Superior Court against Exxon Corp., Exxon Shipping Co., Alyeska Pipeline Service Co. (Alyeska), Joseph Hazelwood, and Edward Murphy. At the time the complaint was filed, Amussen, Alyeska, and Murphy were Alaska citizens. Murphy was dismissed pursuant to a state court stipulation on April 13, 1994, and Alyeska was dismissed on May 5, 1994. Exxon removed the action on May 13, 1994, pursuant to 23 U.S.C. § 1441(a)[4], reasoning that the parties in the state court action were of diverse citizenship, thus creating diversity jurisdiction in the federal district court under 28 U.S.C. § 1332.[5]

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[1] Clerk's Docket No. 5216.

[2] Clerk's Docket No. 5363.

[3] Clerk's Docket No. 5363.

The issue on remand concerns the status of Murphy. It is undisputed that Murphy was dismissed in state court. Amussen argues, however, that although the stipulation dismissing Murphy purports to include Amussen, their attorney, Richard Jameson was not aware of and did not sign the stipulation.[6] Exxon argues that another of plaintiffs' attorneys, Matthew Jamin, had authority to enter into the stipulation on behalf of all plaintiffs, but Mr. Jamin's affidavit denies that he had authority to dismiss Murphy from the Amussen lawsuit. Mr.

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[4] 28 U.S.C. § 1441(a) provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant, or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

[5] 28 U.S.C. § 1332 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different states . . . .

[6] In fact, Mr. Jameson argues that he was not aware of the stipulation until Exxon filed its notice of removal.

Jamin further denies that his signature on the Murphy stipulation was intended to bind Mr. Jameson or Amussen. Notwithstanding the stipulation, Amussen argues that Murphy remains a part of the state court litigation, thus destroying this courts diversity jurisdiction.

The court need not decide whether Amussen dismissed Murphy in state court, because the evidence establishes that Murphy was fraudulently joined. "If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987). Although issues of liability are not ordinarily determined on a motion to remand:

> [I]t is well settled that upon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal.
>
> The court may "pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available."
>
> Of course, as in any removal action, doubt arising from merely inartful, ambiguous or technically defective pleadings should be resolved in favor of remand. Additionally, ordinarily a fraudulent joinder claim must be capable of summary determination.

Gasnik v. State Farm Ins. Co., 825 F.Supp. 245, 249 n.6 (E.D. Cal. 1992) (quoting Lewis v. Time, Inc., 83 F.R.D. 455, 460 (E.D. Cal. 1979) (aff'd, 710 F.2d 549 (9th Cir. 1983) (citations omitted)). See, 1 Richard A. Givens, Manual of Federal Practice, § 1.50 at 102 (1991) ("If there is no arguably reasonable basis for predicting that state law might impose liability on the resident defendants under the facts alleged, then the claim is deemed fraudulent and lack of diversity will not prevent removal.").

Exxon argues that the court has already determined that Murphy was entitled to judgment as a matter of law when it issued Order No. 186 granting Murphy's motion for summary judgment.[7] Because no plaintiffs, including Jameson's plaintiffs, opposed Murphy's motion, Exxon argues that Jameson has admitted that no claim against Murphy exists. However, none of the plaintiffs represented by Jameson named Murphy as a defendant in their federal complaints. They, therefore, had no reason to or basis for opposing Murphy's motion for summary judgment.

The court must now consider whether Amussen's state court complaint states a cause of action under the rules of Alaska. McCabe, 811 F.2d at 1339. Amussen alleges "that Murphy negligently turned over command of the Exxon Valdez to Captain Joseph Hazelwood, who was intoxicated." Amussen reply at 7-8.[8] Although faced with the issue of

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[7] Clerk's Docket No. 4663.

[8] Specifically, the Amussen state court complaint states in count IX:

> 70. Defendant MURPHY owed a duty of care to Plaintiffs to assure that the EXXON VALDEZ

fraudulent joinder, the only evidence Amussen offers to support a claim against Murphy is that "Murphy was aware the [sic] Hazelwood was impaired as he smelled alcohol on Hazelwood's breath." Amussen reply at 8.[9]

To prevail against Murphy, Amussen must prove that Murphy owed Amussen a duty to protect them from the actions of Hazelwood. Common law does not require a "defendant to prevent foreseeable harm when, to do so, he must control the conduct of another person . . . ." Div. of Corrections v. Neakok, 721 P.2d 1121, 1126 (Alaska 1986) (citation omitted). This rule absolves Murphy of blame. However, the

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> passed safely through the harbor, Valdez Narrows, the normal deep-water shipping lane channel, rocky reefs and Bligh Reef.
>
> . . . .
>
> 72. Defendant MURPHY breached his duty of care by entrusting the commanded of the EXXON VALDEZ to Captain HAZELWOOD when Captain HAZELWOOD was in a clearly intoxicated state, and in no condition to command the EXXON VALDEZ through the Narrows.
>
> 73. Defendant MURPHY knew or should have known that is [sic] was unreasonably dangerous to turn over the command of the EXXON VALDEZ to Captain HAZELWOOD and then disembark the EXXON VALDEZ leaving it in the command of Captain HAZELWOOD, who at the time was clearly and visibly intoxicated.

Amussen complaint at 15, attached to Exxon's notice of removal, Clerk's Docket No. 5049 (a).

[9] Amussen cites Murphy's deposition at 106, attached to the reply as Exhibit C.

court must also determine whether Murphy fits into the "special relationships" exception to the rule.

> When a defendant stands in a special relationship to either the dangerous person or the potential victim, the defendant is required to control the dangerous person or warn or otherwise protect the victim.

Id. (citing Restatement (Second) of Torts § 315 (1965)).

Although vessel pilots are held to an "'unusually high degree of care,'" Kingfisher Shipping Co. v. M/V Klarendon, 651 F.Supp. 204, 207 (S.D. Tex. 1986) (citation omitted), no case of which the court is aware has held that a pilot has a duty to control the captain of a ship. In fact, the opposite is true. "While the pilot has command of the navigation of a vessel, he is not her master. Even while on the bridge, he is subject to removal by the master . . . ." McGrath v. Nolan, 83 F.2d 746, 749 (9th Cir. 1936) (citations omitted). See Kingfisher, 651 F.Supp. at 207 ("It is the duty of the captain to interfere with a pilot's orders in cases of danger which the pilot does not foresee and in all cases of great necessity." (citation omitted)). Thus, Hazelwood had both the authority and duty to interfere with Murphy if necessary. Murphy, however, had neither the authority nor the duty to interfere with Hazelwood. Accordingly, Murphy did not stand in a "special relationship" with Hazelwood so that he might control Hazelwood.[10] Furthermore, by safely navigating the Exxon Valdez to the normal disembarking point for pilots, and by leaving the vessel at the appropriate course and speed, Murphy fulfilled his duty to Amussen whether or not he stood in a special relationship to either Hazelwood or Amussen.[11]

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[10] Amussen alleges that "Murphy negligently turned over command of the Exxon Valdez to Captain Joseph Hazelwood . . . ." Amussen reply at 7-8. This allegation fails because

Moreover, despite Amussen's allegation that "Murphy was aware the [sic] Hazelwood was impaired as he smelled alcohol on Hazelwood's breath," Amussen reply at 8 (emphasis added), the depositions of both Murphy and the Exxon Valdez crew show that Hazelwood never exhibited signs of impairment. Although Murphy smelled alcohol on Hazelwood's breath, neither Murphy nor the crew noticed Hazelwood slur his speech, stumble, stagger, sway, or misstep. (See, depositions of Murphy, Cousins, Kunkel, and Higgins attached to Murphy's motion for summary judgment and Murphy's trial transcripts). Hazelwood gave appropriate orders at appropriate times and appeared "normal." Id. Neither Murphy nor the crew detected any signs that Hazelwood was alcohol impaired. Id. Accordingly, Amussen cannot establish that Murphy knew that Hazelwood was intoxicated or impaired by alcohol.

Murphy was never in command of the Exxon Valdez. Captain Hazelwood was in command of the ship throughout its voyage.

[11] The court has reviewed the depositions of various individuals submitted in support of Murphy's motion for summary judgment and those portions of Murphy's deposition read at trial. The evidence shows that when Murphy left the Exxon Valdez at Rocky Point, the ship was in its normal course and the engines slow ahead. Murphy advised Hazelwood of the ship's course, speed, ice reports and vessel traffic before disembarking.

The actions of Murphy were those of a reasonable and prudent pilot. Murphy fulfilled any duty he may have had to protect Amussen and cannot be held liable to Amussen for the actions of Hazelwood. Amussen's failure to state a cause of action against Murphy under the settled rules of Alaska is obvious; therefore, the joinder of Murphy is fraudulent. McCabe v. Gen. Foods Corp., 811 F.2d 1336 (9th Cir. 1987).[12]

For the above stated reasons, Amussen's motion to remand is denied.

DATED at Anchorage, Alaska, this 13th day of September, 1994.

/s/

United States District Judge

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[12] The court also notes that Murphy could not have foreseen, upon leaving the Exxon Valdez in a safe and normal condition, the series of mishaps which led to the ship's grounding.

APPENDIX AC

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV
) (HRH)
the EXXON VALDEZ)
) (Consolidated)
)
)
This Order Relates to All Cases)
)

ORDER NO. 254 SUPPLEMENT

JAMESON PLAINTIFFS' MOTION TO LIFT THE STAY TO FILE MOTION TO RECONSIDER OR FOR INTERLOCUTORY APPEAL OF ORDER NO. 254

The Jameson plaintiffs' have filed a motion to lift the stay to file a motion to reconsider or for interlocutory appeal of Order No. 254.[1] The motion is unopposed.

In Order No. 254, the court ruled that defendant Edward Murphy, pilot of the Exxon Valdez on the night of the grounding, was fraudulently joined in plaintiffs' Alaska state court action against Exxon Corporation, et al. That ruling created diversity jurisdiction in federal district court under 28 U.S.C.

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[1] Clerk's Docket No. 5920. The motion to reconsider which the Jameson plaintiffs would file is attached to Clerk's Docket No. 5920.

§ 1332, and the court denied plaintiffs' motion to remand.

The purpose of a motion to reconsider is to present newly discovered evidence or to demonstrate manifest error of law. Plaintiffs' motion to reconsider would do neither; rather, the underlying motion is devoted to the request for certification of Order No. 254 for interlocutory appeal. The motion to lift stay is denied as to the motion to reconsider. However, the court will consider the request for leave to appeal on an ex parte basis.

The request for interlocutory appeal is based on 28 U.S.C. § 1292, which states in pertinent part:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order.

28 U.S.C. § 1292(b).

Plaintiffs' motion is founded on the misconception that Murphy was aware that Hazelwood was intoxicated before Murphy left the Exxon Valdez. The court specifically addressed this issue in Order No. 254, where the court found that:

> [T]he depositions of both Murphy and the Exxon Valdez crew show that Hazelwood never exhibited signs of

> impairment. Although Murphy smelled alcohol on Hazelwood's breath, neither Murphy nor the crew noticed Hazelwood slur his speech, stumble, stagger, sway, or misstep. (See, depositions of Murphy, Cousins, Kunkel, and Higgins attached to Murphy's motion for summary judgment and Murphy's trial transcripts). Hazelwood gave appropriate orders at appropriate times and appeared "normal". Id. Neither Murphy nor the crew detected any signs that Hazelwood was alcohol impaired. Id. Accordingly, [plaintiffs] cannot establish that Murphy knew that Hazelwood was intoxicated or impaired by alcohol.

Order No. 254 at 7-8, Clerk's Docket No. 5826.

In Order No. 254, the court found that Murphy left the Exxon Valdez in a safe and normal condition and that he could not have foreseen the series of mishaps which led to the ship's grounding. The court further found that:

> The actions of Murphy were those of a reasonable and prudent pilot. Murphy fulfilled any duty he may have had to protect [plaintiffs] and cannot be held liable to [plaintiffs] for the actions of Hazelwood.

Id. at 8.

The only authority plaintiffs offer in support of their motion actually supports the court's reasoning in Order No. 254. Plaintiffs cite The Law of Seamen for the proposition that:

> Under present conditions of vessel operation it is a fairly simple thing to notify the owner and the United States Coast Guard by radio of the conditions aboard the vessel and prudence would dictate that the mate seek permission to take over command.

Plaintiffs' underlying memorandum at 6 (quoting Martin J. Norris, The Law of Seamen § 260 (1970) (emphasis added) (this text is now found at § 10.19 (4th ed. 1985). Thus, even if there were evidence that Murphy knew Hazelwood was intoxicated, it was the mate's responsibility, not Murphy's, to take appropriate action.

A "substantial ground for difference of opinion" does not exist regarding Murphy's responsibilities toward plaintiffs or Murphy's knowledge of Hazelwood's condition the night of the grounding. 28 U.S.C. § 1292(b).[2] The court doubts that an interlocutory appeal as to Murphy would materially advance the ultimate termination of this case. Plaintiffs' request to certify Order No. 254 for interlocutory appeal is denied.

DATED at Anchorage, Alaska, this 17th day of October, 1994.

/s/
United States District Judge

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[2] The court is aware that Jameson has filed an action against Exxon Corporation in New Jersey state court in which Murphy was not named as a defendant. In that suit, Jameson seems to have recognized the futility of pursuing Murphy.

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95 (20) No. 07-219

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DEC 17 2007
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX VOLUME FOUR
[Pages 1495 - 1582]

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Petition for Writ of Certiorari Filed August 20, 2007
Certiorari Granted October 29, 2007

PETITIONER'S BRIEF

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(17)

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**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

An Alaska federal jury awarded $5 billion in punitive damages against Exxon under federal maritime law for the accidental grounding of the tanker EXXON VALDEZ and the resulting oil spill. The award came on top of Exxon's payment of over $3.4 billion in fines, penalties, natural resource damages, cleanup costs, claims payments and other expenses. The jury was instructed not to punish for harm to the environment, which other proceedings had fully redressed, but only for lost income and similar economic harm to commercial fishermen and other private parties. Applying the Due Process Clause, the Ninth Circuit reduced the award to $2.5 billion—still 123 times the compensatory damages awarded and five times what the court found was the total, fully compensated loss to all private economic interests.

The questions presented are:

1. May federal maritime law impose punitive damages on a shipowner for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law expand the penalties Congress provided by adding a punitive damages remedy?

3. Was this $2.5 billion award within the limits permitted by federal maritime law?

PARTIES TO THE PROCEEDING

Petitioners are Exxon Shipping Company (now known as SeaRiver Maritime, Inc.) and Exxon Mobil Corporation (collectively, "Exxon"), defendants-appellants below. Joseph Hazelwood (the master of the EXXON VALDEZ) was also a defendant-appellant below and is therefore a respondent under Rule 12.6.

Plaintiffs-appellees below, who are respondents under Rule 12.6, are Grant Baker, Louie E. Alber, Ahmet Artuner, Jeffrey Bailey, William Bennett, Michael Wayne Bullock, Robyne L. Butler, Albert Ray Carroll, Larry L. Dooley, Mark Doumit, Douglas R. Jensen, Dennis G. Johnson, Donald P. Kompkoff, Sr., Josef Kopecky, Daniel Lowell, Andrean E. Martusheff, Carol Ann Maxwell, Jacquelan Jill Maxwell, Robert A. Maxwell, Sr., Michael McLenaghan, Elenore E. McMullen, Leslie R. Meredith, Leonard S. Ogle, Steven T. Olsen, August M. Pedersen, Jr., Mary Lou Redmond, Joseph David Stanton, Jean A. Tisdall, Darrell Wood, the Alaska Sport Fishing Ass'n, Debra Lee, Inc., Dew Drop, Inc., and the Native Village of Tatitlek. They are representatives of a punitive damages class certified by the district court and defined as "all persons who possess or assert a claim for punitive damages" arising out of the grounding of the EXXON VALDEZ and the resulting oil spill, except for certain governmental entities. Pet. App. 126a.[1]

---

[1] Citations to "JA" indicate the Joint Appendix filed herewith. "Pet. App." indicates the Appendix to the Petition for Certiorari. Citations to "ER" and "RER" indicate materials available in Appellants' Joint Excerpts of Record and Appellants' Joint Rebuttal Excerpts of Record filed in the first Ninth Circuit appeal (No. 97-35191). "Pl. Br." refers to Respondents' Brief filed in the first Ninth Circuit appeal. ER (2004) refers to

RULE 29.6 DISCLOSURE

All of the stock of Exxon Shipping Company is owned directly or indirectly by Exxon Mobil Corporation. Exxon Mobil Corporation has no parent corporation, and no person or entity owns 10% or more of its stock.

Appellants' Joint Excerpts of Record in the second Ninth Circuit appeal (No. 04-35182). "Pl. Br. (2004)" refers to Respondents' Brief in that appeal. Citations to "DX" or "PX" indicate exhibits admitted at trial. The trial transcript is cited by volume, page, and line, so that "19/3181:18-82:8" means volume 19, from page 3181 line 18 to page 3182 line 8. "OCCP" refers to the Brief in Opposition to Conditional Cross-Petition for Writ of Certiorari, filed October 1, 2007, in No. 07-276. Emphasis is supplied throughout, except where otherwise stated, and internal quotations and citations are omitted.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The two opinions of the Ninth Circuit and the opinions of Judges Kozinski and Bea dissenting from denial of rehearing *en banc* are reported at 270 F.3d 1215 and 490 F.3d 1066 and reprinted at Pet. App. 1a-117a and 287a-293a.[2] The district court's initial opinions are unreported and reprinted at Pet. App. 224a-284a. Its later opinions on the constitutionality of the award (not pertinent to the questions presented) are reported at 236 F. Supp. 2d 1043 and 296 F. Supp. 2d 1071 and reprinted at Pet. App. 118a-223a.

JURISDICTION

The Ninth Circuit issued its opinions on November 7, 2001, and December 22, 2006, and amended the latter on May 23, 2007, upon denial of Exxon's timely petition for rehearing. Pet. App. 285a-286a. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Provisions of the Clean Water Act, 33 U.S.C. §§ 1311 *et seq.* (1988), applicable to this spill are reprinted in the Addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background

1. In December 1967, Atlantic Richfield Co. and Humble Oil & Refining Co. (an Exxon predecessor), discovered the giant oil field at Prudhoe Bay on the North Slope of Alaska. Developing this field required the investment of billions of dollars by Exxon

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[2] All citation conventions are explained in note 1, *supra*.

and others, and the construction of the Trans-Alaska Pipeline System (TAPS) from the North Slope to Valdez, Alaska—at the time of its completion the largest civil-engineering project in the world. The project received all government approvals to transport the oil by tanker through Prince William Sound to the lower 48 states. Many fishermen protested these plans, arguing that tanker traffic posed the risk of an oil spill, and that the danger to their fishing income was too great. The State of Alaska, however, strongly favored the project. The relevant state and federal officials carefully considered the fishermen's concerns, analyzed the project thoroughly in an Environmental Impact Statement, and balanced all the competing considerations. In 1973 Congress passed the Trans-Alaska Pipeline Authorization Act, directing the construction of the Pipeline, 43 U.S.C. § 1653(a), and, to deal with the well-known risk of a spill, establishing a special liability regime, the Trans-Alaska Pipeline Liability Fund, to pay prompt and adequate compensation, *id.* § 1653(c). With the firm support of the State of Alaska, Congress thus made the political judgment that the risks of tanker traffic through Prince William Sound were worth taking, for reasons of national security and national energy policy. As the Ninth Circuit observed, "fuel for the United States at moderate expense has great social value." Pet. App. 101a.

2. On March 24, 1989, the EXXON VALDEZ, a state-of-the-art, well-equipped tanker, ran aground on Bligh Reef in Prince William Sound. The immediate cause was the failure of Third Mate Cousins to steer the vessel away from the reef. The vessel's master, Captain Hazelwood, instructed Cousins when and where to make the turn, but then left the

bridge—a violation of Exxon's explicit policy requiring two officers to be present. For reasons that remain unknown, Cousins failed to make the turn as instructed, and the ship went aground, spilling 258,000 barrels of oil. Pet. App. 61a-64a.

Exxon immediately dispatched an emergency response team which prevented the discharge of the remaining 80 per cent of the vessel's oil. JA1249-66. Exxon acknowledged responsibility for the spill and initiated a massive cleanup, ultimately spending \$2.1 billion on that effort—almost double Exxon's annual profit at that time from all United States petroleum operations. Pet. App. 64a; RER 312; DX-6347.

Exxon also established a claims program that paid commercial fishermen and others asserting that the spill had disrupted their businesses. Pet. App. 64a; *see* OCCP 6-9 (detailing compensation program). Plaintiffs "were almost entirely compensated for their damages years ago." Pet. App. 60a. "Some were paid cash without providing releases, some released claims but not all, and some released all claims. Exxon spent \$300 million on voluntary settlements prior to any judgments being entered against it." Pet. App. 64a.

Typically, claims were paid in advance, on estimates of what the fishermen *would* earn in 1989. ER (2004) 452-55. Since fish processors pay fishermen at the end of the season, Exxon paid many fishermen before they would normally have received payment for fish. *Id.* Such payments did not so much compensate for losses as *prevent* them. Alyeska Pipeline Service Company, the operator of TAPS, paid another \$98 million to resolve claims that its oil spill contingency plan had been inadequate. OCCP 4; Pet. App. 35a. Millions in claims were also paid by the Trans-Alaska Pipeline Liability Fund, the entity created by Congress to provide compensation for a spill. *See In re Glacier Bay*, 944 F.2d 577 (9th Cir. 1991). The Fund sought and obtained reimbursement from Exxon.

In addition, Exxon instituted comprehensive remedial measures to reduce the risk of future spills, including: (1) new navigation policies specifying daylight-only departures and reduced speeds in icy conditions, limitations on deviations from traffic lanes, and increased use of tug escorts; (2) a technologically advanced satellite-based navigation tool; (3) a strengthened policy requiring masters to remain on the bridge; (4) enhanced safety training programs; (5) revised alcohol policies; (6) improved monitoring and reporting procedures; (7) random testing for alcohol or substance abuse; (8) an absolute prohibition against use of alcohol by vessel officers while on a tour of duty; (9) additional mates in port; (10) new mandatory rest periods; and (11) strengthened corporate environmental and safety policies, a new Safety, Environmental and Regulatory Department, and a $1 billion industry-wide program to improve spill response capability. JA51-52.

3. The State of Alaska sued Exxon as *parens patriae* for compensatory and punitive damages, and the United States indicted Exxon for violating the Clean Water Act (CWA), 33 U.S.C. § 1311(a), and other statutes. ER 1, 88. Both governments also sued Exxon for natural-resource damages under CWA § 1321(f). Pet. App. 70a. Exxon resolved all these claims in an October 1991 consent decree and plea agreement. Exxon agreed to pay the governments $900 million for natural-resource damages,

and they dismissed or released all pending or potential claims asserted on behalf of the general public, including Alaska's *parens patriae* claim for punitive damages. Pet. App. 65a; ER 242A. Exxon also pled guilty to certain misdemeanors, including negligent discharge of oil in violation of CWA § 1319(c)(1)(A), and was sentenced under 18 U.S.C. § 3571(d) to pay a fine of $150 million and restitution to the United States and Alaska of $100 million. Pet. App. 103a. The fine was remitted to $25 million in recognition of Exxon's exemplary post-spill conduct, including its extensive remedial measures and payment of $2.1 billion for cleanup and $300 million to compensate private losses. Pet. App. 103a; JA45-56. The net sentence of $125 million exceeded the total of all fines previously imposed by the United States in all CWA cases. JA54. Exxon's pretrial payments, settlements, and fines exceeded $3.4 billion. Pet. App. 100a.

At the 1991 sentencing hearing, the Attorney General's representative affirmed that the criminal sentence by itself "clearly" achieved "adequate deterrence." JA1520-21. Alaska's Attorney General similarly observed that a $150 million fine was "a number which the State can hold up to other polluters ... and that certainly should be sufficient ... to give pause to those who do not show the proper regard for the Alaska environment." JA1532. The district court agreed, noting that it "says to others in the industry ... that you can expect fines that are off the chart in response to oil spills that are off the chart ... [b]ut it also says ... [that] if you live up to your legal responsibilities [after such a spill] ... you will get credit for it." The court found that "Exxon has ... been a good corporate citizen ... sensitive to its environmental obligations" which "immediately after the spill ... stepped forward with both its people and its pocketbook and did what had to be done in difficult circumstances," and "will do its utmost to prevent another [spill]." JA1555-58. The court approved the sentence as containing both "an appropriate amount of punishment" and "an appropriate element of encouragement of respect for the law." Pet. App. 103a; JA1557.

B. The Punitive Damages Trial

1. The private punitive damages claims, seeking punishment in addition to punishment already imposed, were tried in 1994 together with claims by commercial fishermen who alleged that the spill caused greater economic losses than Exxon had reimbursed in the claims program. (The spill did not cause a fish kill, so the claims were mostly for business interruption resulting from the State's decisions to close many fisheries.) The district court certified a class of all persons who "possess[ed] or assert[ed]" a punitive damage claim. Pet. App. 126a. The class sought punitive damages under federal maritime law against Hazelwood individually and also against Exxon, Hazelwood's employer and the owner of the vessel and cargo. Since the class included all those who "asserted" a claim as well as those who "possessed" one, many class members in fact suffered no cognizable injury whatever from the spill—*e.g.*, Bristol Bay fishermen, separated from Bligh Reef by a thousand miles and a mountain range, and whose fishery was never closed.

Exxon stipulated that Hazelwood had been negligent in leaving the bridge in violation of Exxon's two-officer policy. Plaintiffs contended that Hazelwood had been *reckless*—the required predicate for punitive damages—both by leaving the bridge and by allowing alcohol to impair his judgment before that. Exxon disputed these contentions, but if Hazelwood was impaired on duty, that too violated Exxon's explicit policy. Pet. App. 89a. The evidence showed the following.

The Grounding of the Exxon Valdez. The vessel departed Valdez at 9:12 p.m. on March 23, 1989, and was guided through the Valdez Narrows by a state-licensed pilot. JA271-72. Hazelwood joined the pilot on the bridge, and at about 11:20 took active command of the navigation of the vessel. The ship's radar showed ice in the inbound and outbound shipping lanes through Prince William Sound. Ships customarily steered out of the defined lanes to avoid ice, JA1014; the two previous outbound tankers had both done so. JA1021-25; DX 1735A. Hazelwood accordingly radioed the Coast Guard that he was going to do likewise. JA76sa.

Cousins helped the pilot transfer to the pilot boat. When Cousins returned, Hazelwood gave orders for returning to the shipping lanes after safely passing the ice. JA350-53, 813, 838. He instructed Cousins to turn right when the ship came abeam Busby Island light, an easily identifiable landmark. JA352, 834-35. There was nothing dangerous or unusual about the turn Hazelwood planned. The Commandant of the Coast Guard testified that these were *not* treacherous waters. JA989-90. The ship was not traveling at an unusual speed. JA1011, 1016. Visibility was good. The sea was calm. JA827-28, 264. Cousins reviewed the planned maneuver with Hazelwood. JA834-37. The district court acknowledged that Hazelwood's instructions were "specific" and "correct." Pet. App. 269a.

Having given his instructions, Hazelwood left the bridge and went to his cabin, a few steps away, telling Cousins he needed to do some paperwork related to avoiding a storm expected in the Gulf of Alaska. JA352-53, 813. His departure from the bridge violated Exxon's Bridge Manual, a statement of company policy regarding the operation and navigation of its vessels, which was placed on the bridge of every vessel, and which every watch officer was required to read and sign. DX 3450, §§ 2.1.5, 8.5; JA945-46, 346-34. Because the VALDEZ was leaving port, the Bridge Manual required both that the Master be on the bridge and that two officers be on the bridge. By leaving Cousins as the only officer on the bridge, Hazelwood violated both provisions. JA559. Exxon later discharged Hazelwood for violating its rules. JA351-53.

When Hazelwood went below, the position abeam Busby Island light was about two minutes away. JA342, 813-14. There was ample room for the VALDEZ to pass between Bligh Reef and the ice. JA349-51, 826-27. At 11:55, Cousins determined that the ship had come abeam the light. He noted his fix on the ship's chart, ordered the helmsman to turn the rudder 10° right, and called Hazelwood to tell him that the turn had begun. JA817-21, 353-54. The turn, however, had not begun. The ship's course recorder indicates that the rudder did not go over to 10° right until 12:02, seven minutes *after* the ship reached the turning point on which Hazelwood and Cousins had agreed. JA1016-17. The rudder was then held steady at 10° right for five minutes. This steered the VALDEZ back toward the shipping lanes, but not soon enough to avoid the reef, where the VALDEZ ran aground at 12:07 a.m. JA1017-18.

Hazelwood immediately returned to the bridge and took command. The objective evidence shows plainly that the turn was not made in accordance with Hazelwood's instructions.

If the VALDEZ had begun turning abeam Busby Island light, as Hazelwood had instructed, it would have missed Bligh Reef by a wide margin. Even a 5° right rudder turn would have been enough. JA1018-20.

Exxon's Alcohol Policy. Plaintiffs argued that Hazelwood was impaired by alcohol,[3] and that but for his impairment he would not have left the bridge to work in his cabin. Plaintiffs further asserted that Hazelwood was an alcoholic, that Exxon knew it, and that Exxon was therefore *independently* reckless for allowing Hazelwood to serve as master and for not supervising him sufficiently. Exxon's evidence showed that its alcohol policy conformed to industry standards, guaranteed that employees seeking treatment would not lose their jobs, and rested on the premise that without job security those needing treatment would hide their affliction—disserving safety, not enhancing it. PX 158; JA684-85, 1082-83, 1088. As this Court has held, it is perfectly consistent with public policy for an employer's substance-abuse policy to provide for reinstatement of relapsed employees, even to safety-sensitive positions. *Eastern Associated Coal Corp. v. United Mine Workers,* 531 U.S. 57 (2000). The Ninth Circuit acknowledged that the jury "could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk." Pet. App. 88a-89a; *see* OCCP 16-25. As will be seen, the district court instructed the jury that it did not need to reach or resolve these issues.

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[3] This was hotly disputed. All 20 witnesses who observed Hazelwood on the night of the grounding, Exxon employees and unrelated parties alike, testified that his actions were normal and professional, and that he was not impaired in any way. *E.g.*, JA999, 273-74, 1003-08, 942-45, 934-39, 981-84, 1013-14, 497-98, 380-83, 833. A state court jury *acquitted* him of operating a vessel under the influence. JA1495-97. And even the district court held as a matter of law that Hazelwood's actions before the pilot left the ship (47 minutes before the grounding) gave no basis to believe he was impaired. JA1577, 1580-82.

Plaintiffs relied on dubious "reverse extrapolation" from the questionable results of a blood test administered by the Coast Guard late in the morning after the spill. Pet. App. 108a-109a. But if the test results and the extrapolation were correct, Hazelwood would have had a blood alcohol level of .166 (which equates to vomiting, blurred vision, staggering, stumbling, and impaired motor skills) even at 3:45 a.m. when Coast Guard officers boarded the vessel, and they would never have left him in command, as they did. JA588.

3. As the master of a tanker, Hazelwood was a "managerial officer or employee" of Exxon as the jury instructions defined that term. Pet. App. 301a. Over Exxon's objection, the district court instructed the jury that:

> the reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

Pet. App. 301a. The district court further instructed the jury, again over Exxon's objection, that this was so "whether or not those acts are contrary to the employer's [established and adequately enforced] policies or instructions." Pet. App. 301a-302a.

In the first phase of the trial, the jury returned a verdict that Hazelwood had been reckless. Having been instructed that any reckless conduct of Hazelwood was "held in law" to be reckless conduct of Exxon, whether or not contrary to Exxon's policies or instructions, the jury necessarily returned a verdict that Exxon had also been reckless. Pet. App. 303a.

In the next phase, the jury substantially rejected the fishermen's claims for $800 million in damages based on low fish prices, finding that the spill did not cause prices to decline after 1989. JA1404-07. (Exxon's proof showed that a worldwide salmon glut drove down prices.) After offsetting prior payments, the district court entered judgment for $19.6 million in compensatory damages. Pet. App. 67a. A state court judgment added $700,000 more, for total compensatory damages of $20.3 million. Pet. App. 32a.

In the final phase of the trial, made necessary by the verdicts on recklessness, the jury was asked to determine the amount of punitive damages to be awarded against Hazelwood and Exxon. The district court instructed the jury that in doing so, it could not consider harm to the environment because "[a]ny liability for punitive damages relating to those harms was resolved" in the government proceedings, Pet. App. 96a-97a, a result required by res judicata. Pet. App. 73a. After hearing evidence about Exxon's net worth and income, the jury awarded punitive damages of $5000 against Hazelwood and $5 *billion* against Exxon. The district court denied Exxon's post-trial motions, Pet. App. 224a-280a, and entered judgment for the full $5 billion award. JA1425-27. Exxon appealed.

C. Appellate Proceedings

1. The Ninth Circuit issued its first opinion in November 2001. Pet. App. 57a. The court rejected Exxon's arguments that no punitive damages were authorized, but added a number of significant caveats. Addressing whether judge-made maritime punitive damages remedies could expand the penalties already provided in the CWA, the court acknowledged that the question was "serious," "not without doubt," and "close." Pet. App. 75a, 77a. On the propriety of the jury instructions authorizing vicarious punitive damages liability, the court pronounced itself bound by its decision in *Protectus Alpha Nav. Co. v. North Pac. Grain Growers*, 767 F.2d 1379 (9th Cir. 1985), but acknowledged that *Protectus* conflicted with the historic maritime-law rule as well as with modern maritime decisions of other circuits. Pet. App. 85a-86a & n.84. And while the court did not accept Exxon's argument that maritime law and due process bar punitive damages when prior sanctions and liabilities have satisfied any public interest in punishment and deterrence, it acknowledged that the argument had "force as logic and policy." Pet. App. 68a.

The Ninth Circuit did, however, hold that a $5 billion award could not stand. Applying the due process guideposts of *BMW of North America v. Gore*, 517 U.S. 559 (1996), the court held that Exxon's conduct was not sufficiently reprehensible to justify so high an award because (1) the spill was not intentional; (2) punishment was for economic injuries only; (3) "fuel for the United States at moderate expense has great social value"; and (4) Exxon had spent billions to mitigate harm in the aftermath of the accident. The court further held that pretrial claims payments and settlements generally should not be included in the "harm" used to analyze the ratio between punitive and compensatory damages, and that a high ratio was unnecessary for deterrence because the $3.4 billion that Exxon had already paid constituted a "massive deterrent" independent of any punitive damages. Pet. App. 95a-104a.

2. The Ninth Circuit remanded the case for determination of the appropriate remittitur. The district court reduced the award to $4 billion, but asserted that it saw no "principled" basis for any reduction at all. Pet. App. 222a-223a. Exxon again appealed, but the Ninth Circuit *sua sponte* remanded the case for reconsideration in light of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). This time the district court *increased* the award to $4.5 billion, asserting that *State Farm* presumptively validated punitive damages of up to nine times the total harm (which the district court calculated to be $500 million). Pet. App. 179a-180a. Exxon appealed for the third time.

3. The Ninth Circuit issued its second opinion in December 2006. Pet. App. 1a. The court again reviewed the award under the *Gore* guideposts, but this time rationalizing a multibillion dollar award. On reprehensibility, for example, the court emphasized that the spill had physically endangered the crew and rescuers of the vessel, even though no one was injured and none of the crew or rescuers was a plaintiff in the lawsuit. Pet. App. 26a-28a. On ratio, the court repudiated its earlier statement that pretrial payments and settlements should not be included in the harm, stating incorrectly that *State Farm* mandated this change of view. Pet. App. 32a-35a, 287a. Accepting the district court's calculation

of $500 million in total losses, the court held that due process would permit a 5:1 ratio because the tort fell within the "mid range" of reprehensibility. Pet. App. 31a-40a. By this reasoning, the court upheld an unprecedented punitive award of $2.5 billion, 200 times the next largest award affirmed by a federal appellate court for unintentional conduct. *See Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991). Judge Browning would have affirmed $5 billion. Pet. App. 42a-56a.

4. Exxon filed a timely petition for panel rehearing and rehearing *en banc*. The court denied it on May 23, 2007, amending its decision to remove its incorrect statement about *State Farm*, but not otherwise changing its result or attempting to justify the repudiation of its prior decision. Pet. App. 285a-286a. Two judges filed dissents from the denial of *en banc* review. Judge Kozinski argued that the court had unjustifiably departed from 200 years of maritime precedent prohibiting vicarious punitive damages, in conflict with every other circuit that had considered the issue. Pet. App. 287a-292a. Judge Bea agreed with Judge Kozinski, and also dissented because a $2.5 billion award was excessive under *State Farm*. Pet. App. 292a-293a.

5. Exxon filed a timely Petition for Writ of Certiorari, which was granted October 29, 2007, limited to Questions 1, 2, and 3(1).

SUMMARY OF ARGUMENT

I. This case involves the largest punitive damages award ever upheld by a federal appellate court, $2.5 *billion*. It was based on a jury instruction that any reckless conduct by Captain Hazelwood is "held in law" to be the reckless conduct of Exxon. Imposing vicarious punitive liability on a shipowner, without requiring the jury to find that the shipowner directed, countenanced, or participated in the conduct, was in conflict with almost 200 years of unbroken maritime law building on this Court's decision in *The Amiable Nancy*, 16 U.S. 546 (1818), and decisions of every court of appeals, other than the Ninth Circuit, that has considered the matter. No maritime law or policy supports overruling this venerable line of cases; yet without overruling them this judgment must be reversed.

The Ninth Circuit's ruling upholding the instruction was even less defensible because the jury was instructed that Hazelwood's acts were imputed to Exxon even though they were *contrary* to corporate policies that Exxon implemented and properly enforced. As a practical matter, the formulation and enforcement of policies is the only way in which a corporate employer may control the activities of its employees, and the Court has recognized—even outside of maritime law—that employers who implement and enforce proper policies should not be subject to vicarious punitive damages. *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

II. Beyond its approval of this clearly erroneous instruction, the Ninth Circuit held that this giant award could be supported under the general maritime law, a form of federal common law. But the power of federal judges to make federal common law governing a particular subject is severely restricted by separation of powers concerns when Congress has already addressed the same subject by statute. Here Congress has enacted the Clean Water Act (CWA), a comprehensive statute that directly addresses both punishment and deterrence of unauthorized discharges of oil and hazardous substances. Punitive damages are not some sort of private entitlement. Rather, they are allowed, if at all, only to foster the same *public* purposes of punishment and deterrence that Congress addressed in the CWA. Congress enacted a carefully calibrated scheme of fines and civil penalties, natural-resource damages and cleanup costs, but did not provide for punitive damages. This Court's cases, starting with *Mobil Oil v. Higginbotham*, 436 U.S. 618 (1978), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), make plain that when Congress has "spoken directly to the question," as it has here, federal judges "are not free to expand the remedies that Congress has chosen." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). Punitive damages were accordingly unavailable, because punishment and deterrence for maritime discharges were already covered by the CWA.

Even if this Court were to conclude that Congress's enactment of statutory punitive and deterrent measures did not preclude additional judicially-created punishment, that would not answer but only *raise* the question of what this Court, exercising its own judicial authority to determine the general maritime law, *should* decide about the need to allow such extra-statutory punishment. But there is no doubt about the answer. This Court ought to conclude that there is no reason for punitive damages in maritime discharge cases, given the indisputable fact that an appropriate system of fines and penalties to deter such discharges is already in place, and given the well-recognized arbitrariness of unconstrained punitive damages.

III. In any event, punitive damages should not have been awarded *here*, because Exxon's payment of $3.4 billion in fines, penalties, cleanup costs, claims payments, and other expenses, has fully achieved both punishment and deterrence. Punishment and deterrence are the only purposes of punitive damages, and when those purposes have been achieved, there is no room for punitive damages. The constitutional grant of admiralty and maritime jurisdiction gives this Court the responsibility to set maritime-law rules that serve the federal interest of protecting maritime commerce and are informed by recognized maritime-law policies and principles, including uniformity and predictability, limitation of liability, and the avoidance of undue burdens on maritime commerce. All of those policies preclude assessment of gargantuan punitive damages, and none permits punitive damages when the defendant has already paid criminal and civil fines, penalties, compensatory damages, cleanup costs and other expenses sufficient to deter and punish anyone for anything.

Alternatively, if the Court is prepared to do what Congress did not, and allow punitive damages for this unintentional oil spill notwithstanding that punishment and deterrence have been fully achieved, the Court should nevertheless order a reduction or vacatur of the award consistent with appropriate standards—drawn from maritime-law policies—for the award of punitive damages. Those standards should include the principles that (1) jury-imposed punitive damages may not exceed the civil punishment authorized by Congress; (2) when compensatory damages are substantial, punitive damages may not exceed them; (3) punitive damages are not available when there is no possibility that the underlying conduct will escape detection; and

(4) juries may not make punitive awards based on corporate net worth.

ARGUMENT

I. This Court Should Not Overrule 200 Years of Maritime Law that Preclude Vicarious Punitive Damages for the Acts of a Master at Sea.

Punitive damages are exceedingly rare in maritime law. This Court has never affirmed such an award. Despite the scarcity of awards, however, one rule of maritime-law punitive damages has always been clear: Punitive damages may not be awarded against a shipowner based solely on the conduct of a ship's master.

The maritime-law rule barring vicarious punitive damages is nearly as old as this nation itself. This Court first articulated it in *The Amiable Nancy*, 16 U.S. 546 (1818), a suit in admiralty against the owners of a privateer whose officers and crew had illegally plundered a neutral ship. Speaking through Justice Story, its leading maritime-law scholar, the Court affirmed the Circuit Court's ruling that the owners' liability for the officers' wanton acts did *not* extend to punitive damages:

> [T]his must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them, in the shape of

> exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages.

Id. at 558-59.

The Court reaffirmed this principle in *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107-17 (1893), declaring the *Amiable Nancy* rule to be in accord with "the preponderance of well-considered precedents" and extending it to non-maritime federal cases.[4] For 150 years, federal courts faithfully applied the rule, and refused vicarious punitive damages in maritime cases. *E.g.*, *Ralston v. The States Rights*, 20 F. Cas. 201 (E.D. Pa. 1836); *The Golden Gate*, 16 F. Cas. 141, 144 (C.C.N.D. Cal. 1856); *The*

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[4] Notably, while the opinion in *Lake Shore* favorably cites state court decisions that applied the same rule against vicarious punishment, it also makes clear that the Court, in extending the rule to all federal cases under its pre-*Erie* jurisprudence, was "exercis[ing] its own judgment, uncontrolled by the decisions of the several states." 147 U.S. at 106.

State of Missouri, 76 F. 376, 380 (7th Cir. 1896); *Pacific Packing & Nav. Co. v. Fielding*, 136 F. 577, 579-80 (9th Cir. 1905); *The Seven Brothers*, 170 F. 126, 127 (D.R.I. 1909); *The Ludlow*, 280 F. 162, 163-64 (N.D. Fla. 1922).

Outside the Ninth Circuit, Justice Story's rule remains. In *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), the Sixth Circuit, emphasizing the maritime reality that a ship's master must have full authority to direct operations at sea, held that "punitive damages are not recoverable against the owner of a vessel for the acts of the master unless it can be shown that the owner authorized or ratified the acts," or that "the acts ... were those of an unfit master and the owner was reckless in employing him." *Id.* at 1148. In *In re P&E Boat Rentals*, 872 F.2d 642 (5th Cir. 1989), the Fifth Circuit held that under maritime law, "punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct." *Id.* at 652. And in *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), the First Circuit confirmed that maritime law bars imposition of punitive damages against an employer for the misconduct of a vessel's master absent "some level of culpability" on the part of the employer. *Id.* at 705.

The Ninth Circuit initially broke from the longstanding consensus in *Protectus*, a 1985 decision that adopted a new rule of vicarious liability for acts of "managerial" employees proposed by the authors of the Restatement (Second) of Torts § 909. 767 F.2d at 1386. While the panel below declared itself "bound by *Protectus*," Pet. App. 86a, it did not meaningfully defend *Protectus*' departure from settled maritime law.

Having no maritime-law support for *Protectus*, the best the panel could cite was this Court's holding in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991), that vicarious punitive damages are not unconstitutional. But the question is not whether the *Constitution* permits such liability. It is whether *maritime law* does so. Pet. App. 289a n.3. The answer turns on maritime-law precedents, not on cases interpreting the outer limits of due process. All maritime-law precedents (other than *Protectus*) forbid such liability.[5]

The reasons given in *Protectus* for departing from maritime law are no better. The court primarily relied on a footnote in *American Society of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982), an antitrust treble damages case, observing that a majority of land-based jurisdictions allow vicarious punitive damages for acts of "managerial" employees, citing the Restatement (Second) of Torts §909(d)—and perhaps did so even at the time of *Lake*

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[5] The panel below suggested that Exxon was not in the same position as the innocent owners in *The Amiable Nancy* because the jury *might* have found that Exxon was independently reckless for not relieving Hazelwood of his command. Pet. App. 83a. But that point is legally irrelevant in light of the jury instructions. The panel conceded that a jury verdict as to Exxon's independent recklessness could have gone either way. Pet. App. 88a-89a; *see also* OCCP 16-25. The instructions, however, required the jurors to find Exxon reckless if they found Hazelwood reckless, even if they found that Exxon itself acted appropriately. When it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground, "the judgment must be reversed." *Greenbelt Co-op Publ'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *see Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-60 (1993).

Shore.[6] But the fact remains that in *The Amiable Nancy*—a case *Protectus* does not even cite, let alone distinguish—the Court squarely adopted the contrary rule for maritime cases. Indeed, Justice Story's opinion adopted that rule even though it found the case to be one of "gross and wanton outrage" where "the honour of the country" and the "duty of the court" were at stake.

And the Court in *Lake Shore*, "exercis[ing] its own judgment" after considering the merits of state law rules on both sides of the issue, 147 U.S. at 106, squarely reaffirmed the *Amiable Nancy* rule. *Stare decisis* alone thus compels rejection of *Protectus*, and with it, the decision below. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("any departure from the doctrine of *stare decisis* demands special justification"); *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 500 (1990) (longstanding precedents of regular application are entitled to special weight).

Moreover, even if the issue were open, the result should be the same. There is no consensus, even in land-based jurisdictions, favoring vicarious imposition of punitive damages. The law of some states, like maritime law, continues to bar such awards.[7]

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[6] As Judge Friendly pointed out, the *Hydrolevel* footnote "seems to have been quite unnecessary" because "the issue was not corporate liability for punitive damages but for the treble damages provided for private antitrust suits in 15 U.S.C. § 15, and rules limiting a principal's liability for punitive damages do not apply to specific statutes giving treble damages." *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 67 n.10 (2d Cir. 1985).

[7] *See, e.g.*, *Matthiessen v. Vanech*, 836 A.2d 394, 404-05 (Conn. 2003); Miss. Code Ann. 11-1-65(1)(a). Several other states bar punitive damages altogether. *See, e.g.*, N.H. Rev. Stat. Ann. § 507:16 (2007).

And the authority of the Restatement (Second) of Torts on this point is especially suspect. Nothing in Tentative Draft No. 19 (which gave rise to § 909), or the American Law Institute (ALI) proceedings[8] that approved § 909 suggests that the Reporter, his advisors, or ALI members intended to repudiate the maritime-law rule stated in *The Amiable Nancy* and consistently applied in all maritime cases. On the contrary, §909 was added only to avoid conflict with Restatement (Second) of Agency § 217C (1958). But that Restatement states expressly that its rules do not apply "to persons or combinations of persons concerning whom special rules exist." *Id.* Thus the Restatements should not be assumed to apply to the "special rules" of maritime law. *See Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001) (recognizing "special rules and procedures" of admiralty).

Indeed, "some of the Torts group ... were in doubt whether the position taken [in § 909] is the right one," but thought the question "foreclosed" because the ALI could not revisit whether § 217C was wrong. Tentative Draft No. 19 at 85. Even so, the "Torts Advisors voted, 9 to 2, to strike the Section [909] or at least to strike the Comments, with a mere reference to the Agency Restatement," *id.*, and the Reporter noted that "the trend, ... although not heavily, is in the direction of *not*" awarding vicarious punitive damages. ALI Proceedings at 236. But at the May 16, 1973 ALI meetings, it was decided that § 909 had to remain because of §217C. *Id.* Just as there is no consensus among land-based courts on this issue, there was also no consensus among the drafters of the Restatement.

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[8] Am. Law Inst., *50th Annual Meeting Proceedings 1973* at 236-41 (1974) [ALI Proceedings].

The issue, moreover, should not depend on the Restatement nor on land-based decisions, but on maritime policy. The Ninth Circuit did not even consider the unique problems with vicarious punishment for misconduct of officers and crew at sea (an issue not raised in *Protectus*). But the court in *Fuhrman*, again drawing on Justice Story, explained why such punishment is not only unfair but potentially counterproductive:

> The relationship of the ship master and the authority and control he exercises over his ship in such emergencies is unique. In order to avoid chaos aboard in such situations, it is imperative that the vessel remain under the control of a single individual with complete and undisputed authority. The master of the vessel must assume authority in such a crisis and he has the responsibility to make the final decision as to what the proper course of action must be in view of all the factors concerned. To hold otherwise would result in hesitations and disastrous delays on the part of the master while he obtains advice and authority from his superiors many miles from the scene.... "Indeed, in many, if not most of the acts done on these melancholy occasions, there is little time for deliberation or consultation. What is to be done, must often, in order to be successful, be done promptly and instantly by the master, upon his own judgment and responsibility. The peril usually calls for action, and skill, and intrepid personal decision, without discouraging others by timid doubts or hesitating movements."

407 F.2d at 1147 (quoting *Columbian Insurance Co. v. Ashby & Stribling*, 38 U.S. 331, 344 (1839)).

Rather than address maritime policy, the Ninth Circuit chose to jettison the traditional maritime rule in reliance on sweeping abstractions, such as the claim that "no reasonable distinction can be made between the guilt of the employee ... and the guilt of the corporation." *Protectus*, 767 F.2d at 1386. But whatever the merits of that idea when an employee's acts implement company policy, as in *Protectus* itself, Pet. App. 85a n.84, it is self-evidently untrue when, as here, the employee's act is forbidden by his employer and hostile to its vital interests. *Fuhrman*, 407 F.2d at 1148; *In re P&E Boat Rentals*, 872 F.2d at 651-52.

In the same vein, the Ninth Circuit in *Protectus* asserted that the Restatement's provision for purely vicarious punitive damages "better reflects the reality of modern corporate America." 767 F.2d at 1386. Since no evidence was taken about the "reality of modern corporate America," this appears to mean simply that the *Protectus* panel thought changing maritime law to adopt the Restatement was a progressive thing to do. But as Judge Kozinski pointed out, "nothing has changed in the relationship between ship owner and captain that would justify importing this innovation into maritime law." Pet. App. 288a n.1.

Not only do the arguments put forth in *Protectus* fail to support vicarious imposition of punitive damage under maritime law, they fail to support vicarious imposition of punitive damages in *any* setting. Indeed, since the decision in *Protectus*, this Court itself has expressly rejected the Restatement position as a matter of federal civil rights policy, *see Kol-*

stad v. American Dental Ass'n, 527 U.S. 526, 539-46 (1999). In *Kolstad*, the Court held that implementation and enforcement of good faith policies to prevent misconduct is a defense to vicarious punitive damages for acts of managerial employees. As Justice O'Connor explained:

> Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages—that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." Where an employer has undertaken such good faith efforts at Title VII compliance, it "demonstrat[es] that it never acted in reckless disregard of federally protected rights."

527 U.S. at 544 (citations omitted).

The same reasoning should apply in most corporate settings, where the primary means of controlling employee misconduct hostile to both corporate and public interests is the promulgation and enforcement of policies prohibiting such misconduct. If there is to be any relaxation of the maritime rule against vicarious punitive damages for employee misconduct, it should at a minimum incorporate the defense recognized in *Kolstad*. In this case, the instructions did the opposite, telling the jury that Exxon must be deemed reckless solely on account of Hazelwood's reckless acts *whether or not* those acts violated properly enforced corporate policies. Pet. App. 302a.

There is no reason to depart from maritime law's historic prohibition against vicarious punitive damages, and ample reason to adhere to it.

II. Punitive Damages for Unauthorized Discharges of Oil and Hazardous Substances Are Not Available in Federal Maritime Tort Actions.

Beyond the fatally flawed jury instruction, a more fundamental maritime-law question in this case is whether plaintiffs were entitled to *any* punitive damages in addition to the full compensatory damages they obtained. The answer implicates no issues of federalism or state sovereignty—the governing legal rules and policy interests are entirely federal. It implicates instead basic separation of powers principles concerning how federal law is established—more specifically, what role federal judges should play vis-à-vis Congress in determining how best to deter and punish oil spills.

Two basic propositions frame the analysis.

First. Punitive damages are not a matter of private right for plaintiffs seeking redress of injury, but instead are allowed—when they are allowed at all—solely to serve the *public* purposes of punishment and deterrence. Punitive damages "'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 & n.14 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).[9] Punitive damages and comlieved the criminal and civil penalties it provided were adequate to achieve punishment and deterrence without overdeterring socially useful commerce, and Congress omitted punitive damages. "Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Miles*, 489 U.S. at 27. Accordingly, the CWA's omission of punitive damages itself suffices to establish the relevant federal policy, and precludes punitive damages here.

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[9] *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or mali-

B. Even if the CWA Leaves Room for Judicial Lawmaking Concerning Punishment and Deterrence of Maritime Oil Spills, the Court Should Not Choose to Authorize Punitive Damages.

Even if one took the view that the CWA does not fully determine federal regulatory policy concerning maritime oil discharges, so that there remains room for substantive judicial lawmaking, that view only raises, but does not answer, the question whether this Court *should* increase the punishment for conduct that is already proscribed by statute and subject to significant civil and criminal punishment. Where Congress has not "spoken" to an issue, the power to make maritime law belongs to this Court. *See* pp. 43-44, *infra*. But it is an inescapable fact that substantial civil and criminal penalties for unauthorized maritime discharges exist. A court asked whether to endorse punitive damages awards in unpredictable and essentially unbounded amounts therefore still must ask whether additional common-law punishment is necessary, and if so, why. To answer those questions, in turn, the court would need to identify judicially-manageable criteria for assess-tive damages imposed by juries. As this Court has noted, punitive damages are essentially the *opposite* of rational, calibrated enforcement measures: Juries generally "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused," *Gertz*, 418 U.S. at 350, and thus "the impact of these windfall awards is unpredictable and potentially substantial," *Foust*, 442 U.S. at 50; *see Haslip*, 499 U.S. 1, 42 (1991) (Kennedy, J., concurring) (noting the "size and recurring unpredictability of punitive damages awards" as a "necessary consequence of [juries'] case-by-case existence"). A judge-made, jury-imposed punitive damages remedy literally billions of dollars higher than the penalties Congress provided does not just disrupt the balance that Congress struck, it *obliterates* it. Certainly no unstated intention to allow such a result can be read into the savings clause: to the contrary, this Court has repeatedly held that limited exceptions to comprehensive regulatory statutes must be read *narrowly* to preserve the primary operation of the statutory policy. *See, e.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings*, 510 U.S. 86, 97 (1993); *Comm'r v. Clark*, 489 U.S. 726, 739 (1989).

* * *

Read properly, the savings clause thus confirms and reinforces what is obviously the overall design of the CWA. The statute is not addressed to compensation for private harms, but instead prescribes a comprehensive, calibrated scheme of *public* enforcement, aiming to avoid unauthorized discharges, including oil spills, by punishing the offender and deterring the conduct that led to the discharge. Congress be-imposed vicarious punitive damages on a shipowner for the actions of a master at sea, *see* Part I, *supra.* Punitive damage liability against shipowners in maritime oil spill cases thus was virtually unknown and would not have been remotely considered a significant aspect of maritime tort law, to be "saved" specially by Congress.[16]

Finally, plaintiffs' view implausibly assumes that Congress tacitly sought to supplement its carefully calibrated public enforcement scheme with the wildly unpredictable and frequently excessive puni-

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pudiated. *Guevara*, 59 F.3d 1496; *Glynn v. Roy Al Boat Management Co.*, 57 F.3d 1495 (9th Cir. 1995). Some courts also held punitive damages available to seamen and others in personal injury cases, *e.g.*, *In re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981); the overwhelming majority of these cases can no longer be considered good law in light of *Miles*. The largest maritime punitive damages award affirmed by a federal appellate court before this one, in *Protectus*, was $500,000, equal to 1/14 of the $7 million in compensatories, 767 F.2d at 1381, for a deliberate and purposeful act, required by the employer's rules, that resulted in a death, in stark contrast to the award here, for lost commercial income from an unintentional spill that caused no personal injury. Pet. App. 98a.

[16] Plaintiffs have also cited a separate savings clause in the CWA, § 1365(e). That clause is part of the CWA's "citizen suit" provision. It provides that "[n]othing in this section"—*i.e.*, the citizen suit provision—"shall restrict any right which any person ... may have ... to seek any other relief." Unlike § 1321(o)(1), § 1365(e) explicitly speaks to common-law relief; it thus underscores § 1321(o)(1)'s irrelevance to this case, since the latter preserves at most "provisions" of law, not common-law remedies. Section 1365(e), however, is inapplicable to this case. In *Milwaukee*, this Court confirmed that § 1365(e) means only that the citizen suit provision (*i.e.*, "this section") does not in and of itself revoke other remedies. 451 U.S. at 328-29. "It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions." *Id.* at 329.

compensation for property damage caused by another. *See* pp. 27-28, *supra*. Punitive damages are also manifestly not "for damages *to property*," or to anything else. Punitive damages instead punish and deter the conduct that caused the damages—distinct public purposes directly and fully addressed by the CWA's public enforcement scheme.

Plaintiffs misread § 1321(o)(1) as intended to save punitive damages awards in maritime oil spill cases. The clause cannot bear the weight plaintiffs would put on it. First, their reading is inconsistent with the statutory language just discussed.[14] Second, plaintiffs erroneously assume that maritime punitive damages were a significant remedy Congress would have sought to save. But at the time § 1321(o)(1) was enacted in 1970, *see* Pub. L. No. 91-224 sec. 102, § 11(o)(1), 84 Stat. 91, 97 (1970), no maritime case had ever awarded punitive damages for an oil spill, few cases (if any) had awarded punitive damages for conduct not involving an intentional tort,[15] and certainly no maritime case had ever and necessary to deter such discharges and punish wrongdoers.[13]

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[14] It also conflicts with the clause's limitation to claims asserted under any "provision of law," which refers to "a clause in a statute, contract or other legal instrument." Black's Law Dictionary 1262 (8th ed. 2004). Plaintiffs' punitive damages claims are based on no such provision of law.

[15] This Court has never affirmed an award of punitive damages under maritime law. *See Guevara*, 59 F.3d at 1508 n.11. Nineteenth-century cases in the lower courts sometimes awarded "vindictive" damages in maritime cases, but those were all cases of intentional torts committed by ships' officers or crew. Recent punitive damages cases effectively began with *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973), and other cases allowing punitive damages for refusal to pay maintenance and cure—all of them involving intentional conduct. These decisions were based on a misreading of *Vaughan v. Atkinson*, 369 U.S. 527 (1962), and have now generally been re-

The CWA's focus on punitive and deterrent measures is clear from the provision of the statute that saves certain private claims for damages to property. It provides in pertinent part:

> Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel ... under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of ... any oil.

33 U.S.C. § 1321(o)(1). A vessel owner's duty to pay actual compensation for damage caused to property is clearly an "obligation[] ... for damages to ... property." The obligation to pay compensation for an injury is fundamental to the common law. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803). Punitive damages, by contrast, are not "obligations," since "a key feature of punitive damages" is that "they are never awarded as of right." *Smith v. Wade*, 461 U.S. 30, 52 (1983). As discussed above, they are allowed only in the rare case in which they are deemed necessary to serve public purposes of punishment and deterrence—objectives entirely *distinct* from satisfying a person's basic legal entitlement to monetary

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[13] The Ninth Circuit incorrectly suggested that Congress intended the CWA to punish only "public" as distinguished from "private" harm. Pet. App. 77a. In fact, the CWA expressly includes the protection of "private property" within its administrative enforcement scheme, 33 U.S.C. § 1321(b)(4). Moreover, if the court meant that private punitive damages are intended to serve something other than *public* interests, its opinion fundamentally misconceives both the nature and purpose of punitive damages. *See* pp. 27-28, *supra*.

ages not recoverable under DOHSA. 524 U.S. at 121-24.[12]

Notably, both *Milwaukee* and *Sea Clammers* held that the plaintiffs' claims were *entirely* displaced by the CWA—so the fishermen in *Sea Clammers* were allowed no private recovery at all. The Court need not go so far to resolve this case, because here the only question is whether the CWA's comprehensive scheme for *punishing and deterring* unauthorized discharges obviates the need for judge-made *punitive damages awards* to accomplish—imperfectly and standardlessly—exactly the same *public* purpose. The relevant "subject" on which "Congress has legislated" (*Oswego Barge*, 664 F.2d at 335), in other words, is the measure of punishment appropriate

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[12] The principle that judge-made maritime tort remedies for particular conduct are precluded when Congress has not provided them in a statute addressing the same conduct has been routinely applied by federal courts in maritime cases. *E.g.*, *Conner v. Aerovox, Inc.*, 730 F.2d 835, 838-42 (1st Cir. 1984) (*Milwaukee* and *Sea Clammers* equally foreclose judge-made *maritime*-law nuisance claims for pollution damage to fishing grounds); *In re Oswego Barge Corp.*, 664 F.2d 327, 339-44 (2d Cir. 1981) (CWA forecloses maritime-law negligence claims for government cleanup costs exceeding government's maximum recovery under the CWA). And multiple circuits have held that these principles bar recovery of *punitive* damages under maritime law when federal statutes do not authorize them. *E.g.*, *Miller v. American President Lines*, 989 F.2d 1450, 1454-59 (6th Cir. 1993); *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1091-94 (2d Cir. 1993); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1500-13 (5th Cir. 1995) .

Seas Act (DOHSA) precluded loss of society damages under maritime law for a death on the high seas because Congress had "limited survivors to recovery of their pecuniary losses." 436 U.S. at 623. The Court rejected the contention that judge-made maritime law could supplement the statutory remedy provided in DOHSA, holding that "Congress has struck the balance for us." *Id.* "In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.* at 625.

Similarly in *Miles*, a unanimous Court held that a survival action by the heirs of Jones Act seamen under general maritime law could give no remedies not provided by the Jones Act. 498 U.S. at 32 ("It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action"). *Miles* emphasized not only the subordinate role of judge-made federal law in matters addressed by Congress, but also the strong maritime policy of uniformity:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will .... Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created.

498 U.S. at 36-37. This Court most recently reaffirmed these principles in *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998), declining, again unanimously, to approve a general maritime law survivorship remedy for pre-death pain and suffering dam-

in *Milwaukee* that subsequent amendments to the CWA displaced the existing common-law action. The "question whether a previously available common-law action has been displaced by federal statutory law," the Court explained, "involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." 451 U.S. at 315 n.8. Because the CWA amendments established a comprehensive program for regulating water pollution, the Court held that there was no longer "room for courts to attempt to improve on that program with federal common law." *Id.* at 319.

The Court applied that rule two months later in *Sea Clammers* to displace a private nuisance claim asserted under both maritime law and federal common law on facts closely analogous to this case. 453 U.S. at 21-22. In that case, as here, the defendant improperly discharged a prohibited substance into coastal waters governed by the CWA. There, as here, the plaintiff—a fishermen's organization—alleged that the discharge had damaged the economic livelihood of its members. There, as here, the plaintiff sought recovery of compensatory and punitive damages on a tort theory (there, public nuisance) under maritime law. 453 U.S. at 10 & n.15. This Court rejected the claim, holding that "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope" of the CWA. *Id.* at 22.

The rule that federal common-law remedies applicable to a given subject are displaced when Congress has addressed the same subject applies as well to remedies sought under the general maritime law. In *Mobil*, this Court held that the Death on the High scribing balancing of factors Congress wished courts to use in imposing CWA punishments).

The CWA thus speaks directly and comprehensively to the only issue presented by plaintiffs' claims for punitive damages: what punishment is necessary and appropriate to satisfy the *public* regulatory goals of punishing and deterring maritime oil spills? The CWA's answer is that these objectives are satisfied by cleanup costs and natural-resource damages, as well as substantial but calibrated monetary civil and criminal penalties—and even potential imprisonment—all subject to the prosecutorial judgment of federal administrators and prosecutors. Of course Congress knows how to provide punitive damages—when it thinks they are necessary.[11] Its failure to provide them here speaks volumes.

This Court's precedents make clear that the CWA's public enforcement scheme for punishing and deterring unauthorized discharges leaves no room for supplemental judicial regulation of the same subject by judge-made punitive damages remedies. *Milwaukee* and *Sea Clammers* are especially in point. In *Milwaukee*, a plaintiff brought a federal common-law public nuisance action to abate a discharge of sewage into U.S. navigable waters. This Court earlier had explicitly sanctioned public nuisance actions under federal common law, but it held eliminated the cap in cases of "willful misconduct within the privity and knowledge of the [ship]owner." 33 U.S.C. § 1321(f).

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[11] *E.g.*, Commodities Exchange Act, 7 U.S.C. § 18(a)(1)(B); Bankruptcy Code, 11 U.S.C. § 363(n); Fair Credit Reporting Act, 15 U.S.C. § 1681u; Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d); Federal Wiretap Act, 18 U.S.C. § 2520(b)(2); Postal Accountability & Enhancement Act, 39 U.S.C. § 3018(g)(2); Civil Rights Act of 1981, 42 U.S.C. § 1981A; Fair Housing Act, 42 U.S.C. § 3613(c); CERCLA, 42 U.S.C. § 9607(c)(3).

Apart from these provisions aimed at punishing and deterring spills, the CWA provides for a limited private right of action. It includes a citizen's suit provision allowing an injured private party to abate a continuing violation of the statute and even to enforce the statute's prescribed civil penalties. *Id.* § 1365(a). But the CWA did not and does not include in its enforcement scheme a private action for punitive damages, even for willful misconduct. The public interest in punishing and deterring negligent and intentional oil spills is left exclusively to the calibrated *public* enforcement mechanisms established by the Act.

The CWA reflects Congress's "comprehensive long-range policy" for punishing and deterring maritime oil spills, and includes "the most comprehensive and far-reaching" provisions ever enacted on the subject. *Milwaukee*, 451 U.S. at 317-18; *see Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (noting "comprehensive scope of the [CWA]"). The CWA thus involves an explicit *balance* of Congress's twin goals of protecting the environment *and* limiting the liability of shipowners and other carriers so as not to impair commerce, consistent with longstanding maritime policy generally favoring limited liability for seagoing accidents. *See* S. Rep. No. 91-351 at 5 (1969) (citing as important factors "the effect of too rigid a liability test on maritime commerce" and "the economic impact of any specific amount of liability on the owner of the vessel, the shipper of the oil, and the consumer"); *see also Tull*, 481 U.S. at 422-23 & n.8 (de-

A. The Clean Water Act Establishes Federal Maritime Policy Concerning Punishment and Deterrence of Unauthorized Discharges and Displaces Judicial Regulation of the Same Subject

The Clean Water Act (CWA) specifically addresses the problem of both negligent and intentional maritime oil spills. The "discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States" is expressly "prohibited" by the Act. *Id.* § 1321(b)(3). The Act charges the President with determining "those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to ... public and private property." *Id.* § 1321(b)(4). It authorizes the Administrator of the Environmental Protection Agency to enforce the President's regulations through civil actions seeking monetary penalties for unauthorized discharges, *id.* § 1321(b)(6), and it establishes criminal penalties—including imprisonment—for negligent discharges of oil, with greater criminal sanctions for knowing discharges, *id.* § 1311(c); *see also* 18 U.S.C. § 3571(d) (authorizing criminal fines of up to twice third-party pecuniary losses).[10] The CWA also capped a vessel owner's liability to the federal government for cleanup costs and natural-resource damages, but questions familiar from the state-law preemption context. The question in the maritime-law context instead is simply "whether the legislative scheme 'spoke directly'" to the issue before the maritime court. *Id.* at 315 (quoting *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 625 (1978)). If "Congress has legislated on the subject," *Oswego Barge*, 664 F.2d at 335, that legislation displaces (or obviates the need for) supplemental judicial regulation of the same subject through application of judge-made maritime law.

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[10] Enforcement of these provisions by the federal government led to the record fine imposed on Exxon in this case. After the spill, Congress increased the statutory civil penalties for such spills—subject to reduction on account of mitigation efforts, prior penalties, etc., *see* § 1321(b)(7)-(8), enacted as part of the Oil Pollution Act of 1990—but still did not authorize private punitive damages.

Here, the courts below applied maritime law not only to compensate plaintiffs for economic losses, but also to impose on Exxon an additional $2.5 billion judicial penalty, for the regulatory purpose of punishing Exxon for the spill. Using a private maritime tort case to impose that regulatory sanction was wrong. The need for judicially-created measures to punish and deter unauthorized maritime discharges of oil and hazardous substances was eliminated by Congress's legislative action on precisely the same subject in the Clean Water Act, and by the comprehensive *public* enforcement scheme for punishing and deterring such discharges which Congress established. In determining what punishment is required, courts should defer to Congress's judgment about the proper balance between the public interest in deterrence and punishment, on the one hand, and the public interest in promoting maritime commerce, on the other.

ralty courts were the primary sources of public regulation of maritime conduct: "Maritime tort law is now dominated by federal statute," *id.* at 36, and "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance," *id.* at 27. Despite the history of judicial lawmaking in admiralty, "Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Id.*

Indeed, quite unlike the principle that governs whether Congress intended a federal statute to preempt *state* law, if the question is "which branch of the Federal Government is the source of *federal* law," *Milwaukee*, 451 U.S. at 319 n.14, courts "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as matter of federal law," *id.* at 317. This rule reflects the Court's longstanding "commitment to the separation of powers," which is "too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *Id.* at 315. "While federalism concerns create a presumption *against* preemption of state law, including state common law, separation of powers concerns create a presumption *in favor of* preemption of federal common law whenever it can be said that Congress has legislated on the subject." *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). In other words, the question is "not whether Congress ha[s] affirmatively proscribed the use of federal common law" (*Milwaukee*, 451 U.S. at 315) or whether there is "evidence of a clear and manifest purpose" to displace common-law rules (*id.* at 317)—

pensatory damages "serve distinct purposes." Whereas compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," punitive damages "have been described as 'quasi-criminal'" and "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman*, 532 U.S. 424, 432 (2001); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) (punitive damages are "similar" to "civil penalties"). In then-Judge Kennedy's words:

> [Punitive damages plaintiffs] act as private attorneys general to effect the deterrence and retribution functions of [punitive damages]. So far is this from being a fundamental personal right that it is not truly personal in nature at all. It is rather a public interest.

In re Paris Air Crash, 622 F.2d 1315, 1319-20 (9th Cir. 1980).

Second. Even where the federal judiciary has constitutional authority to "make" federal law through the exercise of its common-law power—as in cases arising in admiralty—that power is strictly circumscribed, if not displaced outright, where Congress has already addressed the problem. "Federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 n.14 (1981). This general rule applies equally in admiralty. As explained in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the time is long past when admi-

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cious, and to deter him and others from similar extreme conduct.").

ing whether existing statutory penalties are adequate to the regulatory task, and for identifying those which can be effectively improved upon by a common-law device such as private punitive damages awards.

The ultimate question is therefore whether judges should impose common-law punishment for a maritime oil spill in the form of punitive damages awards. And that question must be answered in light of the relevant considerations already discussed.

- Congress has already and repeatedly addressed the federal regulatory interest in this issue.
- Congress has never considered punitive damages an appropriate enforcement device in maritime policy.
- Punitive damages have rarely been awarded in maritime cases, and never for an unintentional discharge of oil or other hazardous substance.
- Maritime law seeks to protect maritime commerce and generally disfavors expanded liability.
- Punitive damages are a blunt and arbitrary mechanism for punishing and deterring certain conduct, and may well overdeter useful conduct.

Taken together, those considerations surely make the answer clear. Even assuming arguendo that the CWA does not itself operate to displace judge-made punitive damages awards, there is no practical need nor any sound policy basis for courts to choose to authorize supplemental common-law punishment that Congress has not provided.[17]

III.Maritime Law Does Not Permit This Punitive Damages Award.

Federal courts have a "unique role in admiralty cases," since the "need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998). Article III of the Constitution therefore vested in this Court jurisdiction over cases of an "admiralty and maritime" nature. It has long been settled that with the grant of jurisdiction came the power and the duty to determine the rules of the general maritime law, consistent with the policies that underlie the jurisdictional grant, in the same way that state courts determine the common law of their states. *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 22-25 (2004); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207-08 (1994); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975).

Accordingly, if there are to be punitive damages in oil spill cases, it is still the duty of the federal courts, under this Court's guidance, to clarify, shape, and ultimately declare, as common-law courts, the uniform general maritime law of the United States applicable to the issue of punitive damages. Yet despite Exxon's express request, the Ninth Circuit affirmatively declined to perform its duty as a maritime court to articulate, based on the policies of maritime law, the rules that should govern punitive damages, and to reduce the award accordingly. It held that the only applicable limit on the size of the award was the constitutional one. Pet. App. 68a-70a, 90a-91a. In so doing, the Ninth Circuit evaded a central question posed by this litigation: Should punitive damages be awarded under maritime law to plaintiffs who have received full compensation when deterrence and punishment have been fully achieved?

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[17] The Court's decision as to what law, if any, should be made in light of these considerations would, of course, be unaffected by the savings clause: Nobody could plausibly suggest that a 1970 savings clause forever *requires* this Court to provide a punitive damages remedy for oil spills, even if this Court decides, in the exercise of its common-law judgment, that such a remedy would be contrary to sound maritime policy.

A. Substantive Maritime Law, Not Just the Constitution, Sets Limits on Maritime Punitive Damages Awards.

In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that common-law judicial review of the size of punitive damage awards is a vital part of the traditional justification for allowing juries to make such awards, and that it cannot be omitted consistent with procedural due process. *See also Gore*, 517 U.S. at 598 (Scalia, J., dissenting). As the Second Circuit explained:

> [E]ven where the punitive award is not beyond the outer constitutional limit marked out ... by the three *Gore* guideposts, we retain an appellate responsibility to review punitive awards for excessiveness in applying federal statutes .... [T]he appellate function must be exercised, and review of punitive awards for excessiveness is an especially appropriate context in which the reflective role of a court of appeals follows the often dramatic arena of a trial court.

Mathie v. Fries, 121 F.3d 808, 816-17 (2d Cir. 1997); *see also Lee v. Edwards*, 101 F.3d 805, 809 (2d Cir. 1996); *Gaffney v. Riverboat Services of Indiana, Inc.*, 451 F.3d 424, 464 & n.39 (7th Cir. 2006); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 n.24 (1993) (noting non-constitutional state law reasonableness requirements).

State common law courts conduct two-phase review as a matter of course, first applying the pertinent standard under state common law and then considering the constitutional limits. *See, e.g., Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143-44 (Ohio 2002); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 277-78 (Md. 1998); *Routh Wrecker Serv. v. Washington*, 980 S.W.2d 240, 244 (Ark. 1998). This Court has expressly upheld and endorsed that procedure on the ground that "[f]or rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996).

Individual Justices have emphasized the power and duty of common-law courts to make rules governing punitive damages. *E.g., Haslip*, 499 U.S. at 42 (Kennedy, J., concurring) ("We do not have the authority, *as do judges in some of the States*, to alter the rules of the common law .... *Were we sitting as state court judges*, the size and recurring unpredictability of punitive damage awards might be a convincing argument to reconsider those rules."); *TXO*, 509 U.S. at 472 (1993) (Scalia, J., concurring) ("State ... courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime."); *State Farm*, 538 U.S. at 438 (Ginsburg, J., dissenting) ("state high court[s]" could "cap punitive damages").

In maritime cases, federal appellate courts perform the same function state high courts do when ruling on state common law. The court of appeals thus should have started by reviewing the punitive damages award here under applicable principles of the general maritime law. This Court has reiterated that the "fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Kirby*, 543 U.S. at 25; *accord Sisson v. Ruby*, 497 U.S. 358, 367 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982). Maritime commerce entails risks not found on land. Even with the greatest of prudence, accidents will happen, and mariners must often make difficult decisions. Therefore "[t]hrough long experience, the law of the sea ... is concerned with ... limitation of liability." *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 270 (1972). This Court has also reiterated that maritime law demands the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 88 U.S. 558, 575 (1874); *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994). And this Court has referred from time to time to admiralty's policies of fair compensation for injury, promotion of settlement, and judicial economy. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 211 (1994).

None of these policies supports punitive damages in this case. Such awards penalize maritime commerce rather than protect it; they expand rather than limit liability; they are unpredictable and inconsistent; they have nothing to do with compensation for actual injury; and they impede rather than promote settlement and judicial economy. Because of the unique role of federal courts in shaping maritime law (assuming Congress has not spoken to a particular issue), federal courts are the "proper institutions of our society to undertake th[e] task," *TXO*, 509 U.S. at 472 (Scalia, J., concurring), of specifying, based on maritime policies, whether or when maritime punitive damages are permissible, and what, if any amount, should be their permissible size.

B. No Punitive Damages Are Available Under Maritime Law Where Prior Criminal and Civil Sanctions Have Already Satisfied Any Reasonable Interest in Punishment or Deterrence.

This Court has recognized that the only proper purpose of punitive damages is to vindicate the public interest in retribution and deterrence. *Haslip*, 499 U.S. at 19; *accord Gore*, 517 U.S. at 568. In *State Farm*, the Court recognized that punitive damages should be awarded only when compensatory damages are not sufficient "to achieve punishment or deterrence." 538 U.S. at 419; *see Gore*, 517 U.S. at 584-85 (requiring consideration of whether "less drastic remedies could be expected" to achieve punishment and deterrence). While *Haslip* and *State Farm* concerned constitutional principles, those principles derive from the common law. *See Haslip*, 499 U.S. at 19, *Gore*, 517 U.S. at 568. Common-law courts have long followed this rule to determine when punitive damages should be available, well before this Court's recent decisions addressing the constitutional limits on punitive damages. *See*

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (Friendly, J.) ("Criminal penalties and heavy compensatory damages ... should sufficiently meet [the social] objectives [of punishment and deterrence]."); *accord McMillan v. Massachusetts SPCA*, 140 F.3d 288, 306 (1st Cir. 1998); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985); *Mirkin v. Wasserman*, 858 P.2d 568, 583 (Cal. 1993); *Rosado v. Santiago*, 562 F.2d 114, 121 (1st Cir. 1977). This Court should apply the same rule to maritime tort cases: When a defendant, prior to trial, has been fully punished and deterred by the combined imposition of compensatory damages, civil sanctions, criminal penalties, and other costs, there is no role left for punitive damages.

That is the situation here. The Ninth Circuit found that "[t]he plaintiffs here were almost entirely compensated for their damages years ago." Pet. 60a. And long before punitive damages were awarded, society's interests in punishing Exxon and deterring future oil spills had been fully achieved. As a result of the spill, Exxon was required to pay $2.1 billion in cleanup costs, $900 million to settle government claims for natural-resource damages, $125 million in criminal fines and restitution, and over $300 million to compensate private persons; and Exxon incurred a casualty loss of $46 million for vessel and cargo. JA331sa. As even the Ninth Circuit recognized, using a colorful "ink on the rug" example, "the cleanup expenses Exxon paid should be considered part of the deterrent already imposed." Pet. App. 99a-100a. The $125 million in fines and restitution was itself "one of the largest recoveries in a criminal case in the world," and more than twice the aggregate of *all amounts previously paid* in criminal proceedings for environmental fines. JA50-51, 53-54; *see also* pp. 5-6, *supra*.

Punitive damages are meant to serve public purposes of deterrence and punishment. It is unclear what *public* purpose could support allowing an Alaska jury to transfer to Alaska plaintiffs a windfall of $2.5 *billion*, on top of the full compensation they already received for their (purely economic) losses.

It is not deterrence. Plaintiffs virtually concede that the award was unnecessary for that purpose, since Exxon's $3.4 billion in spill-related costs and expenses was enough to deter anyone from anything. Instead they seek to justify the award on the basis of "punishment." *See* Pl. Br. 68-70.

But it is not punishment, either. Congress prescribed by statute the appropriate penalties and punishment for oil spills. It did not provide for punitive damages. The district court applied that statute and imposed the punishment it deemed fully adequate to balance the harm to public interests protected by the Clean Water Act with the court's appreciation of Exxon's exemplary post-spill conduct. Surely any public interest in punishing a defendant has been satisfied and discharged when the defendant has received the punishment specified by law and imposed by the court.

The strong maritime policies of uniformity, predictability, and avoiding undue burdens on maritime commerce only underscore the conclusion that maritime law should not allow punitive damages in these circumstances. Uniformity and predictability mean that punishment ought to be prescribed for everyone equally under the law, not imposed in the essentially standardless discretion of a jury. Avoiding undue burdens on maritime commerce means that those who suffer losses should be compensated, but that courts will prevent civil punishment going beyond what is necessary for deterrence. In such circumstances, punitive damages are overkill; they pile liability upon liability to give a windfall to plaintiffs who already have been fully compensated.

C. In the Alternative, the Court Should Set Appropriate Standards for Punitive Damages Under Maritime Law, Consistent with Maritime Policies.

If punitive damages may be awarded in maritime cases where Congress has not provided them by statute, *but see* Part II *supra*, and even where all purposes of punishment and deterrence have long since been achieved, *but see* Part III(B) *supra*, still it is for the federal courts, under this Court's guidance, to make sure that such awards are limited to what maritime law and policy permit. No case illustrates better than this one the need for simple, reasonable, and easily administered *standards* to constrain unfettered discretion in the award of punitive damages. *See Philip Morris USA Inc. v. Williams*, 127 S. Ct. 1057, 1062 (2007); *Gore*, 517 U.S. at 587 (Breyer, J., concurring). If the Court is to permit punitive damages in circumstances where neither Congress nor maritime law has ever previously provided them, then it must at least control the "game-show mentality," *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 792 (6th Cir. 1996), that drives juries in land-based cases to award whatever they will; and absent such standards an expanded regime of punitive damages should not be grafted onto federal maritime law. The maritime policies of uniformity, predictability, protection of maritime commerce, and limitation of liability require no less.

The standards identified below are drawn from or consistent with maritime policy, and each would require a complete or substantial reduction of the $2.5 billion award in this case. Certainly a $2.5 billion judgment that meets *none* of these standards, and which contravenes *all* maritime law policies, cannot stand.

1. *Civil punishment by a jury should not exceed the civil punishment that Congress has prescribed.*

Even if the CWA were not sufficient to preclude punitive damages altogether, *but see* Part II *supra*, respect for the pre-eminent role of Congress in the maritime area surely means at least that federal courts should not impose, through punitive damages, civil punishment that exceeds the maximum Congress has prescribed. Here Congress prescribed penalties, and permitted affected states to prescribe civil penalties of their own. *See* 33 U.S.C. § 1321(o)(2). Plaintiffs' brief below reckons that the civil penalties allowed by Congress for this oil spill (including those imposed by Alaska) total $80.2 million. Pl. Br. [2004] 65-66.

When Congress has specified by statute the civil punishment available, its decision should limit the size of punitive damages that civil juries may award. Federal courts are "not free" to impose civil punishment totaling more than what Congress has specified, and thereby "to rewrite rules that Congress has affirmatively and specifically enacted." *Dooley*, 524 U.S. at 122. Thus if the maximum civil punishment under the CWA is $80.2 million, civil punishment via punitive damages cannot be $2.5 billion. Such a result would entirely defeat congressional policy, directly contradict the statutory language, and destroy the maritime-law policies of predictability and uniformity.

2. *Where, as here, compensatory damages are substantial, punitive damages awarded by a jury may not exceed them.*

Borrowing from common-law principles, many state courts and legislatures impose caps on punitive damages, generally requiring that they not exceed a fixed multiple of compensatory damages. *See Gore*, 517 U.S. at 615-16 (Ginsburg, J., dissenting). In *State Farm*, this Court stated that when compensatory damages are substantial, "then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

Because the Court was interpreting the Constitution in *State Farm*, it did not make this principle into a rule applicable in every situation. The Court has been deeply mindful of the federalism interests involved in interpreting the Due Process Clause to prohibit particular punitive damage verdicts. *E.g.*, *Gore*, 517 U.S. at 568 ("In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages they will allow in different classes of cases and in any particular case."); *id.* at 598 (Scalia, J., dissenting). But that concern is absolutely irrelevant in this case, since it involves no rule of law announced by any sovereign state.

Rather, the same considerations of "size and recurring unpredictability" that have led state courts and legislatures to impose caps on punitive damages should lead the Court to set a limit here. *See Haslip*, 499 U.S. at 42 (Kennedy, J., concurring). Enforcing such a limit would serve the maritime policies of uniformity and predictability. It would also promote the maritime policies of settlement and judicial economy. When there is an accident, compensation should be paid promptly and fairly, as Exxon did here. But if compensation paid quickly and fairly nevertheless is treated as part of the multiplier for punitive damages, then there are strong incentives to litigate compensation. Every dollar paid in compensation can, as the Ninth Circuit held, increase punitive damages by five dollars.

The prospect of punitive damages thus interferes with what would otherwise be desirable incentives to pay claims quickly and fairly. It creates windfalls for some plaintiffs, and for many plaintiffs' lawyers. But it means that injured parties will be compensated more slowly, that compensatory payments will be scrutinized because of their potential to affect punitive damages, and that punitive damages, which are supposed to serve public purposes, will end up defeating or restricting one of the most important public purposes of maritime tort law (or land-based tort law, for that matter), the prompt and fair compensation of injured parties.

3. *When there is no likelihood that wrongful conduct will escape detection, there is no need for punitive damages greater than what is necessary to remove any profit from the wrongful conduct.*

The modern theory of compensatory damages in tort is that they are awarded to create proper incentives for safety. The economic theory of punitive damages, however, assumes that there are situations where merely requiring those able to prevent accidents to bear the costs of them will not suffice to reduce accidents to a minimum or correctly incentivize potential tortfeasors. The often-overlapping situations relevant here are: (1) deliberate, intentionally tortious conduct, where one person derives profit, pleasure, or amusement from causing an injury to another; and (2) conduct that the actor believes will always or at least frequently escape detection. In these situations, the obligation to pay compensatory damages may not be sufficient to deter wrongful conduct, and punitive damages may be needed. *See Gore*, 517 U.S. at 592-93 (Breyer, J., concurring); *Kemezy v. Peters*, 79 F.3d 33, 34-35 (7th Cir. 1996) (citing economic literature); Shavell, ECONOMIC ANALYSIS OF ACCIDENT LAW 162 (1987).

But the reverse is also true. If there is no potential profit from the conduct, and no likelihood that the conduct will escape detection, then there is no economic rationale for the award of punitive damages. *Id.* The obligation to pay compensatory damages is sufficient to align the tortfeasor's incentives properly, and thus to make sure that the costs of accidents are reduced to the optimum. There is no need and no warrant for punitive damages. Such a rule of law is particularly appropriate for maritime law, where the basic objective is the protection of maritime commerce. *Kirby*, 543 U.S. at 25; *Sisson*, 497 U.S. at 367; *Foremost Ins. Co.*, 457 U.S. at 674.

This maritime accident is clearly one where an award of punitive damages makes no economic sense. The spill was immediately known. There was no possibility of hiding it, even for a few minutes. Exxon made no profit, and had no prospect of profit, from any of the activities that plaintiffs point to as wrongful. If Exxon made mistakes, it has paid dearly for them. But that does not change the grounding into a situation economically appropriate for punitive damages. The rules of maritime law, designed to protect maritime commerce, ought to be shaped by this Court to fit economic reality. Economic reality does not warrant punitive damages in these circumstances.

4. *Juries may not be instructed to consider the net worth of corporate defendants in awarding punitive damages.*

Plaintiffs' evidence in Phase III of the trial was entirely devoted to Exxon's income and net worth. The jury was instructed it could and should consider that evidence in determining the proper size of the award. ER 517-19. Punishment on such a theory is clearly contrary to the maritime policies of predictability and uniformity, since it implies that the punishment of different actors for the same conduct may be different. It rests on an economically irrational foundation, a false analogy between the wealth of individuals and corporate net worth, as Judge Easterbrook has cogently explained. *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508-09 (7th Cir. 1992).

Allowing juries to consider corporate net worth permits punishment of companies disproportionately based on size, which is directly contrary to the fundamental maritime-law policy of encouraging adequate capitalization for risky activities. It also invites juries to vent "raw redistributionist impulses," *TXO*, 509 U.S. at 468 (Kennedy, J., concurring), lets them "use their verdicts to express biases," *Honda*, 512 U.S. at 432, and "provides an open-ended basis for inflating awards." *Gore*, 517 U.S. at 591 (Breyer, J., concurring). None of this serves the policies of maritime law.

* * *

The identification of clear standards to tether the award of punitive damages to maritime policy may seem an awkward policymaking task for a federal court, even though common law courts routinely perform such tasks. But a choice necessarily must be made one way or another. The position advanced by plaintiffs calls for the Court to make a most extraordinary policy choice—that judges should permit juries to impose whatever level of punishment they desire, capped only by the outer limits of the Constitution. If such policy judgments are difficult ones for a court to make, that is simply another reason why the decision to provide a punitive damages remedy should be made by Congress.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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STATUTORY PROVISIONS INVOLVED

RELEVANT PROVISIONS OF THE CLEAN WATER ACT

Clean Water Act, 33 U.S.C. §§ 1311(a), 1311(c), 1319(c), 1319(d), 1321(b), 1321(f), 1321(o), 1365(a), and 1365(e), as they read on March 24, 1989:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

§ 1319. Enforcement

* * *

(c) Criminal penalties

(1) Negligent violations

Any person who-

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title

* * *

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who-

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328 or 1345 of this title

* * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title * * * and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

* * *

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

* * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title * * * and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * *

§ 1321. Oil and hazardous substance liability

* * *

(b) Congressional declaration of policy against discharges of oil or hazardous substances; * * * ; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

(1) The Congress hereby declares that is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]).

* * *

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

* * *

(6) * * *

(B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based on consideration of the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this clause where a penalty has been assessed under clause (A) of this paragraph.

(C) In addition to establishing a penalty for the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(D) Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 1319(b) of this title.

(E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

* * *

(f) Liability for actual costs of removal

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

* * *

(4) The costs of removal of oil or hazardous substance for which the owner or operator of a vessel or on shore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

* * *

(o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

§ 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * *

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

RESPONDENT'S BRIEF

58292

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95P90 No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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U.S.S.G. § 8C3.3 66

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Alaska Stat. 46.03.759(c) 65

Miss. Code Ann. § 11-1-65(3)(d) 64

Mont. Code Ann. 27-1-220(3) 61

N.C. Gen. Stat. § 1D-26 65

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Fed. R. Civ. P. 58(2) 42

Fed. R. Civ. P. 58(a)(2)(B) 42

OTHER AUTHORITIES

American Law Institute, 50th Annual Meeting Proceedings (May 16, 1973) 25

Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages, 98 A.L.R.3d 870 (1980) 51

Exxon Mobil 2006 Annual Report, *available at* http://www.exxonmobil.com/corporate/files/corporate/XOM_2006_SAR.pdf 3

Henry Flanders, A Treatise on the Law of Shipping (1853) 22

10 William M. Fletcher, Cyclopedia of the Law of Private Corporations (perm. ed., rev. vol. 2001) 33, 34

Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393 (1993) 68, 69

Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3 (1990) 69

Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty (2d ed. 1975) 32, 44, 56

Andrew W. Homer, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues Aggressive Criminal Prosecution of Intentional Pollution from Ships*, 32 TUL. MAR. L.J. 149 (2007) 28

H.R. REP. NO. 101-200 (1989) 10

Int'l Maritime Org., *IMO and Dangerous Goods at Sea* (1996) 32

Intoxication of Automobile Driver as Basis for Awarding Punitive Damages, 33 A.L.R.5th 303 (1995) 51, 52

2 JOHN KIRCHER & CHRISTINE WISEMAN, PUNITIVE DAMAGES LAW & PRACTICE (2d ed. 2005) 24

Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571 (2005) 34

Letter from United States and Alaska to Counsel for Natives and Native Corporations (Oct. 31, 1991) 49

THEOPHILUS PARSONS, A TREATISE ON MARITIME LAW (1859) 22

W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971) 51

KENNETH REDDEN, PUNITIVE DAMAGES (1980) 62

Restatement (Second) of Agency § 217C 24

Restatement (Second) of Agency § 229 34

Restatement (Third) of Agency § 7.03 .... 24, 25

Restatement (Second) of Torts § 908 51

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David Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997) 2, 22, 55

Peter B. Schroeder, Contact at Sea (1967) 31, 32

S. Rep. No. 101-94 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722 10

2 Thomas G. Shearman & Amasa A. Redfield, A Treatise on the Law of Negligence (5th ed. 1898) 37

Jeffrey W. Short, et al., *Slightly Weathered* Exxon Valdez *Oil Persists in Gulf of Alaska Beach Sediments After 16 Years*, 41 Envtl. Sci. & Tech. 1245 (National Marine Fisheries Serv. 2007) 16

2 H.G. Wood, A Treatise on the Law of Railroads (1885) 26

9B Charles A. Wright, et al., Federal Practice & Procedure § 2537 (3d ed. 2008) 41

INTRODUCTION

"It is a well-established principle of the common law, that in ... all actions on the case for torts," juries may impose punitive damages. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). "Imposing exemplary damages on [a] corporation when its agent commits [a tort] creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1999) (quoting *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927)). Punitive damages also punish the corporation for its wrongdoing and force it to internalize the full consequences of its misconduct. *BMW v. Gore*, 517 U.S. 559, 568 (1996); *id.* at 592-93 (Breyer, J., concurring).[1]

Exxon asks this Court to turn its back on these settled principles because this is a maritime case. According to Exxon, special maritime concerns require unique judge-made limitations on punitive liability for corporate vessel operators.

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[1] As corporations and the ramifications of their wrongdoing have grown, so have punitive awards in cases involving significant harm. *See, e.g., Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 87 (2d Cir. 2007) (upholding $1 billion award); *In re Wilson*, 451 F.3d 161, 165 (3d Cir. 2006) ($3.75 billion settlement for claim seeking punitive damages); *In re A.H. Robins Co., Inc.*, 86 F.3d 364, 367-68 (4th Cir. 1996) ($2.47 billion settlement for claim seeking punitive damages); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 866 (Tex. App. 1987) (upholding $1 billion award); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 387 (La. App. 2001) (upholding $850 million award). The same is true with respect to antitrust treble damages. *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 795 (6th Cir. 2002) (upholding $1.05 billion award).

Since the earliest days of this Nation, however, it has been clear that "[c]ourts of admiralty allow [exemplary damages] upon the same principles, as they are often allowed damages in cases of torts, by courts of common law." *Boston Mfg. Co. v. Fiske*, 2 Mason 119, 121 (1820) (Story, J.). "Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions" – just as in other tort actions – "where [a] defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995); *see also* David Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 86-98 (1997) (maritime law always has "firmly recognized" availability of punitive damages).

This case fits well within that archetype. "The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." Pet. App. 83a. Unlike any previous shipping disaster, Exxon's reprehensible conduct inflicted such widespread harm to private parties' interests that the district court, *at Exxon's request*, certified a mandatory punitive damages class to protect Exxon from the threat of multiple punitive damage verdicts. Pet. App. 67a. The 83-day, three-phase trial and subsequent appeals established that 32,677 claimants suffered an average of about $15,500 in recoverable economic harm, apart from substantial unrecoverable economic and non-economic harm.

Plaintiffs were awarded an average of approximately $76,500 each in punitive damages – just less than five times their average compensable economic harm. The aggregate punitive judgment stands at $2.5 billion, or about three weeks of Exxon's current net profits.[2] This judgment is rational and proportionate, and should be affirmed.

STATEMENT

Respondents set forth the facts of this case as found by the courts below and other governmental entities, with citations to the trial record only when necessary to fill out the picture. Exxon claims that some of these matters were "hotly disputed," Petrs. Br. 9 n.3; points elsewhere to "Exxon's evidence," *id.* 9; and recites as "facts" various snippets of friendly testimony. But the jury "plainly did not" interpret the evidence according to the tale Exxon tells. Pet. App. 87a. Nor did the district court or the Ninth Circuit in performing *de novo* due process reviews. Pet. App. 22a-31a, 120a-124a, 149a-157a. More fundamentally, this is not the place to argue about evidence that a district court observed over a five-month trial and that it and a court of appeals already have examined, sorted, and distilled from an immense record. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996); *Newell v. Norton & Ship*, 70 U.S. 257, 267-68 (1865).

1. a. In 1973, Congress passed the Trans-Alaska Pipeline Authorization Act (TAPAA), Pub. L. No. 93-153, 87 Stat. 584, which permitted oil companies, including Exxon, to bring crude oil from Alaska's

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[2] Exxon Mobil 2006 Annual Report 5, *available at* http://www.exxonmobil.com/corporate/files/corporate/XOM_2006_SAR.pdf.

North Slope to market. From the pipeline's terminus in Valdez, oil tankers would travel through the "icy and treacherous waters of Prince William Sound," Pet. App. 22a, before heading southward.

As the proceedings leading to TAPAA emphasized, "[t]he economy of this area depends almost entirely on commercial fishing, the processing of the catch, and related activities." JA1442; *see also* Pet. App. 41a, 155a; JA1439, 1475-81. The Sound and adjacent waters also are home to thousands of Native Alaskans, who have engaged for centuries in subsistence living. Congress therefore passed TAPAA only after securing the industry's assurance that tankers would employ extensive safety measures to protect the Sound's pristine and resource-rich waters. *See* Br. of Alaska Legislative Council 4, 10-13.

Like the rest of the industry, Exxon knew the consequences of breaking its commitment – namely, that "a major oil spill in the Valdez area would cause [an] incalculable disaster to the rich fisheries," as well as to Native Alaskans' subsistence cultures. JA1488; *see also* Pet. App. 122a, 232a; JA213-14, 1437-41, 1475-94. The official contingency plan for the area acknowledged that the oil companies could not contain any spill exceeding 200,000 barrels (8.4 million gallons). SJA60sa-62sa. And the industry knew that oil from such a spill would "persist for years." C.A. 2004 Supp. ER1114.

b. Exxon Shipping Company ran Exxon's tanker operations out of the Port of Valdez.[3] An alcoholic culture pervaded the company. Supertanker crews partied with alcohol aboard ship; drank together in port; "destroyed" confiscated liquor by drinking it; and violated rules that forbade returning to duty within four hours of drinking.[4] Although on paper Exxon had an alcohol policy that prohibited drinking aboard ship, it did not enforce the policy, and Exxon's crews were "pretty conscious of" the fact that reporting alcohol violations by officers "could come back to haunt you."[5]

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[3] Petitioners stipulated that Exxon Corporation (now Exxon Mobil Corporation) and its subsidiary Exxon Shipping Company would be treated as one entity. JA212-13. Except where

Exxon put Captain Joseph Hazelwood in command of the EXXON VALDEZ, one of the thousand-foot supertankers that transited Prince William Sound. Hazelwood was a drinking alcoholic, and Exxon knew it. In 1985, Exxon officials learned through internal complaints that Hazelwood had been drinking aboard ship and had been drunk on several occasions when he boarded ship.[6] Because Hazelwood had not self-reported his on-duty drinking, JA355-56, Exxon's written alcohol policy called for him to be fired. JA599. Exxon, however, did not fire him.

Hazelwood instead attended a 28-day alcohol treatment program and started, but dropped out of, a prescribed after-care rehabilitation program. Pet. App. 63a. Nevertheless, after "fail[ing] to evaluate" his fitness for duty or "consider[ing] whether he

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context requires, this brief refers to the two collectively as "Exxon."

[4] JA226-37, 306-08, 314-15, 331-38, 379-80, 423-24, 445-47, 499, 562-71, 639-40, 649, 750-54; SJA118sa-29sa.

[5] JA721-22; *see also* JA372-73, 434, 537, 566-68, 628-35, 707, 713, 742-43, 1012, 1095-96, 1104; SJA360sa.

[6] JA1033-34; SJA135sa-36sa.

should be given a shoreside assignment," Exxon reassigned him to commanding supertankers. Pet. App. 256a; SJA210sa. Hazelwood's supervisor held his back-to-work meeting while enjoying a beer in a bar. JA294-95.

Less than a year after returning to duty, Hazelwood relapsed. Pet. App. 63a-64a, 121a. He did not hide his drinking. JA306. He drank – often with other Exxon personnel – "in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers." Pet. App. 255a-256a.[7] He also ignored rules requiring him to remain on the bridge while transiting Prince William Sound. JA432-33, 448.

Hazelwood's supervisors promptly began receiving reports that he "had fallen off the wagon." Pet. App. 63a-64a, 154a-155a; JA409-26, 849. The first report was relayed to the President of Exxon Shipping, who was told that "Hazelwood was acting kind of crazy or kind of strange." JA960-61.

Shortly before the official 1988 stewardship review for the EXXON VALDEZ, Hazelwood's supervisors, one of whom reported directly to the President, witnessed Hazelwood's relapse. Following a loud encounter in which Hazelwood was "erratic" and "abusive" toward his boss, the supervisor told another officer that "Joe had perhaps gone back to drinking because of his behavior." SJA374sa-375sa. During the review meeting itself, the drunken Hazelwood, whose "physical appearance was very bad" and whose "eyes were bloodshot," fell asleep.

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[7] JA227-29, 235, 306-08, 314-37, 357, 379-80, 411-26, 444-47, 562-71, 640-42, 647-50, 694-746, 752-57, 830, 848-50; SJA364sa-383sa; BIO App. 42a-43a.

SJA379sa-380sa. The supervisor and his boss signaled the officer conducting the review to "just keep rolling ... as if nothing happened." SJA380sa-383sa.

"[T]he highest executives in Exxon Shipping" continued to receive reports concerning Hazelwood's drinking. Pet. App. 64a. Less than two weeks before the grounding of the EXXON VALDEZ, Hazelwood's supervisor was told that Hazelwood had been drinking and insulting another captain over the ship's radio. JA693-707, 727-35, 745-46. It was apparent that "[s]omething was wrong with" Hazelwood. JA704. As the district court summarized:

> For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving.

Pet. App. 154a; *see also id.* 29a, 64a, 83a, 89a-91a, 121a-122a, 153a-157a. To make matters worse, Exxon "routine[ly]" staffed its ships, including Hazelwood's, with overworked and fatigued crews. Pet. App. 90a, 254a; SJA70sa.

c. On the night of March 23, 1989, the EXXON VALDEZ departed Valdez loaded with 53 million gallons of crude oil. Hazelwood was the captain and the only officer aboard licensed to navigate through Prince William Sound. Predictably, he also was drunk – "so drunk that a non-alcoholic would have passed out." Pet. App. 87a. Before boarding the ship, Hazelwood had consumed between five and nine double vodkas (between fifteen and twenty-seven ounces of 80-proof alcohol) in waterfront bars. Pet. App. 64a.

Shortly after getting underway, Hazelwood – his blood alcohol level at about .241, Pet. App. 256a – steered the vessel away from some ice and toward Bligh Reef, a "known and foreseen hazard." Pet. App. 61a, 253a. He put the ship on an "autopilot program [that] sped the vessel up," something not ordinarily done when a vessel is outside shipping lanes. Pet. App. 63a, 87a. With the reef "only minutes away," Pet. App. 253a, Hazelwood abandoned the bridge and went down to his cabin. He left control to the third mate – who was "fatigued" on his second consecutive watch – with "vague" orders concerning the "tricky" turn necessary to avoid the approaching reef. Pet. App. 63-64a, 87a; JA469-72; SJA294sa. With the third mate unable to perform both his own job and Hazelwood's, the supertanker ran aground.

Exxon invites this Court to infer that the "[i]mmediate cause" of the grounding was the mate's failure to execute a simple turn. Petrs. Br. 2. But Exxon stipulated in the district court that Hazelwood "was negligent in leaving the bridge of the vessel on the night of the grounding, that such negligence was a legal cause of the oil spill, and that the Exxon defendants are responsible for this act of negligence." JA212. Expert mariners elaborated that the turn was not simple, Pet. App. 62a-63a, and Hazelwood's decision-making that night defied "common sense." Pet. App. 63a, 87a; JA460-84. Hazelwood took these improper actions because "his judgment was impaired by alcohol," Pet. App. 63a, 87a – a fact apparent from the tape of his contemporaneous report of the grounding to the Coast Guard. PX92A (Resps' DVD).[8]

After speaking by satellite phone with an Exxon executive in San Francisco, Hazelwood tried to rock the supertanker off the reef. Pet. App. 122a, 234a n.13; JA223-24, 354-55, 872-76; SJA295sa. Had he succeeded, the ship "would probably have foundered, risking the loss of the entire cargo and the lives of those aboard." Pet. App. 122a, 167a-68a.

As it was, the reef ruptured the ship's hull, releasing 11 million gallons of crude oil into the Sound, causing the "most notorious oil spill in recent times." *United States v. Locke*, 529 U.S. 89, 96 (2000). Wind and water spread the oil across 600 linear miles (roughly the distance from Cape Cod, Massachusetts, to Cape Lookout, North Carolina) and over 10,000 square miles of the surrounding marine ecosystem. For days, this situation was "exacerbated greatly by an unreasonably slow, confused and inadequate response by industry and government that failed miserably in containing the spill and preventing damage." S. REP. NO. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723-24.

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[8] Exxon's suggestion, Petrs. Br. 9 n.3, that Hazelwood was not drunk illustrates just how brazenly its Statement of the Case ignores the detailed decisions below and how severely Exxon slants the record. The jury heard testimony about Hazelwood's drinking on March 23 from crew members who drank with him, bartenders, another customer, and Hazelwood himself. JA219-21, 239-55, 334-35; Tr. 2729, 2766-67. The state-employed pilot testified that he smelled alcohol on Hazelwood's breath before the grounding, JA267-71, as did Coast Guard officers who boarded the ship after the grounding. JA489-92, 1015-16. Coast Guard blood alcohol tests confirmed that Hazelwood had been extremely drunk. Pet. App. 108a, 256a-257a. Even Exxon's Chairman conceded shortly after the spill that Hazelwood was "drunk," PX2 at 7:05 (Resps' DVD); SJA207sa, and Exxon fired him for that reason. SJA198sa.

d. Eventually, "[i]n keeping with ... legal obligations" imposing a duty even on innocent spillers to clean up toxic discharges, "Exxon undertook a massive cleanup effort." Pet. App. 124a (citing 33 U.S.C. § 1321). But a congressional report determined that Exxon's response was "wholly inadequate." H.R. REP. NO. 101-200, at 6 (1989). Exxon cleaned up only 13-14% of the oil. DX5505A.

What is more, the jury could have concluded that Exxon directed its cleanup efforts more at appearances than effects. In taped conversations with the Alyeska Emergency Center, an Exxon official was reminded, and acknowledged, that the oil industry's contingency plan could not contain a spill this big. PX722A (Resps' DVD). He nonetheless urged the deployment of "bright and yellow" cleanup equipment to avoid a "public relations nightmare." *Id.* at 1:50, 6:03. Exxon's representative explained: "I don't care so much whether [the equipment is] working or not but ... it needs to be something out there that looks like an effort is being made...." *Id.* at 1:54. "I don't care if it picks up two gallons a week. Get that shit out there ... and ... standing around where people can see it." *Id.* at 6:37.

Meanwhile, Exxon's Chairman publicly acknowledged that its executives had known about Hazelwood's alcoholism and that it had been a "gross error" to assign him to the safety-sensitive position of ship master. PX2 at 19:40 (Resps' DVD). He called the assignment a "bad judgment ... on a going in basis." *Id.* at 15:03.

The oil spill "disrupted the lives (and livelihood) of thousands of [people in the region] for years." Pet. App. 24a. The likelihood that any "fish harvested [would be] adulterated by oil," JA1118, required the State of Alaska to close fishing seasons in 1989. The spill also reduced harvests in later years and depressed the prices of all Alaska fish, including those from unoiled areas. JA1155-56. The oil damaged approximately 1,300 miles of shoreline, much of it privately owned. It destroyed the subsistence activities of Native Alaskans, "for whom subsistence fishing is not merely a way to feed their families but an important part of their culture." Pet. App. 123a. As one would expect from a disaster that cripples an entire region's economy, "[t]he social fabric of Prince William Sound and Lower Cook Inlet was torn apart," producing a high incidence of severe depression, post-traumatic stress disorder, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound. Pet. App. 150a-151a, 166a-167a; SJA386sa-572sa.

2. Thousands of individuals and local businesses sued Exxon respecting their private harm. The Limitation of Shipowners' Liability Act, now codified at 46 U.S.C. § 30501 *et seq.*, generally allows a shipowner six months to petition to limit its liability (to the value of the vessel and cargo) if it lacked "privity or knowledge" as to crewmembers' tortious conduct. But Exxon's counsel advised that Exxon "will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood," BIO App. 43a, and Exxon did not even attempt limitation.

The federal government and State of Alaska separately pursued civil and criminal cases against Exxon for the oil spill's environmental impacts. But Exxon quickly entered into settlements with the governments – pleading guilty to three crimes that were punishable by a combined $3 billion fine, but paying only $25 million, and agreeing in the civil matters to pay $900 million over ten years for environmental restoration. Pet. App. 173a-175a, 240a-241a.

Exxon made some compensatory payments to some commercial fishermen, but it refused to pay anything for most of the harm it caused. *See* Pltfs. 2004 C.A. Br. 47-49. It also refused to compensate other injured groups and opposed administrative relief from the Trans-Alaska Pipeline Fund. *Id.*; JA1428-29. So plaintiffs proceeded with this litigation, providing the first opportunity for an adversarial proceeding to develop the facts fully. Pet. App. 174a n.111.

The district court "did a masterful job of managing this very complex case." Pet. App. 67a. At Exxon's request, the district court certified a mandatory punitive damages class. Pet. App. 126a; JA 115. The class includes 32,677 commercial fishermen, related individuals and businesses, private landowners, Native Alaskans, municipalities, and others.

After years of discovery, the parties tried the case to a jury in 1994. The trial comprised three phases over 83 trial days (filling 7,714 pages of transcript), with 155 witnesses and 1,109 exhibits.

In the first trial phase, the jury found that Hazelwood and Exxon each had been reckless, thus establishing a necessary but not sufficient condition for assessing punitive damages. Pet. App. 67a.

In the second phase, the jury awarded $287 million in compensatory damages for economic harm to fishermen in the major commercial fisheries. Pet. App. 160a. In post-trial proceedings, the district court and court of appeals determined that the class members, including victims whose claims had been dealt with outside of Phase II, recovered economic damages exceeding $500 million. Pet. App. 38a, 160a-163a. Plaintiffs, however, could not recover for all their harm. The district court dismissed as barred by maritime law or too remote (and the court of appeals refused to reinstate) claims for various other economic injuries and emotional damages. *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997); *see* Pet. App. 115a-116a; JA118-61, 1368-81, 1384-90.[9]

In the third phase, the jury was asked to "determine liability for and the amount of punitive damages, *if any*, for all plaintiffs." JA165 (emphasis added). The district court gave the jury "unusually detailed" instructions, which embodied "the very same concepts" later elaborated in this Court's due process cases. Pet. App. 127a, 146a. The instructions further emphasized that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made." BIO App. 12a, 17a.

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[9] The court of appeals did allow "tenderboat operators and crews, and seafood processors, dealers, wholesalers, and processor employees" to assert certain claims under state law. Pet. App. 115a. These claims later settled for about $5 million. "'For rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy.'" Petrs. Br. 45 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996)). The Court should recognize that the ability of these class members to recover punitive damages under state law will not be affected by its rulings on the federal questions presented.

The jury returned separate verdicts for $5000 against Hazelwood and for $5 billion against Exxon, finding that each award was "necessary in this case to achieve punishment and deterrence" with respect to each defendant. JA1408. The district court upheld the verdicts as supported by the evidence and substantively reasonable. Pet. App. 231a-245a.[10]

3. In 2001, the Ninth Circuit affirmed the jury's compensatory verdict and its decision to award punitive damages. Exxon also argued that the punitive award was constitutionally excessive. But in case the Ninth Circuit "d[id] not wish to reach the issue of constitutional excessiveness," Exxon said that "it should exercise its power as a common law maritime court to reduce the award to no more than the amount, if any, that is necessary to the objective of punishment and deterrence in a maritime context." Exxon 1997 C.A. Br. 81. The court of appeals elected to undertake the constitutional

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[10] Exxon will not have to pay the full amount of any judgment. Before trial, it entered into secret agreements with certain seafood-processor plaintiffs in which those plaintiffs agreed to "cede back" any punitive awards they receive. The agreements entitle Exxon to an 11.38% rebate on any award. SJA341sa-342sa. The Ninth Circuit found the agreements enforceable, though it did "not condone Exxon's conduct" in representing to the jury (and the district court) that it obtained "only receipts in return" for payments it made in connection with these agreements. *In re the Exxon Valdez*, 229 F.3d 790, 800 (9th Cir. 2000).

review and twice remanded the case for the district court to reconsider the size of the punitive award in light of this Court's evolving due process jurisprudence.

4. The district court twice more analyzed the voluminous record. It finally concluded that "a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of ... its right to due process." Pet. App. 178a-179a. In an eighty-one page opinion, the district court reasoned that: (1) it was "highly reprehensible" for Exxon knowingly and repeatedly to allow a relapsed alcoholic to captain a supertanker full of toxic crude oil through Prince William Sound; (2) the ratio of the punitive verdict to compensated economic harm was 9.74 to 1, and falls still lower once non-economic and potential harms are taken into account; and (3) "comparable civil and criminal penalties could have exceeded $5 billion." *Id.* But because the Ninth Circuit had directed it not only to apply the due process guideposts "in the first instance," Pet. App. 95a, but also to reduce the award, Pet. App. 104a, the district court entered a new judgment reducing the award to $4.5 billion – representing roughly a 9:1 ratio between punitive damages and economic harm. Pet. App. 179a-180a.

5. A divided Ninth Circuit reduced the award to $2.5 billion. The majority held that, on these facts, due process would not allow more than a 5:1 ratio to economic harm. Pet. App. 24a, 40a. Judge Browning dissented. He noted that the majority's ratio analysis had not accounted for the vast noneconomic harm or additional potential harm, and "agree[d] with the district court's assessment that there is no

principled means by which this award should be reduced." Pet. App. 42a-56a.

6. The Ninth Circuit denied rehearing en banc. Without discussing the facts, Judge Kozinski argued in dissent that a shipowner should not have to pay punitive damages when it merely has "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a. Judge Bea argued that a 5:1 ratio was excessive. Pet. App. 293a.

7. During the 13 years that Exxon has pursued its post-verdict challenges, approximately 20% of the members of the plaintiff class have died. Hundreds have gone bankrupt. Still others continue to struggle, as roughly 26,000 gallons of oil remain in the water and in subsurface sediments, impairing fish stocks and marine habitat. Jeffrey W. Short, et al., *Slightly Weathered* Exxon Valdez *Oil Persists in Gulf of Alaska Beach Sediments After 16 Years*, 41 ENVTL. SCI. & TECH. 1245 (National Marine Fisheries Serv. 2007). Exxon, meanwhile, has more than recouped the $2.5 billion judgment by operation of the differential between its internal rate of return and the statutory judgment rate. It has assured the district court that paying even the $5 billion jury verdict "would not have a material impact on the corporation or its credit quality." SJA334sa.

SUMMARY OF ARGUMENT

This punitive award is consistent with well-accepted common-law principles, and nothing about maritime law warrants deviation from those standards.

I. The Phase I jury instruction that Exxon was responsible for the acts of its managerial agents does not warrant vacating the judgment.

A. Exxon concedes that Captain Hazelwood was a managerial agent, and the common law of almost every state allows punitive liability against corporations based on managerial agents' recklessness. Federal statutes governing pollution likewise authorize punitive damages and penalties based on the wrongdoing of managerial agents (or any other shipboard employees). Nothing in maritime policy or precedent – especially not the *dictum* concerning privateers in *The Amiable Nancy*, 16 U.S. 546 (1818) – requires a different agency rule here, particularly since Captain Hazelwood acted recklessly *before* leaving port and did not ground the tanker during any crisis at sea. Nor does Exxon's current claim that Hazelwood violated corporate policies alter this analysis. Tort law does not absolve corporations from punitive liability when managerial agents violate company policy. In any event, Exxon did not enforce – or even claim at trial that it enforced – any serious alcohol policy that would have prevented the disaster.

B. Even if Phase I's managerial agent instructions had been flawed, the judgment should still stand. The jury considered whether to award punitive damages in Phase III, after being instructed to assess Exxon's conduct separately from Hazelwood's and hearing arguments focused entirely on Exxon's conduct in leaving a drinking alcoholic in command of the EXXON VALDEZ. The jury's $5 billion verdict against Exxon makes clear that "Exxon is not in the position of the owners in *The Amiable Nancy* or *Lake Shore*." Pet. App. 83a. "[T]he jury found that the corporation, not just the employee, was reckless" in giving command of an oil tanker to a relapsed alcoholic. *Id.*

II. The Clean Water Act (CWA) does not absolve Exxon of punitive liability.

A. Exxon's argument is not properly before this Court. Exxon never made a timely Rule 50 motion seeking CWA relief in the district court. When a party fails to preserve an argument under Rule 50, appellate courts are powerless to reach it.

B. In any event, the CWA's scheme of penalties does not inhibit respondents' ability to recover punitive damages under maritime law. The CWA does not occupy the field of remedies with respect to oil spills – let alone spills of trans-Alaskan oil, which the Trans-Alaska Pipeline Authorization Act specifically governs. The CWA concerns only the government's ability to enforce statutory discharge standards so as to redress environmental harm. Respondents' claims, by contrast, are tort claims brought by private parties, based upon harm to private economic and quasi-economic interests.

III. The size of the award satisfies maritime-law review.

A. When "no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination [concerning the size of the award] under an abuse-of-discretion standard." *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 433 (2001) (quotations omitted). The district court did not abuse its discretion. After overseeing the government's criminal prosecution of Exxon and later presiding over this lengthy trial, the district court properly concluded that the jury reasonably could have determined that a multi-billion dollar punitive award was necessary to achieve punishment and deterrence. Maritime law requires nothing more; Congress already has set forth the scope of shipowners' supplemental protection from substantial liability in the Limitation of Shipowners' Liability Act, and the Act does not apply here.

B. The award satisfies any set of guideposts this Court might apply. Placing a relapsed alcoholic at the helm of a supertanker transiting Prince William Sound was highly reprehensible conduct. It foreseeably caused catastrophic harm. The ratio of the punitive award to the mandatory class members' economic harm for which they were able to recover is less than 5:1, and the ratio of the punitive award to the totality of their injuries is smaller still. Comparable penalties also gave Exxon ample notice it could face multi-billion dollar punishment for its wrongdoing. Finally, the jury had ample reason to reject Exxon's contention that prior penalties and cleanup expenditures – which totaled only $25 million more than an *innocent* spiller would have paid – had punished and deterred Exxon enough for recklessly and "massive[ly] disrupt[ing]" the lives of tens of thousands of Alaskans and businesses for years. Pet. App. 24a-26a, 242a-245a.

ARGUMENT

I. Both Captain Hazelwood's Recklessness and That of Exxon's Top Management Subjected Exxon to Punitive Liability.

Because a corporation can act only through natural persons, jury instructions on corporate punitive damages *must* provide guidance as to whose conduct will be attributed to the corporation. This trial's Phase I instructions followed the Restatements of Torts and Agency, which place "strict limits" on the jury's ability to impute an employee's acts to a corporation. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 542 (1999). The instructions allowed the jury to hold Exxon responsible for the reckless acts of only "those employees who [we]re employed in a *managerial capacity* while acting in the scope of their employment." Pet. App. 301a (emphasis added). The instructions defined managerial employees as those who "ha[ve] responsibility for, and authority over, a particular aspect of the corporation's business." *Id.*

Exxon concedes that Captain Hazelwood was a managerial employee. Petrs. Br. 10; Pet. App. 264a n.8. It argues, however, that the Phase I instructions were flawed because punitive damages simply "may not be awarded against a shipowner based solely on the conduct of a ship's master." Petrs. Br. 18. Exxon's argument contradicts accepted tort and agency law, misconstrues maritime precedent, and rests on non-existent maritime policies. Furthermore, even if a flaw had existed in the Phase I instructions, the judgment should still be affirmed: the Phase III proceedings and evidence establish that "the jury found that the corporation, not just the employee, was reckless." Pet. App. 83a.

A. Exxon Was Responsible for Captain Hazelwood's Acts Because He Was a Managerial Agent.

1. Overreaching from the start, Exxon says that a "venerable line of cases" prohibits punitive damages based on a master's recklessness, even one conceded to be a managerial agent. Petrs. Br. 15. In truth, this Court has never issued a decision – inside or outside the maritime context – inconsistent with the Restatement's conservative approach treating a managerial agent's tortious acts as those of the corporation for purposes of assessing punitive damages. Nor is any "venerable" maritime rule contrary to the Restatement established anywhere else.

The Amiable Nancy, 16 U.S. 546 (1818), upon which Exxon chiefly relies, did not lay down any "general doctrine" on this subject. *Hopkins v. Atlantic & St. Lawrence R.R.*, 36 N.H. 9, 20 (1857). The case did not involve a corporation, a managerial agent, a master, or even a request for punitive damages. It arose from an unjustified robbery committed by the crew of a *privateer* (a governmentally commissioned warship), whose individual owners had no knowledge or forewarning of the wrongdoing. Justice Story stated that the plaintiff could not have gotten "vindictive damages" against the owners, because imposing such damages would "defeat the policy of the government, by burthening the service [of privateers] with a responsibility beyond what justice requires." 16 U.S. at 559. Nineteenth century courts and treatises understood that *dictum* to be grounded in the "peculiar relations subsisting between the owners and the officers and crew of a privateer, and on reasons of public policy connected with the employment of privateers in our public wars." *Hopkins*, 36 N.H. at 20; *see also Dias v. The Revenge*, 7 F. Cas. 637, 638-39 (D. Penn. 1814) (No. 3,877) (discussing quasi-public nature of privateers); HENRY FLANDERS, A TREATISE ON THE LAW OF SHIPPING ¶¶151, 154-56 (1853) (owners liable for recklessness of masters, but "different considerations prevail" respecting privateers); THEOPHILUS PARSONS, A TREATISE ON MARITIME LAW 391-94 (1859) (same).

Later cases recognized that corporations could be liable for punitive damages based on employees' misconduct, without pinpointing what position an employee had to occupy before the employee's conduct or acquiescence became that of the corporation. This Court held in 1887, for example, that a railroad could face punitive liability for tortious conduct by a vice-president and assistant general manager. *Denver & R.G. Ry. v. Harris*, 122 U.S. 597, 608-10 (1887). In *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101, 114 (1893), on the other hand, the Court held that another railroad could not be liable for punitive damages based on a conductor's misconduct. In maritime cases, nineteenth and early twentieth century lower-court decisions adopted various approaches, ranging from "full vicarious liability" in punitive damages for any agent's misconduct – whether shipboard or not – to more restrictive formulations. Robertson, *supra*, at 121 (discussing cases); *Colegrove v. The S.S. City of Columbia*, 11 Haw. 693, 700-01 (1899) (imputing recklessness of ship's master to shipowner).

More modern maritime cases likewise have taken varying approaches. *See CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 704-05 (1st Cir. 1995) (surveying cases). But over the past nearly 100 years, during which both the corporate form and maritime commerce have come of age, *no* federal court has held, as Exxon asks this Court to hold, that "[p]unitive damages may not be awarded against a shipowner based solely on the conduct of a ship's master." Petrs. Br. 18.[11] No current maritime treatise mentions any such rule.

2. This Court draws maritime tort law from two primary sources: (a) state tort law and (b) federal statutory law and policy concerning related maritime issues. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986). These sources dictate that Phase I's managerial agent instructions were correct.

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[11] Only two federal cases stand for Exxon's proposition. *See The Seven Brothers*, 170 F. 126 (D.R.I. 1909); *The Golden Gate*, 16 F. Cas. 141 (C.C.N.D. Cal. 1836). None of the other cases Exxon cites had to decide whether punitive damages may be based solely on a master's recklessness. The First Circuit in *CEH* held that it "need not resolve" the issue because the shipowner "share[d]" "some level of culpability." 70 F.3d at 705. In *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1147 (6th Cir. 1969), the court found that the master's conduct was not reckless. In *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989), the Fifth Circuit considered only whether it should drop "the punitive damage hammer on the principal for the wrongful acts of the simple agent or lower echelon employee," not a ship's master. In *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896), the damages were not "other than compensatory," so the Seventh Circuit did not decide what standard might govern punitive recoveries. The final two cases Exxon cites appear to endorse vicarious liability. *The Ludlow*, 280 F. Cas. 162, 163-64 (N.D. Fla. 1922); *Ralston v. The States Rights*, 20 F. Cas. 201, 208-09 (E.D. Pa. 1836).

a. Federal maritime law presumptively follows the common law applicable to land-based torts. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-39 (1996); *see also American Export Lines v. Alvez*, 446 U.S. 274, 284-85 & n.11 (1980) (adopting rule of "clear majority of States"); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1979) (adopting general Restatement test). Borrowing from state common law promotes an integrated approach to maritime torts, as states retain concurrent jurisdiction over those torts in state waters. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29-30 (1990).

Among the forty-eight states that permit punitive damages, nearly every one allows them to be imposed against a corporation based upon the reckless acts of at least a managerial agent. 2 JOHN KIRCHER & CHRISTINE WISEMAN, PUNITIVE DAMAGES LAW & PRACTICE § 24-5 (2d ed. 2005). The American Law Institute (ALI) endorses the "managerial agent" approach in the Restatements of Torts and Agency. RESTATEMENT (SECOND) OF AGENCY § 217C(c) (1958); RESTATEMENT (SECOND) OF TORTS § 909(c) (1979); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e, at 158 (2006). The Restatement rule rests on the premise that a managerial agent's act *is* the principal's act. It recognizes that "imposition of corporate punitive damages based upon the theory of managerial capacity tends to deter the employment of unfit persons for important positions and encourage their supervision." *Albuquerque Concrete Coring Co. v. Pan-Am World Servs.*, 879 P.2d 772, 778 (N.M. 1994) (citation omitted); *see also*

RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e, at 158.

Exxon treats the Restatement test as if it were an accident. But the ALI has endorsed the test on three occasions (in 1958, 1977, and 2005) over a fifty-year span. And the record of ALI proceedings that Exxon cites (Petrs. Br. 23) shows that (i) no one questioned that a managerial agent's tortious conduct could result in corporate liability for punitive damages, and (ii) the motion to retain Section 909 was withdrawn as unnecessary because "there was no one who wanted it to be eliminated." ALI, 50th Annual Meeting Proceedings 236-38 (May 16, 1973). Not only do the vast majority of states impose punitive liability based on a managerial agent's conduct, but this Court has adopted a modified version of the Restatement rule for purposes of Title VII claims, and other federal courts have done so respecting various other federal statutory claims. *See Kolstad*, 527 U.S. at 540-46; *Brady v. Dairy Fresh Prods.*, 974 F.2d 1149, 1153-54 (9th Cir. 1992) (RICO treble damages); *United States v. O'Connell*, 890 F.2d 563, 567-69 (1st Cir. 1989) (False Claims Act punitive damages); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 972-73 (4th Cir. 1987) (Fair Credit Reporting Act punitive damages).

Indeed, for over a century, "[a] slight majority of states" has followed a rule of pure *respondeat superior*, under which a corporation may be held liable for punitive damages based on the wrongdoing of *any employee*. RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e, at 157; *see also Briner v. Hyslop*, 337 N.W.2d 858, 863-65 (Iowa 1983) (surveying cases);

Little Rock Ry. & Elec. Co. v. Dobbins, 95 S.W. 788, 791-92 (Ark. 1906) ("majority of the states" followed this rule); 2 H.G. WOOD, A TREATISE ON THE LAW OF RAILROADS § 317, at 1242-44 (1885) (any agent rule "is now generally held in the better class of cases"). Maine's Supreme Judicial Court explained this doctrine in the much-cited decision in *Goddard v. Grand Trunk Railway*, 57 Me. 202 (1869), just as corporations were emerging as a fixture of American life:

> A corporation ... has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. ... All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment.

Id. at 223-24.

This Court recently referenced *Goddard*, by way of acknowledging that *Lake Shore*'s more restrictive formulation "may have departed from the trend of late 19th century decisions." *American Soc'y o: Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982); *see also Smith v. Wade*, 461 U.S. 30, 45-46 n.12 (1983). This Court also has adopted the "any agent" rule for purposes of antitrust treble damages, *Hydrolevel*, 456 U.S. at 575-76, and has held that such a rule in tort cases comports with due process. *Haslip*, 499 U.S. at 14. It "creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented,'" whereas a more limited rule would give an employer "an incentive to minimize oversight of its agents." *Id.* (quoting *Louis Pizitz Dry Goods*, 274 U.S. at 116).

This Court, however, need not revisit the question of "any agent" tort liability here. The jury instructions took the Restatement's conservative approach, allowing only the acts of Exxon's chosen managerial employees to be attributed to it. Not only was Captain Hazelwood a "managerial officer" in charge of the ship and its crew, Petrs. Br. 10, but, under Exxon's practice of "shift[ing] responsibility and authority from the shoreside staff to shipboard teams," SJA288sa; JA896-98, he was broadly responsible for "the goals, operating parameters, and expense projections" in the vessel's annual forecast. SJA289sa. He had the authority to keep the supertanker in port and was the person who decided, on Exxon's behalf, that it was safe to depart on March 23, 1989. Tr. 552. As Exxon's expert declared, the captain of a supertanker "is a CEO." Tr. 3866.

b. "[F]ederal common lawmaking in admiralty ... is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994); *accord Miles*, 498 U.S. at 26-27. Relevant federal statutory law, which follows the more liberal "any agent" rule respecting corporate liability for wrongdoing at sea, reinforces the propriety of the conservative managerial agent instructions given to the jury.

The Oil Pollution Act of 1990, 33 U.S.C. § 2702 *et seq.*, enacted in response to this spill, requires corporations to pay civil penalties into the hundreds of millions of dollars when the gross negligence of *any agent* – shipboard or not – causes an oil spill. 33 U.S.C. § 2704(c)(1); Pet. App. 104a. Several federal criminal statutes – including three to which Exxon pleaded guilty – likewise impose corporate criminal liability for any agent's wrongful actions at sea. *See, e.g.*, Pet. App. 173a-174a (Clean Water Act, Refuse Act, Ports and Waterways Safety Act, Dangerous Cargo Act, and Migratory Bird Treaty Act); C.A. 1997 ER121 (government's statement of factual basis for Exxon's guilty pleas explaining that Exxon acted negligently "through the actions of its employees" aboard the supertanker); Andrew W. Homer, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues Aggressive Criminal Prosecution of Intentional Pollution from Ships*, 32 TUL. MAR. L.J. 149, 162-66 (2007) (discussing other statutes and prosecutions).

As to criminal liability generally, this Court long ago held that "we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them." *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494-95 (1909). As with punitive damages, such a rule brings "pressure ... on those who own the entity to see to it that their agents abide by the law." *United States v. A&P Trucking*, 358 U.S. 121, 126 (1958). Neither this Court nor any other has suggested that different considerations apply to corporate vessel operators vis-à-vis their shipboard agents, much less their shipboard *managerial* agents.[12]

3. Contrary to Exxon's argument (Petrs. Br. 24), there is no reason unique to masters at sea categorically to exempt corporate shipowners from the ordinary common-law and statutory rules applying to managerial agents.

a. For as long as corporations have conducted business in America (and even before), this Court has made clear that "courts of admiralty ... proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages." *Lake Shore*, 147 U.S. at 108; *accord Boston Mfg. Co. v. Fiske*, 2 Mason 119, 121 (1820) (Story, J.). Accordingly, nothing in *The Amiable Nancy* purported to rest on any special considerations of admiralty (apart from a focus on the unique nature of privateers). Nor did anything in *Lake Shore* distinguish agents assigned to seagoing duty from those on land. The reason for this parallel treatment is obvious: for purposes of the policies underlying punitive damages, a master of a ship does not differ materially from the manager of an offsite factory or the director of a remote power plant, refinery, or research station. *See CEH*, 70 F.3d at 704.

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[12] The Transportation Institute incorrectly suggests that the Limitation of Shipowners' Liability Act and current and former statutes governing shipboard cargo counsel against imputing masters' acts to corporations. Amicus Br. 13-19. TAPAA rendered the Limitation Act inapplicable to spills of trans-Alaskan oil, and OPA suspended the Act with respect to all future oil spills. *See* Exxon Cert. Reply 3 (acknowledging TAPAA's and OPA's effect). Even when the Limitation Act applies, a corporate owner has privity or knowledge respecting tortious conduct "where the negligence is that of an executive officer, *manager* or *superintendent* whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred." *Coryell v. Phipps*, 317 U.S. 406, 410 (1943) (emphasis added); *see also Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 231 (7th Cir. 1993) (limitation denied when "a managerial employee is possessed of 'privity or knowledge'"), *aff'd*, 513 U.S. 527 (1995). Accordingly, the master's "privity and knowledge [i]s that of the corporation" when a corporate owner grants a master "autonomy in the management of the vessel." *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1377 (5th Cir. 1983) (en banc); *see also Holloway Concrete Prods. v. Beltz-Beatty, Inc.*, 293 F.2d 474, 479 (5th Cir. 1961); *Bates v. Merritt Seafood, Inc.*, 663 F. Supp. 915, 932-33 (D.S.C. 1987). The cargo statutes that the Institute references similarly depend on the shipowner's proving, among other things, that it exercised due care in selecting and entrusting authority to a competent master – something Exxon could not show. *See, e.g., In re Ta Chi Navigation Corp.*, 513 F. Supp. 148, 157-58 (E.D. La. 1981), *aff'd*, 728 F.2d 699 (5th Cir. 1984).

Exxon insists that punishing corporate shipowners for the actions of masters is "unfair" and "potentially counterproductive" because masters must respond "instantly" with "intrepid personal decisions" in "emergencies" at sea. Petrs. Br. 24 (quotations omitted). Yet so must a factory manager facing a life-threatening technological malfunction or a director of a remote facility confronting a violent climatic event. Tort law accommodates these rare events not by categorically excluding managerial agents from the scope of potential employer liability, but by providing that a good-faith split-second decision in a crisis does not constitute reckless behavior. *See, e.g., The Genesee Chief*, 53 U.S. 443, 461 (1851); *The Marion E. Bulley*, 94 F.2d 646, 647 (2d Cir. 1938); *Robbins v. Trident Marine Corp.*, 613 F. Supp. 41, 44 (N.D. Ohio 1985); *cf. Anderson v. Creighton*, 483 U.S. 635, 638-41 (1987) (law enforcement officers not liable for reasonable split-second actions). Even in the case Exxon cites, the court found that the master's conduct at sea was not reckless, noting that he made his judgment call in "good faith." *Fuhrman*, 407 F.2d at 1147.

Exxon had every opportunity to argue at trial that Captain Hazelwood faced an emergency in command of the EXXON VALDEZ. But of course it did not. Hazelwood hardly made an "intrepid personal decision" when he lifted his last glass of vodka in port in Valdez, when he chose to set sail despite his incapacitation, or when he decided to go below moments before a crucial maneuver that required his presence on the bridge (not just as the captain but also as the only officer aboard licensed to navigate in the area). He made the first two decisions shore-side, and made the last without any evident pressure: "Visibility was good. The sea was calm." Petrs. Br. 7. And there was nothing "unusual" about the turn that he should have made to avoid Bligh Reef. *Id.* At each juncture, a moment's sober reflection from the EXXON VALDEZ's "CEO" could have avoided catastrophe.

Any other argument for immunizing shipowners for the reckless acts of masters lacks foundation. One of Exxon's *amici* advocates immunity on the ground that shipowners cannot communicate with or control a master at sea. Transp. Inst. Br. 28-29. Exxon itself does not press that point, and for good reason. Whatever relevance this assertion might have had during the Napoleonic era of *The Amiable Nancy*, when ships were so isolated that a British squadron captured an American vessel several weeks after the end of the War of 1812, PETER B.

SCHROEDER, CONTACT AT SEA I (1967), modern technology gives a corporation as much control over a master as it has over other managerial agents. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 10-24, at 894 (2d ed. 1975) (noting development of "instantaneous" ship-to-shore communication); *cf. The Linseed King*, 285 U.S. 502, 511-12 (1932) (shipowner's ability to communicate and consult with masters forecloses limitation). The EXXON VALDEZ itself was "equipped to maintain communications with Exxon Headquarters during its shipping operations," SJA249sa, and Hazelwood spoke on the phone with an Exxon shoreside executive in San Francisco before his nearly disastrous attempt to dislodge the vessel from the reef. Pet. App. 122a; JA872-76.

The primary reasons for making corporate owners liable in punitive damages for reckless managers – that it will deter "the employment of unfit persons for important positions," RESTATEMENT (SECOND) OF TORTS § 909 cmt. b; *accord Basquall v. The City of Carlisle*, 39 Fed. 807, 817 (D. Or. 1889), and encourage employers to monitor their agents, *Hydrolevel*, 456 U.S. at 573 – have particular force in modern maritime commerce. Massive vessels now routinely transport hazardous substances, ranging from crude oil to nuclear waste. If discharged, these substances can befoul the environment for years, a problem that nineteenth century courts did not confront. *See* Int'l Maritime Org., *IMO and Dangerous Goods at Sea* 1-3 (1996).

More generally, "[t]o hold that punitive damages may not be imposed unless there is some participation by the highest corporate executives is unrealistic given the size of some corporations whose operations are multi-state or international in character." 10 WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4906.50, at 552 (perm. ed., rev. vol. 2001); *accord Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716, 721-22 (2d Cir. 1977); *GMAC v. Froelich*, 273 F.2d 92, 94 (D.C. Cir. 1959).

Exxon chides the Ninth Circuit for having paid heed to the attributes of modern American shipping corporations. Petrs. Br. 25. But judge-made law by its nature depends upon "conditions as they now exist." *Funk v. United States*, 290 U.S. 371, 382 (1933); *see also Jaffee v. Redmond*, 518 U.S. 1, 7-8 (1996); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 410-11 (1975) (abrogating admiralty's divided-damages rule because the "reasons that originally led to the Court's adoption of the rule have long since disappeared"). Thus, even if Exxon were correct that the common law at one time imputed only top officers' and directors' actions to corporations for purposes of imposing punitive damages, this Court should reject its proposal to apply such a rule here. Exxon's suggestion would deny the law the "appropriate evolution," *CEH*, 70 F.3d at 705, of treating the Restatement's "managerial agent" test as the modern equivalent of a corporate "complicity" or "participation" requirement. *See Laidlaw Transit v. Crouse*, 53 P.3d 1093, 1098 n.8 (Alaska 2002); *Dahl v. Sittner*, 474 N.W.2d 897, 903 (S.D. 1991); *Johnson v. Rogers*, 763 P.2d 771, 778 (Utah 1988); *Briner*, 337 N.W.2d at 861. As these states and nearly all others recognize, punitive damages will be meaningful only if corporations can be held accountable for the actions of at least their managerial agents.

b. Exxon's argument that it should be exempted from liability because Captain Hazelwood violated "good faith policies to prevent misconduct" (Petrs. Br. 26) fares no better. No state has adopted any such complete defense as part of its common law. The Restatement takes the position that such policies do not insulate corporations from punitive liability. RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a. And federal law (including maritime law) imposes corporate criminal liability regardless of whether the offending employee acted contrary to a corporate policy. FLETCHER, *supra*, § 4942, at 640-41. The reasons for this overwhelming consensus are simple: corporations are best positioned to prevent gross misconduct, and it is practically impossible to distinguish between effective policies and mere "window-dressing." Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 572-74 (2005).

To be sure, the Federal Sentencing Guidelines that govern criminal pollution (and all other) cases recognize that evidence of a corporation's consistently enforced policy (as well as an agent's lower level status) may mitigate the need for punishment. U.S.S.G. §§ 8B2.1, 8C2.5(f). But that is as far as it goes. And Exxon received precisely such a jury instruction here. BIO App. 17a.

This Court's singular deviation from this general framework in *Kolstad* rested, as the government has urged elsewhere, on considerations "unique to Title VII." *United States ex rel. Bryant v. Williams Bldg. Corp.*, 158 F. Supp. 2d 1001, 1008 (D.S.D. 2001).

That statute precludes punitive damages when a discriminator is subjectively "unaware of the relevant federal prohibition." *Kolstad*, 527 U.S. at 536-37. In that unusual liability regime, employers have a "perverse incentive" to refrain from training managers, lest the training provide a factual basis for arguments that the employees understood that they were violating federally-protected rights. *Id.* at 544-45. Thus, to encourage education consistent with the federal policy of preventing discrimination, this Court felt "compelled to modify" common-law principles to allow an employer to defend against punitive damages by pointing to implementation of policies to encourage statutory compliance. *Id.* at 545.

Kolstad's reasoning does not have any relevance here. Tort liability is based on objective standards. Accordingly, this Court need not be concerned that future shipping companies will have a "perverse incentive" to avoid educating their masters as to the dangers of piloting a supertanker while drunk. To the contrary, the prospect of punitive damages will encourage employers to teach their agents to act with due care.

In any event, an employer that did not diligently enforce any relevant policy is not entitled to an opportunity to make out a *Kolstad* defense. *See, e.g.*, *Lowery v. Circuit City Stores*, 206 F.3d 431, 446 (4th Cir. 2000). Any suggestion that Exxon was a diligent employer betrayed by a renegade supertanker captain would make a mockery of the evidence. *See supra* at 4-7. It also would be inconsistent with Exxon's own arguments to the jury. Although the district court instructed the jury in Phase III that it could consider whether Hazelwood's actions contravened a consistently enforced corporate policy, Exxon discussed only one policy: the requirement that two officers man the bridge when transiting Prince William Sound, Tr. 7400-01, which it enforced inconsistently. JA432-33, 438-39, 448; Tr. 3666-67. In closing, Exxon did not claim diligence in enforcing *any* policy. JA1321-53. It conceded that it "didn't have a written detailed policy" to monitor alcoholics returning to duty, JA1344, or to safeguard the public from the threat of a drinking captain, JA1095, 1104, and it acknowledged criticism that the policy of two officers on the bridge "was ambiguous." JA1346. Exxon had no right to any additional instructions on the point.

B. Exxon's Own Recklessness Subjected the Corporation to Punitive Liability.

Even if the managerial agent instructions had been flawed, there would be no basis to remand for retrial nearly twenty years after the event. The Court does not consider the effect of an erroneous instruction "in artificial isolation" but views it "in the context of the overall charge," taking into account that the judgment is "the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *see also Philip Morris, U.S.A. v. Williams*, 127 S. Ct. 1057 (2007) (evaluating punitive award based on manner in which parties tried case). If the outcome would not change based on different instructions, the Court will not remand. *Jones v. United States*, 527 U.S. 373, 391-94 (1999); *see also Neder v. United States*, 527 U.S. 1, 18 (1999); *id.* at 26 (Stevens, J., concurring); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 157 (1967) (plurality opinion) (despite omission of instruction, declining to remand based on "the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts").

These same considerations counsel affirmance here, irrespective of Phase I's managerial agent instructions. *Lake Shore* noted that "[i]f a railroad company ... knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amendable to the severest rule of damages." 147 U.S. at 116 (quotation omitted). Indeed, "the employment of a known drunken driver" is a time-honored basis for imposing punitive damages. 2 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 749, at 1283 & n.3 (5th ed. 1898) (citing cases); *see also Fuhrman*, 407 F.2d at 1148 (punitive damages available when "the acts ... were those of an unfit master and the owner was reckless in employing him").

The Phase III instructions and special verdict form required the jury to base any award against Exxon on a *de novo* finding – apart from anything it found in Phase I – that punitive damages were necessary to punish and deter *Exxon*. BIO App. 1a-25a (entire set of Phase III instructions), 26a. The district court brought that point home by instructing the jury that its Phase I findings did "not necessarily mean that [Exxon's conduct] was reprehensible, or that an award of punitive damages should be made." BIO App. 12a, 17a. It also directed the jury to consider whether the employees that were reckless "had lesser duties or responsibilities within the corporation," or, conversely, whether Exxon employees "failed to prevent the wrongful conduct and that those employees held positions involving significant duties and responsibilities within the corporation." BIO App. 18a.

Consistent with these instructions, plaintiffs' counsel in Phase III discussed only Exxon's corporate acts and omissions. Plaintiffs never argued that the jury should award punitive damages against Exxon based on Hazelwood's conduct. JA1291-1320, 1353-67. Exxon's counsel likewise argued to the jury about Hazelwood's superiors' conduct, JA1332-37, claiming that "we tried [to monitor Hazelwood], and we may have made bad mistakes in there and that may be why you found us reckless, but ... we didn't ignore the risk." JA1334.

The jury rejected Exxon's argument. It found that "Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking," and thus that "the corporation, not just [Hazelwood], was reckless." Pet. App. 83a; *accord id.* 31a. The subsequent reviews by the district court and the Ninth Circuit confirm that there is no other way to interpret the jury's $5 billion verdict, for "the highest executives in Exxon Shipping" were well aware of Hazelwood's relapse. Pet. App. 64a; *see also id.* 22a, 26a, 121a-122a, 154a-157a. Thus, as the

Ninth Circuit explained. "Exxon is not in the position of the owners in *The Amiable Nancy* or *Lake Shore* of having neither directed ... nor countenanced ... nor ... participated in the slightest degree in the wrong." Pet. App. 83a (quotation omitted); *accord id.* 26a.[13] At minimum, the Phase III proceedings and instructions bring this case under the First Circuit's cautious ruling in *CEH*, upholding a punitive award because there was "some level of culpability" on the shipowner's part. 70 F.3d at 705.

II. Exxon's Tardy Invocation of the Clean Water Act Does Not Inhibit Respondents' Ability to Recover Punitive Damages.

In 1995, more than one year after the verdict, Exxon lodged a motion arguing for the first time that the Clean Water Act (CWA) prohibited respondents from recovering punitive damages. This Court, like the district court, should decline to reach the merits of this argument because Exxon raised it far too late. In any event, nothing in the CWA's remedial scheme precludes respondents' punitive recovery.

A. Exxon Irretrievably Waived Its CWA Argument.

In 1989, there were two federal Acts that prescribed liability specifically for spilling oil: the Trans-Alaska Pipeline Authorization Act (TAPAA) and the CWA. TAPAA created strict liability up to specified limits and a compensation fund for private harm caused by spills of trans-Alaskan oil. 43 U.S.C. § 1653(c). It also contained a savings clause providing that "[t]he unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law." § 1653(c)(3).[14] The CWA, on the other hand, allowed the federal government to recoup its cleanup costs and to impose civil and criminal penalties for public harm caused by discharges of oil and other hazardous substances. 33 U.S.C. §§ 1319, 1321.[15]

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[13] Exxon suggests that the Ninth Circuit held that the evidence "'could have'" supported a finding that Exxon did not know Hazelwood was taking command while drunk. Petrs. Br. 10 (quoting Pet. App. 88a). But the Ninth Circuit's statement, in the context of its two opinions, explained only that Exxon's sufficiency-of-the-evidence argument relied on an improper standard of review.

1. Before trial, Exxon moved for partial summary judgment arguing that *TAPAA* "prescribe[s] a comprehensive remedial scheme for [Trans-Alaska Pipeline] oil spills which leaves no room for punitive damages claims." JA63. Nothing in the motion suggested that the CWA impaired plaintiffs' claims. To the contrary, in contending that TAPAA's savings clause did not preserve respondents' right to seek punitive damages, Exxon contrasted that clause with "the broader savings clause" in the relevant portion of the CWA, known as the Federal Water Pollution Control Act. JA87 n.9. The district court denied Exxon's motion, holding that Exxon's argument would "disregard Congress' plain language" in TAPAA to preclude private parties from seeking

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[14] The relevant provisions of TAPAA are reproduced in the appendix to this brief.

[15] The only private right created by the CWA is for "citizen suits" against the government or alleged violators to enforce effluent standards or limitations created under the Act. 33 U.S.C. § 1365. That section expressly provides that it does not limit any right to "other relief" "under any statute or common law." § 1365(e).

punitive damages in a case involving trans-Alaskan oil. JA103.

Exxon never raised the CWA as a bar to recovery until October 23, 1995, in a motion filed *thirteen months* after trial asking that the judgment "not include an award of punitive damages." BIO App. 30a; *see* Pet. App. 73a. Respondents countered that the filing was untimely. BIO App. 33a. Motions for judgment as a matter of law must be filed under Rule 50(b), *see* 9B CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2537, at 576 (3d ed. 2008), and the stipulated deadline for filing any motion under that rule had passed many months before. In addition, Exxon never made a Rule 50(a)(2) motion on CWA grounds during trial, which is a prerequisite to a post-trial Rule 50(b) motion. *See Canny v. Dr. Pepper/Seven-Up Bottling Group*, 439 F.3d 894, 901 (8th Cir. 2006). The district court summarily denied Exxon leave to file its motion. BIO App. 35a.[16]

When Exxon advanced its CWA argument in the court of appeals, respondents argued that it was waived as untimely. Pltfs. 1997 C.A. Br. 79-80. The Ninth Circuit, however, elected to affirm the district court's ruling on the ground that Exxon's CWA argument lacked substantive merit. Pet. App. 73a-74a.

2. Neither of the Ninth Circuit's proffered rationales gave it authority to reach the merits of this issue. First, the Ninth Circuit stated that Exxon

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[16] Deluged by motions, the district court imposed a stay on motion practice, requiring the parties to seek leave to file motions. The district court denied Exxon's request to lift the stay in order to file its CWA motion. *See* BIO App. 28a, 35a.

was raising a significant question of law. But regardless of whether a motion raises a meaningful question of law, "an untimely [post-trial] motion, by itself, is not sufficient to preserve an issue for appellate review." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993). Indeed, this Court recently reaffirmed that a federal court of appeals is "powerless" to reach an argument for relief from a judgment that was not properly raised under Rule 50. *Unitherm Food Sys. Co. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405 (2006); *accord Cone v. West Va. Pulp & Paper*, 330 U.S. 212, 213-14 (1947). Exxon does not dispute that its CWA motion failed to comply with Rule 50's timing requirements. BIO App. 37a.[17]

Second, the Ninth Circuit noted that Exxon had "clearly and consistently argued statutory preemption" in the district court – albeit under TAPAA, *not* under the CWA. But a party cannot preserve a preemption-type argument by arguing that *an entirely different federal statutory scheme* precludes relief that a plaintiff seeks. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

3. Exxon's assertion that this Court has the power to review any issue "pressed or passed upon," Cert. Reply 5, cannot erase its waiver problem. This Court recently explained that so long as a plaintiff has

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[17] Exxon's citations in the district court and the Ninth Circuit to Rules 49(a) and 58(2), *see* BIO App. 30a, 37a, accomplish nothing. Rule 49(a) describes how to submit special verdicts to juries, and Rule 58(2) (now recodified as Rule 58(a)(2)(B)) is purely ministerial, directing district courts to "approve the form of the judgment" after the clerk has prepared it. *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989). No case suggests that either rule provides a platform for making an untimely substantive motion for judgment as a matter of law.

objected – as respondents consistently have done – to a defendant's attempt to evade Rule 50's filing deadline (which Rule 6(b) says may not be extended) these "*inflexible*" "claim-processing rules ... *assure relief* to a party properly raising them." *Eberhart v. United States*, 546 U.S. 12, 19 (2006) (emphasis added). Reaching the merits of Exxon's CWA argument because the Ninth Circuit chose to ignore these binding rules would turn on its head the rules' "insistent demand for a definite end to proceedings." *Id.* Indeed, it would effectively overrule *Unitherm* and its predecessors, which reversed federal courts of appeals because they reached the merits of arguments not properly raised under Rule 50.

Even if this Court had discretion to reach the merits of Exxon's defaulted CWA argument, the equities would dictate finding it waived. Like the petitioner in *City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (per curiam), Exxon "has informed [this Court] of no special circumstance explaining its failure to preserve this question." Indeed, Exxon's TAPAA motion showed that it was aware of the CWA and eschewed any argument based on that Act. JA87 n.9.

Moreover, resolving Exxon's CWA argument will not give guidance for any future cases. Immediately following this oil spill, Congress passed the Oil Pollution Act (OPA) of 1990. The "statutory displacement" question in any future oil spill will not be whether the CWA forecloses private claims for punitive damages but whether *OPA* does so. *See South Port Marine v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 65 (1st Cir. 2000) (while "the general admiralty and maritime law that existed prior to the enactment of [OPA] ... permitted the award of punitive damages for reckless behavior" causing oil spills, OPA's expanded penalties regime does not). Indeed, Exxon has acknowledged that the Ninth Circuit's holding that the CWA leaves room for punitive damages based on private harm from oil spills can "have no progeny in future cases." Exxon 1997 C.A. Supp. Br. 3.

B. The CWA Does Not Foreclose Private Claims for Punitive Damages Based on Private Harm.

There is a simple explanation for Exxon's disinterest in the CWA until its last-ditch effort to avoid entry of judgment: the argument that the CWA precludes punitive damages plainly lacks merit. No court has ever held that the CWA foreclosed punitive damages in a tort action based on private harm from a discharge of any hazardous substance. To the contrary, a leading admiralty treatise written shortly after the CWA's enactment noted that "[t]here is nothing in the [amendments to the CWA at issue] to suggest that claims for property loss, injury or death under the general maritime law are to be *in any way* affected" by the CWA. GILMORE & BLACK, *supra*, § 10-4(b), at 829 (emphasis added).[18] Nor has any common-law court ever accepted the more general notion that when statutes provide penalties for certain harm from specified conduct, those statutes preclude private plaintiffs from recovering punitive damages based on *entirely different* harms from the same conduct.

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[18] The only other published opinion besides this case to consider the question agreed that the CWA imposes no barrier to recovering punitive damages for maritime recklessness. *Poe v. PPG Indus.*, 782 So. 2d 1168, 1175-78 (La. App. 2001). Other courts have allowed punitive damages in other kinds of water contamination cases. *See, e.g., Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1337-39 (11th Cir. 1999) (acid); *Knabe v. National Supply Div.*, 592 F.2d 841, 844-45 (5th Cir. 1979) (industrial waste).

1. Exxon first argues that the CWA forecloses respondents' ability to recover punitive damages because it "speaks directly and comprehensively" to the subject of "punishing and deterring maritime oil spills." Petrs. Br. 33. This argument fails for two independent reasons.

a. Exxon proceeds in this Court from the proposition that the CWA is a "controlling statute." Petrs. Br. i. But as Exxon acknowledged in the district court, TAPAA, not the CWA, is "*the* controlling statute with regard to trans-Alaska oil." *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991); *accord In re Tug Allie-B.*, 273 F.3d 936, 947 (11th Cir. 2001); JA64, 80 (Exxon's TAPAA motion). TAPAA's purpose, as explained *supra* at 39-40, is to "expand[] recovery, not restrict[] recovery." JA105 (district court order). Furthermore, TAPAA contains a broad savings clause, providing that any portion of a private claim left unpaid by the Act's enhanced liability regime "may be asserted and adjudicated under other applicable Federal or state law." 43 U.S.C. § 1653(c)(3). The district court therefore held that TAPAA's "plain language" allows respondents to recover punitive damages. JA103-08. Because Exxon did not appeal that order, Pet. App. 73a, and does not challenge it here, it is the law of the case.

The district court's holding also is correct. "TAPAA was designed to supersede any conflicting law." *Glacier Bay*, 944 F.2d at 583. And in the realm of statutory interpretation, "the specific governs the general." *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992). If TAPAA, a statute that specifically deals with private remedies and specifically governs trans-Alaskan oil, affirmatively preserves private parties' right to recover punitive damages for reckless conduct causing oil spills, then the more generic CWA cannot require a different result. It would contravene TAPAA's text and purpose to prevent those injured by an Alaskan oil spill from seeking remedies otherwise available under traditional maritime law. *See* Br. of Alaska Legislative Council 14-18.

b. Even if TAPAA's specific savings clause left room for the possibility that the CWA could displace private parties' common-law remedies relating to trans-Alaskan oil, it would not matter. Many of the "statutory displacement" cases Exxon cites are really just pre-emption cases. They stand merely for the proposition that a federal statutory scheme forecloses a private tort claim if the plaintiff's *substantive cause of action* would interfere, or be incompatible with, the scheme's operation. *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981) (CWA's standards for effluent discharges foreclose common-law nuisance action that might impose different standard); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981) (same); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 491-97 (1987) (applying *Sea Clammers* and *Milwaukee* and allowing nuisance claim).

Exxon does not argue that the CWA pre-empts respondents' substantive cause of action. And for good reason: nothing about respondents' private tort claims risks interference with the CWA's provisions allowing the federal government to set discharge standards, impose penalties for their violation, and recoup its cleanup costs. Indeed, this Court has made clear that the CWA, by means of its savings clauses, "le[aves] ... room" for tort claims arising from water pollution. *Ouellette*, 479 U.S. at 492; 33 U.S.C. § 1321(*o*)(1)-(2); *Askew v. American Waterways Opers.*, 411 U.S. 325, 329 (1973) (identically worded prior version of § 1321(*o*) allowed state regulation).

This leaves Exxon only with the contention that even though respondents have legitimate tort claims, they cannot recover punitive damages. This Court's doctrine, however, is highly skeptical of such contentions. The presumption is that a plaintiff who brings a legitimate common-law cause of action may seek the full panoply of customarily available remedies. *Ouellette*, 479 U.S. at 499 n.19; *see also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 (1996) (parents bringing common-law tort action for wrongful death of daughter, who died riding jet-ski in territorial waters, could seek punitive damages because "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (refusing to split punitive remedy from viable tort claim). Only in the rare situation when a statutory scheme prescribes a "comprehensive tort recovery regime to be uniformly applied" may a plaintiff be deprived of tort remedies beyond what that scheme provides. *Yamaha*, 516 U.S. at 215. *See Dooley v. Korean Air Lines*, 524 U.S. 116

(1998) (DOHSA sets forth exclusive remedies for survival actions arising from deaths on high seas); *Miles*, 498 U.S. at 31-33 (Jones Act's remedies for wrongful death actions govern suit for seaman's wrongful death caused by unseaworthiness); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (DOHSA sets forth exclusive types of recoverable damages for wrongful death actions arising from deaths on high seas).

The court of appeals correctly recognized that the CWA does *not* prescribe a "comprehensive tort recovery regime" with respect to oil spills. Pet App. 74a-75a, 78a-79a. The CWA's provisions applicable to oil spills do not concern tort claims at all. They concern only the enforcement of statutory and regulatory requirements respecting "harm[] to the public health or welfare of the United States," 33 U.S.C. § 1321(b)(4) – in other words, "harm to the environment." Pet. App. 79a; *see also id.* 71a-72a; JA1520 (CWA "designed to protect the environment").

Even then, the CWA does not prescribe any comprehensive regime of punishment and deterrence; the government indicted Exxon for violating *four other* criminal statutes (and Exxon pleaded guilty to violating two). Pet. App. 173a-174a. Accordingly, "there can be no serious claim" that the government's CWA prosecution could or did comprehensively address all harm that Exxon's conduct inflicted, including private harm. Pet. App. 72a.[19]

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[19] Exxon has suggested that its criminal CWA fine was based in part on harm to commercial fishermen. Cert. Reply 6 n.3. Not so. The United States Attorney, Alaska's Attorney General,

Exxon tries to avoid the court of appeals' reasoning by asserting that "Congress knows how to provide punitive damages – when it thinks they are necessary." Petrs. Br. 33. If respondents had brought *legislatively created* claims for which there were no preexisting remedies, Exxon's quip might be relevant. But when, as here, plaintiffs' claim is a *maritime-law* tort cause of action that traditionally provides a certain remedy, the test is whether Congress has *abrogated* the common-law remedy "in unambiguous terms." *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 302-05 (1959); *see also United States v. Texas*, 507 U.S. 529, 534 (1993) (*Higginbotham* and *Milwaukee* preclude plaintiffs from recovering common-law remedies in maritime suit only when Congress has "'sp[oken] directly' to the question"); *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580-81 (1943) (abrogation of common-law relief "should hardly be left to conjecture"). Congress has expressly foreclosed punitive damages in other instances but did not do so here. *Compare, e.g.*, 28 U.S.C. § 2674 (Federal Tort Claims Act); 49 U.S.C. § 44303(b) (air carrier liability for third party claims arising from act of terrorism).

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and the district judge all emphasized at Exxon's criminal sentencing that the only "victim" in the case was "the environment" or "Prince William Sound." JA1519, 1530-31, 1559; *see also* JA54-55 (sentence did not provide restitution to private victims). The same was true in the civil context, where the government expressly disclaimed any *parens patriae* role respecting private harm. Pet. App. 71a-72a; Letter from United States and Alaska to Counsel for Natives and Native Corporations (Oct. 31, 1991) ("[n]either of these [government] settlement agreements impairs or diminishes private claims available to Alaska Native Villages or Corporations").

Lest there be any doubt, the savings clause in the CWA's oil spill section preserves all preexisting legal "obligations" of vessel owners for harm to private property. 33 U.S.C. § 1321(*o*)(1). Regardless of whether plaintiffs ever have a "right" to punitive damages, *see* Petrs. Br. 37, defendants have an "obligation" to pay them if a judgment awards them. *See Smith v. Wade*, 461 U.S. at 52 n.5 (term "redress" in remedial provision does not foreclose punitive damages). The CWA leaves untouched the preexisting full range of private common-law tort remedies for harm to "private economic and quasi-economic resources." Pet. App. 79a.

Leaving punishment for causing private harm to the private tort system comports not only with tradition but with common sense. At Exxon's CWA sentencing hearing, the Acting Assistant Attorney General of the Department of Justice's Environment and Natural Resources Division explained that "environmental enforcement cases ... are different from other cases." JA1527. "Unlike other economic crimes ..., we can't simply pay interest 20 years down the road to make up for the losses. In environmental cases it is critically important that we address the consequence of the conduct immediately." JA1527-28; *see also* JA54-56, 1526. The CWA, therefore, allows the government to impose swift penalties to redress environmental harm.

At the same time, reckless oil spills exact a human toll – one that may take years to measure and thus years to litigate. The CWA wisely leaves any "prosecution" for that harm to the private parties who suffer it. Those parties – whether or not properly characterized, as Exxon would have it, as "private attorneys general," Petrs. Br. 28 (quotation omitted) – occupy the best position, and have the strongest incentive, to bring lawsuits respecting such harm. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985) (private attorney general lawsuits "are in part designed to fill prosecutorial gaps"). Respondents, as both courts below acknowledged, illuminated and recovered punishment for harm that had not otherwise been accounted for. Pet. App. 72a, 240a.

2. Exxon's fallback argument is equally unsupportable. Without citing authority, Exxon argues that the simple fact that the CWA provides for "substantial civil and criminal penalties" for oil spills should cause this Court to establish a common-law rule barring additional punishment in the form of punitive damages. Petrs. Br. 41-43.

Exxon's lack of authority for this argument is telling. As Exxon acknowledges, this Court has "the duty to determine the rules of general maritime law ... in the same way that state courts determine the common law of their states." Petrs. Br. 43. Yet not one state bars punitive damages on common-law grounds because other statutory provisions already allow the government to impose criminal and civil penalties. Private punitive damages have been allowed under such circumstances since the inception of this Nation. *See* RESTATEMENT (SECOND) OF TORTS § 908, cmt. a; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 11 & n.86 (4th ed. 1971); *Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages*, 98 A.L.R.3d 870 (1980) (collecting cases); *Intoxication of Automobile*

Driver as Basis for Awarding Punitive Damages, 33 A.L.R.5th 303, 345 (1995) ("imposition of criminal sanctions for the offense of driving while intoxicated would not preclude an award of punitive damages").

The most any defendant can obtain in this setting is a jury instruction stating that criminal liability is "one factor in determining whether an award of punitive damages would serve a meaningful deterrent function." *Hanover Ins. Co. v. Hayward*, 464 A.2d 156, 159 (Me. 1983); *see also Cook v. Ellis*, 6 Hill 466, 469 (N.Y. 1844) (such an instruction "was quite as favorable to the defendant as he could possibly claim"). Exxon received exactly such an instruction here. BIO App. 20a.

III. The Size of the Punitive Award Is Permissible.

The facts as the jury, the district court, and the Ninth Circuit have found them – coupled with the extraordinary procedural protections and post-trial reviews Exxon received – demonstrate that the punitive award was predictable, proportionate, and justified. That the award is larger than previous maritime awards simply reflects the unprecedented scope of harm that Exxon's highly reprehensible conduct inflicted and the unique class proceeding that took place at Exxon's request.

In light of these facts, this Court need not deviate from the ordinary common-law system of appellate review for abuse of discretion. Even if this Court were to specify bolstered standards, this award would satisfy them.

A. Maritime Law Follows Traditional Common-Law Review, Which This Award Satisfies.

1. The common law has long accepted that "punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved." *BMW v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting); *see also Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[N]othing is better settled than that ... it is the peculiar function of the jury to determine the amount" of punitive damages.); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (task of determining amount "has [always been] left to the discretion of the jury").

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Haslip, 499 U.S. at 15.

This Court, guided and restrained by the Seventh Amendment's Reexamination Clause, has adopted this framework as a matter of federal common law. When "no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination [concerning the size of the award] under an abuse-of-discretion standard." *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 433 (2001) (quotations omitted); *see also Gasperini v. Center for Humanities*, 518 U.S. 415, 432-39 (1996); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1121-22 (10th Cir. 2004). When sufficient evidence supports the punitive award and the trial court reasonably has explained why the award satisfies governing standards, appellate review ends – regardless of whether plaintiffs' claim is based in federal or state law. *Haslip*, 499 U.S. at 18-25; *see also id.* at 24-27 (Scalia, J., concurring in the judgment); *Gasperini*, 518 U.S. at 437-39; *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 471 (1993) (Scalia, J., concurring in the judgment).

This Court takes the same approach in the context of criminal punishment, where at least equally weighty interests in uniformity and avoiding undue punishment apply. *See Gall v. United States*, 128 S. Ct. 586 (2007). "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.* at 597.

The common-law test is readily satisfied here. The jury was told in Phase III to consider Exxon's conduct separately from Hazelwood's and received "unusually detailed punitive damages instructions," which elaborated "the very same concepts embodied within the *BMW* guideposts." Pet. App. 127a, 146a; BIO App. 1a-25a (complete set of instructions). The district court held and the Ninth Circuit confirmed that substantial evidence supported the jury's decision to impose punitive damages against Exxon. Pet. App. 83a, 88a-90a. And the district court thrice found, in increasingly "penetrating" post-trial inquiries, that *$5 billion* was a reasonable determination of what was necessary to achieve punishment and deterrence. Pet. App. 178a, 221a, 242a-245a.

2. Nothing about maritime torts requires additional analysis. As explained above, it has long been settled that the same principles govern punitive damages in maritime cases as under federal common law generally. *See supra* at 29-30. Consequently, no court sitting in admiralty of which we are aware has reviewed a maritime punitive award under more stringent standards than any other punitive award. *See* Robertson, *supra*, at 88-115, 128-38 (describing maritime decisions upholding punitive damage awards).

To the extent that any interest in protecting maritime commerce could trigger a concern over exposing shipping companies to substantial liability for reckless conduct causing widespread harm, the Limitation of Shipowners' Liability Act, 46 U.S.C. § 30501 *et seq.* – as its name implies – already addresses it. The Limitation Act, enacted in 1851, limits a shipowner's liability to the value of its interest in its vessel and cargo – an amount that does not leave room for any significant punitive award – whenever a seaworthy vessel causes damage "without the owner's privity or knowledge." *Lewis v. Lewis & Clark Marine*, 531 U.S. 438, 446 (2001). The purpose of the Act was "to encourage shipbuilding and to induce capitalists to invest money in this branch of industry." *Norwich Co. v. Wright*, 80 U.S. 104, 121 (1871). Recent commentators ranging from Chief Judge Kozinski to Charles Black have called the Act "a vestige of a time gone by" and verging on "economic obsolescence." *In re Esta Later*

Charters, 875 F.2d 234, 235 (9th Cir. 1989); GILMORE & BLACK, *supra*, § 10-4, at 822. But the Act remains on the books, providing far-reaching protection to shipowners in all but the most blameworthy circumstances.

Exxon comes to this Court seeking relief only because, for three independent reasons, it could not seek cover under the Limitation Act: (1) Exxon's knowledge of Hazelwood's alcohol use – as its own lawyers informed it shortly after the spill – constituted "privity or knowledge," BIO App. 43a;[20] (2) Exxon gave Hazelwood such a high level of responsibility as to make his misconduct that of the corporation, *see supra* at 27; and (3) Congress suspended the Act in TAPAA, so as to encourage heightened care in shipping trans-Alaskan oil, *see Glacier Bay*, 944 F.2d at 582-83.

This Court should not upset the balance Congress already has struck. When Congress enacts maritime statutes, it "does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect." *Miles*, 498 U.S. at 24. A statute, in other words, may say "this much and no more." *Id.* That is what the Limitation Act does. Indeed, because the Limitation Act is in "derogation of the common law," this Court held long ago that it could not "limit the right of an injured party to a recovery" except as "necessary to effectuate" the purpose of the

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[20] For cases supporting Exxon's lawyers' assessment, see *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 338-40 (1955) (crewmember's excessive drinking habits and violent character); *Empresa Lineas Maritimas Argentinas S.A. v. United States*, 730 F.2d 153, 156-58 (4th Cir. 1984) (master's asthma and accompanying sleep deprivation).

Act. *The Main v. Williams*, 152 U.S. 122, 132-33 (1894). This Court should not immunize a vessel operator such as Exxon from full liability in circumstances in which Congress has refrained from doing so.

B. Even if This Court Were to Create New Maritime-Law "Guideposts," the Award Would Satisfy Them.

Exxon's brief avoids proffering any system of maritime excessiveness review that might be generally applied. Instead, Exxon offers only four slogans tailored to make this award look excessive. Petrs. Br. 51-55.

Exxon provides no rational justification for such a result-oriented approach – and none could be advanced. If this Court were to decide to enhance the traditional system of common-law review by adopting a new set of specific maritime guideposts, they should mirror the three that this Court has prescribed as a matter of substantive due process (and which themselves are largely derived from common law), so as to ensure that punitive awards receive consistent review. This award satisfies that test or any variant that might be adopted.

1. *Reprehensibility.* Although Exxon ignores the "reprehensibility of [its] conduct," this factor is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575.

As the district court and the court of appeals have detailed, Exxon's executives' decision to "[p]lac[e] a relapsed alcoholic in control of a supertanker was highly reprehensible conduct." Pet. App. 31a; *see* *also id.* 22a-31a, 147a-157a. Even apart from Hazelwood's relapse, Exxon's Chairman characterized placing Hazelwood in command as a "gross error." PX2 at 19:40 (Resps' DVD). But regardless of how one views Exxon's original decision to reinstate Hazelwood to command in 1985 after he enrolled in (but did not complete) rehabilitation programs, Pet. App. 63a; *see* Amicus Br. of American Maritime Safety, Inc. 2-7, Exxon had no excuse for keeping him in that position once it learned he had resumed drinking while managing supertankers. Pet. App. 89a-90a, 155a. The district court called this "deliberate[]" decision to keep Hazelwood in command despite awareness of his relapse "*the* critical factor" in evaluating the nature of Exxon's wrongdoing. Pet. App. 155a-156a.

Exxon not only "repeatedly allowed Captain Hazelwood to sail into and out of Prince William Sound with a full load of crude oil," Pet. App. 154a, but it did so knowing that Alaskans who depended on the Sound for their lives and their livelihoods had no way to protect themselves from Exxon's recklessness. Pet. App. 30a. Equipment sufficient to contain a major oil spill did not exist in Alaska. SJA60sa-62sa. Area residents thus depended on Exxon to transport its toxic cargo through the Sound's resource-rich waters with the utmost care. Pet. App. 155a.

Exxon's conduct was especially egregious because the disastrous consequences of its actions were "entirely foreseeable":

> Anyone setting an oil tanker loose on the seas under command of a relapsed alcoholic has to know that he is imposing [a] massive risk.

> Though spilling the oil is an accident, putting the relapsed alcoholic in charge of the tanker is a deliberate act. The massive disruption of lives is entirely predictable when a giant oil tanker goes astray. Thus, Exxon's reprehensibility goes considerably beyond the mere careless imposition of economic harm.

Pet. App. 26a; *see also id.* 30a-31a; JA1431-94.

There is no basis for questioning this conclusion. Exxon has told this Court that its "maritime-law excessiveness arguments implicate no disputed facts." Exxon Cert. Reply 8.[21] And Exxon's opening brief does not challenge the Ninth Circuit's and district court's reprehensibility analyses.

2. *Ratio.* The punitive award is just under five times the amount respondents recovered for economic harm. The common law has long allowed (and sometimes required) punitive or enhanced damages at various single-digit ratios to the underlying harm the defendant's conduct caused. *See State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 425 (2003) (referencing this history); *TXO*, 509 U.S. at 462 (upholding 10:1 ratio); *Haslip*, 499 U.S. at 23-24 (upholding 4:1 ratio); *Missouri Pac. Ry. v. Humes*, 115 U.S. 512, 523 (1885) ("nearly every state of the Union" provides for such damages). Exxon nevertheless suggests that the maximum ratio here is 1:1 because the compensatory damages are substantial. Petrs. Br. 52.

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[21] In any event, historical findings of fact pertaining to a punitive award are subject only to "clearly erroneous" review, *Cooper*, 532 U.S. at 435, 440 n.14, and all of the findings below are supported by substantial evidence.

No court in over 200 years of American jurisprudence has adopted such a common-law rule. Indeed, the only authority Exxon cites for its proposed rule is one sentence of *dictum* in *State Farm*, an insurance case involving a 145:1 ratio, stating that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. In addition to ignoring the words "perhaps" and "can" in this quotation, Exxon ignores three aspects of this case that would render any such 1:1 guideline inappropriate.

a. The average amount of compensated economic harm per class member was not "substantial"; it averaged less than $15,500. Pet. App. 168a-169a.[22] The overall harm figure appears large only because this case, *at Exxon's request*, proceeded as a mandatory class action, bringing together the claims of over 32,000 claimants. Pet. App. 126a, 146a-147a.

Aggregating multiple modest individual recoveries into a large collective injury cannot reduce the permissible ratio of a punitive award. Every federal and state court to consider the issue has held that (legislative) limits on punitive awards apply only on a *per plaintiff* basis. *See EEOC v. W&O, Inc.*, 213

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[22] Because some plaintiffs' harm is accounted for in settlement payments and administrative proceedings instead of the compensatory judgment here, Exxon attempted in the Ninth Circuit to draw a distinction between harm – the term this Court uses for ratio purposes – and the net compensatory damage judgment, arguing that the latter controlled. The Ninth Circuit rejected this argument, Pet. App. 32a-35a, and Exxon does not renew it here. Respondents' Ninth Circuit brief further explains why Exxon's argument lacked merit. *See* Pltfs. 2004 C.A. Br. 38-50.

F.3d 600, 613-14 (11th Cir. 2000) (Title VII); *Hayes Sight & Sound v. Oneok, Inc.*, 136 P.3d 428, 453 (Ks. 2006) (state-law cap); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 20-21 (N.C. 2004) (same); *Bagley v. Shortt*, 410 S.E.2d 738, 739 (Ga. 1991) (same). This principle applies especially in the context of a class action, for class certification cannot "abridge, enlarge or modify any substantive right of class members." *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997); *see also* Ala. Code 6-11-21(h) (state-law cap inapplicable to class actions); Mont. Code Ann. 27-1-220(3) (same). Exxon conceded as much in the district court, emphasizing that "certification of a mandatory punitive damages class would not in any way ... prejudice any of the parties." JA115-16.

b. *State Farm*'s 1:1 suggestion (as well as its single-digit guidance) assumes a situation in which the monetary value of a plaintiff's noneconomic harm has been quantified, and "the plaintiff has been made whole for his injuries by compensatory damages." 538 U.S. at 419, 425. The plaintiffs in *State Farm*, for example, recovered $500,000 each for eighteen months of emotional distress over whether their insurance claim would be covered. *Id.* at 426. But when the totality of the plaintiffs' harm has not been quantified because "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine,'" higher ratios are permissible. *Id.* at 425 (quoting *BMW*, 517 U.S. at 582).

This principle has special force in the legal regime that governs respondents' tort claims. "[T]he whole [common-law] doctrine of punitory or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation." *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 586 (1885); *see also Cooper*, 532 U.S. at 437 n.11 (referencing this history); KENNETH REDDEN, PUNITIVE DAMAGES § 2.2 (1980) (same). Common-law cases are legion in which punitive damages were allowed because the defendant's conduct caused injuries, most often mental anguish and inexact consequential harm, for which plaintiffs could not recover compensatory damages. *See, e.g.*, *Brown v. Swineford*, 44 Wis. 282, 286-89 (1878); *Fay v. Parker*, 53 N.H. 342, 382-84 (1872); *McNamara v. King*, 7 Ill. 432, 437 (1845).

The mental anguish or consequential harm supporting such damages did not need to be "specially pleaded." *Wise v. Daniel*, 190 N.W. 746, 747-48 (Mich. 1922); *see also Coryell v. Colbaugh*, 1 N.J.L. 77, 77-78 (1791). The operative principle was that in cases involving egregious acts, juries could consider whether "mental suffering and injury to the feelings [we]re natural and proximate in view of the nature of the act." *Wise*, 190 N.W. at 748 (quotations omitted). This principle lives on today in pockets of statutory law in which compensatory damages for economic harm may not fully capture the harm that the proscribed conduct causes. *See Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2417 (2006) ("Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory ... and punitive damages, concluding that the additional remedies were necessary to help make victims whole.") (quotations omitted); *Illinois*

Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977) (treble damages under antitrust laws).

That is the case here. Maritime law, by means of "a pragmatic limitation imposed ... upon the tort doctrine of foreseeability," forbids recovery for many economic and all emotional injuries. *Getty Ref. & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 833 (3d Cir. 1985); *see also Robins Dry Dock & Repair v. Flint*, 275 U.S. 303 (1927); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1035 (5th Cir. 1985) (Wisdom, J., dissenting) (maritime law restricts reach of "conventional tort principles of foreseeability and proximate cause"). Accordingly, commercial fishermen were unable to recover anything for the spill's profound emotional impact on them and their families. JA1384-90; *see* Pet. App. 25a-26a, 150a-151a, 166a-169a; SJA385sa-572sa. Nor were Native class members able to recover for the impact on their subsistence cultures, Pet. App. 123a-124a; JA149-61, even though the spill destroyed their traditional way of life. And maritime law did not allow any compensatory damages for "price diminishment in fisheries that were not oiled, diminished value of limited entry fishing permits or fishing vessels absent a sale of the permit or vessel, damages to unoiled land, [or] diminution of market value owing to fear or stigma." *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997); *see* Pet. App. 115a-116a; JA118-48, 1155-56, 1368-81; SJA1sa-36sa. The punitive award here properly may reflect these real and foreseeable, but more remote and intangible effects of Exxon's tort. Pet. App. 24a-26a, 53a (Browning, J., dissenting), 150a-151a, 166a-168a.

c. Ratio analysis must consider not just the actual harm that the defendant's tort inflicted but also the potential harm it threatened. *State Farm*, 538 U.S. at 424-25; *TXO*, 509 U.S. at 459-62. After consulting with an Exxon executive in San Francisco, Hazelwood tried to rock the EXXON VALDEZ off the reef. Pet. App. 152a-153a; JA223-34, 872-76; SJA295sa. If this maneuver had been successful, the ship "would probably have foundered, risking the loss of the entire cargo and the lives of those aboard." Pet. App. 122a. Spilling the supertanker's remaining 42 million gallons of crude alone would have caused "immense" additional harm. Pet. App. 168a.

d. Instead of engaging any of these points, Exxon suggests – by analogy to the minority of state legislatures that have imposed various punitive damages caps – that this Court can make up whatever new limitations it wants because this case involves federal maritime law. Petrs. Br. 52. But a court's lawmaking authority, as Justice Holmes famously explained, is only "interstitial[]" in nature. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 220 (1917) (dissenting opinion). It does not license judges, as a legislature might do, to undertake major reallocations of costs and risks. Indeed, not a single state court has imposed any common-law cap on punitive awards; all twenty-one state monetary caps or maximum ratios are statutory. *See Cooper*, 532 U.S. at 433 n.6; *BMW*, 517 U.S. at 614-16 (Ginsburg, J., dissenting). And even among the states with statutory limitations, most do not apply to awards under $100,000 per victim; several others suspend them in cases involving intoxication. *See, e.g.*, Miss. Code Ann. § 11-1-65(3)(d); N.J. Stat. 2A:15-5.14(c);

N.C. Gen. Stat. § 1D-26. This Court should not legislate new rules that no court has imposed and even most legislatures eschew.

3. *Comparable penalties.* Comparable statutory penalties – assuming they apply to a system of common-law review, *but see Cooper*, 532 U.S. at 448 (Ginsburg, J., dissenting) (this guidepost "is not similarly rooted in common law") – also support the reasonableness of the award. The federal government indicted Exxon for five federal crimes. Exxon pleaded guilty to three charges in exchange for the government's dropping the other two. Those three crimes were punishable by a collective fine of over $3 billion; all five would have been punishable by over $5 billion. Pet. App. 173a-175a. In addition, federal and state legislation enacted in response to this disaster would have subjected Exxon to $1.3 billion in civil penalties. Pet. App. 104a ($786 million federal penalty); Alaska Stat. 46.03.759(a)(1), (a)(2), (c)(1) ($500 million state penalty).

Exxon ignores these realities, limiting its attention to civil penalties in place before the spill. Petrs. Br. 51. But this Court has explained that "[c]omparing the punitive damages award and the civil *or criminal* penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW*, 517 U.S. at 583 (emphasis added). Whatever care must be taken when the imposition of criminal sanctions is a "remote possibility," *State Farm*, 538 U.S. at 428, does not apply when the defendant *pleaded guilty* to three crimes punishable by more than the amount of the punitive award. And post-event civil statutes represent "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (quotation omitted), just as much as pre-existing ones.

4. *Wealth.* Contrary to Exxon's suggestion, evidence regarding wealth, "[w]hen compared to the entire trial, ... was a rather small percentage of the total presentation of evidence." Pet. App. 238a. And there was nothing wrong with this evidence. It is a "well settled" matter of common-law practice that juries may consider a defendant's wealth. *TXO*, 509 U.S. at 462 n.28; *see also State Farm*, 538 U.S. at 427-28 (informing jury of wealth is not "'unlawful or inappropriate'") (quoting *BMW*, 519 U.S. at 591 (Breyer, J., concurring)); RESTATEMENT (SECOND) OF TORTS § 908(2) (endorsing this practice). Federal statutes respecting punishment for maritime and other crimes require the same. 18 U.S.C. § 3572(a); *see also* U.S.S.G. §§ 8C2.8, 8C3.3. A defendant's financial condition obviously bears on any rational determination of the amount necessary to punish and deter.

5. *Punishment and deterrence.* Finally, Exxon contends that no punitive damages should be awarded because the corporation's prior penalties and cleanup costs already have "fully punished and deterred" it. Petrs. Br. 48. Exxon made the same argument at trial. Exxon's Chairman took the stand and went through a chart of all of its fines and expenditures relating to the oil spill and told the jury that punitive damages were not "necessary to punish and deter Exxon." JA1278-87; SJA331sa. Exxon's counsel urged the same opinion in closing argument. JA1340-42, 1349-51. The jury, after being expressly instructed that it was free to accept Exxon's

argument, BIO App. 20a, decided that Exxon's prior payments were *not* enough to "punish[] and deter[]" with respect to private harm. JA1408 (verdict form).

The instruction leaving it to the jury whether to accept Exxon's argument was correct, *see supra* at 51-52, and the district court properly held that "substantial evidence" supports the jury's rejection of the argument. Pet. App. 240a-245a. Exxon's civil fines and related expenditures were made "quite simply, to clean up Exxon's mess." Pet. App. 241a; *see also id.* 124a. It is unclear why Exxon deserves praise for that, especially when the cleanup response itself was "wholly inadequate" and more a public relations campaign than an environmental effort. *See supra* at 10.

The *only* money Exxon has paid above and beyond what an entirely innocent spiller would have paid for this oil spill was the $25 million criminal penalty for harming the environment. And that payment was made before discovery in this case. The district court, speaking through the same judge who had accepted Exxon's criminal plea agreement, explained later that not only was that fine limited to addressing environmental harms, but it "did not comprehend the enormity of the harm or number of people adversely affected by the spill." Pet. App. 242a-243a. "It also is possible," the court later observed, "that, from the testimony of Exxon executives, the jury could have inferred a lack of remorse." Pet. App. 245a.[23] This Court does not second-guess such assessments by a jury and district court.

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[23] Exxon quotes remarks the district court made complimenting Exxon's integrity when accepting the criminal plea bargain. Petrs. Br. 5-6. The court never made any such comment after presiding over the trial – including observing 57 Exxon

Exxon's related argument that the punitive award "makes no economic sense" because it should have to do no more than "bear the costs" of the spill, Petrs. Br. 53-54, fares no better. "[D]eterrence is not the only purpose served by punitive damages." *Cooper*, 532 U.S. at 439. Thus, it should suffice to respond that just as the Due Process Clause's punitive damages jurisprudence "does not require [this Court] to adopt the views of the Law and Economics school," *TXO*, 509 U.S. at 491 (O'Connor, J., dissenting), neither does the common law. Indeed, even as to deterrence, "[c]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct." *Cooper*, 532 U.S. at 439 (quotations and citation omitted).

This case illustrates the point. Exxon had sober captains available to manage the EXXON VALDEZ, SJA117sa, and replacing Hazelwood obviously would have avoided an enormous financial risk. Yet Exxon did not respond to textbook economic incentives. It chose instead to let Hazelwood continue in command and apparently accepted the possibility of liability if he grounded a supertanker in Prince William Sound. Pet. App. 170a, 233a. Whether rooted in a sense of imperviousness or the corporation's alcoholic culture, Exxon's "wickedness [was] not greed but rather perverse indifference to another person's values." Marc Galanter & David Luban, *Poetic Justice:*

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employees (including numerous top executives) through live or videotaped testimony – in this case.

any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder, including any administrative and other costs incurred by the Secretary or any other Federal officer or agency. Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

(c) Discharges of oil from vessels loaded at terminal facilities of pipeline; strict liability; limitation on liability; apportionment of liability; establishment and operation of Trans-Alaska Pipeline Liability Fund

(1) Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

(2) Strict liability shall not be imposed under this subsection if the owner or operator of the vessel, or

the Fund, can prove that the damages were caused by an act of war or by the negligence of the United States or other governmental agency. Strict liability shall not be imposed under this subsection with respect to the claim of a damaged party if the owner or operator of the vessel, or the Fund, can prove that the damage was caused by the negligence of such party.

(3) Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed. Financial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control act, as amended (33 U.S.C. 1321(p)) before the oil is loaded. The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

(4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name. The Fund shall be administered by the holders of the trans-Alaska pipeline right-of-way under regulations prescribed by the Secretary. The fund shall be subject to an annual audit by the Comptroller General, and a copy of the audit shall be submitted to the Congress.

(5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel

a fee of five cents per barrel. The collection shall cease when $100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below $100,000,000.

(6) The collections under paragraph (5) shall be delivered to the Fund. Costs of administration shall be paid from the money paid to the fund, and all sums not needed for administration and the satisfaction of claims shall be invested prudently in income-producing securities approved by the Secretary. Income from such securities shall be added to the principal of the Fund.

(7) The provisions of this subsection shall apply only to vessels engaged in transportation between the terminal facilities of the pipeline and ports under the jurisdiction of the United States. Strict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States.

(8) In any case where liability without regard to fault is imposed pursuant to this subsection and the damages involved were caused by the unseaworthiness of the vessel or by negligence, the owner and operator of the vessel, and the Fund, as the case may be, shall be subrogated under applicable State and Federal laws to the rights under said laws of any person entitled to recovery hereunder. If any subrogee brings an action based on unseaworthiness of the vessel or negligence of its owner or operator, it may recover from any affiliate of the owner or operator, if the respective owner or operator fails to satisfy any claim by the subrogee allowed under this paragraph.

(9) This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.

(10) If the Fund is unable to satisfy a claim asserted and finally determined under this subsection, the Fund may borrow the money needed to satisfy the claim from any commercial credit source, at the lowest available rate of interest, subject to approval of the Secretary.

(11) For purposes of this subsection only, the term "affiliate" includes—

(A) Any person owned or effectively controlled by the vessel owner or operator; or

(B) Any person that effectively controls or has the power effectively to control the vessel owner or operator by—

(i) stock interest, or

(ii) representation on a board of directors or similar body, or

(iii) contract or other agreement with other stockholders, or

(iv) otherwise; or

(C) Any person which is under common ownership or control with the vessel owner or operator.

(12) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization.

REPLY
BRIEF

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IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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Int'l Paper Co. v. Ouellette,
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Roza v. Smith,
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The State of Missouri,
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U.S. Steel Corp. v. Fuhrman,
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United States v. Williams,
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Unitherm Food Sys. Co. v. Swift-Eckrich, Inc.,
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Yamaha Motor Corp. v. Calhoun,
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Yankee v. Gallagher,
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Kan. Stat. Ann. § 60-3701 11

Ky. Rev. Stat. Ann. § 411.184 11

OTHER AUTHORITIES

American Law of Products Liability 3d
(2008) 11

Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48
Ariz. L. Rev. 773 (2006) 27

Blatt et al., Punitive Damages: State-by-State Guide to Law & Practice
(2008) 11

Kircher & Wiseman, Punitive Damages:
Law & Practice (2007) 11

Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar.
L. & Com. 73 (1997) 20

Schoenbaum, Admiralty and Maritime
Law (Supp. 2008) 8

REPLY BRIEF FOR PETITIONERS

Plaintiffs offer no persuasive reasons for upholding this unprecedented \$2.5 billion punitive award in the face of (1) the longstanding maritime law prohibiting vicarious punitive damages; (2) a federal statute comprehensively addressing punishment and deterrence of marine oil spills; and (3) the absence of any basis to conclude that an additional award of \$2.5 billion under judge-made federal law, on top of the \$3.4 billion Exxon has already paid in fines, restitution, and public and private compensation, is either reasonable or necessary to punish or deter the conduct here in issue. Nothing justifies the massive award here, which violates multiple precepts and policies of maritime law. It must be reversed.

I. This Court Should Not Overrule 200 Years of Maritime Law Prohibiting Vicarious Punitive Damages

A. The Vicarious Punishment Issue Is Properly Presented

1. Plaintiffs argue that any instructional error on vicarious punishment was harmless because the jury here "found that the corporation, not just the employee, was reckless." Br. 38-39 (quoting Pet. App. 83a). Plaintiffs are wrong. The Phase I instructions on their face *required* the jury to impute Hazelwood's recklessness to Exxon as a matter of law. App. A-1 ("[t]he reckless act or omission of a managerial agent or employee ... is held in law to be the reckless act or omission of the corporation"). Given those explicit instructions, no one can say whether the jury found that Exxon was reckless independent of Hazelwood's acts. If the jury followed its instructions, it was not required even to reach the issue. Once the jury

found Hazelwood individually reckless (as it expressly did, Pet. App. 303a), it had *no choice* but to find Exxon vicariously reckless.

Plaintiffs' one-sided recitation of facts allegedly evidencing independent recklessness by Exxon does not advance their argument. As Exxon previously demonstrated at length in its Opposition to Plaintiffs' Conditional Cross-Petition, No. 07-276 ("OCCP"), at 15-25, plaintiffs seriously distort the record,[1] but they also miss the point: even if the jury *could* have found Exxon independently reckless, the question here is whether the jury could also have found Exxon *not* independently reckless. On this point, both the Ninth Circuit and the district court expressly agreed that reasonable jurors could have found for Exxon. Pet. App. 88a-89a (jury "could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk"), 252a-257a (repeatedly acknowledging that "reasonable minds might draw inconsistent conclusions based on the evidence"). As both courts recognized, contrary to plaintiffs' argument here, abundant record evidence supported Exxon's position. *See* OCCP 10-25.

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[1] The discussion at Br. 6-7, for instance, certainly sounds bad. But the first full paragraph is false as shown at OCCP 20. The second is false as shown at OCCP 19. The third is not from the record below, but from another case in which the jury found Exxon *not* reckless. And the fourth is misleading as shown at OCCP 20.

When it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground, "the judgment must be reversed." *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *see Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-60 (1993). The need to apply that rule here is patent. In a dispute between Exxon and its insurers involving substantially the same contentions and evidence, a jury not required by its instructions to impute Hazelwood's recklessness to Exxon found that Exxon did *not* act recklessly. Dkt.7535, Exh.A at 4. After the trial here, jurors told the press that they, too, did not decide that Exxon was independently reckless, but instead relied on the challenged instruction. 1997ER638-39, 652-54. Plaintiffs would have this Court affirm a $2.5 billion punitive award on the mere supposition that the jury would have found for them regardless, effectively denying Exxon the right to defend its conduct before a factfinder properly instructed on the requirements for liability. No principle of law permits that result.

2. Plaintiffs are equally incorrect that the Phase III instructions somehow "cured" the instructional error in Phase I. Br. 37-39. First, the Phase I instructions were what allowed the jury to determine that punitive damages were authorized at all. If those instructions allowed the jury to do so on an impermissible basis, then the entire Phase III proceeding (including its verdict) was impermissible.

Second, Phase III Instruction 20 expressly incorporated Phase I liability findings as the basis for consideration of punitive damages. App. A-3 ("[i]n Phase I of the trial, you determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless"). Instruction 20 thus imported the

Phase I error into Phase III. Pet. App. 273a n.16 ("Phase III instructions did not permit the jury to revisit its Phase I liability determinations.").

Third, plaintiffs falsely assert that the Phase III instructions *required* the jury to base any award against Exxon on Exxon's independent recklessness. Br. 37. Plaintiffs emphasize (Br. 38) Instruction 30, which stated, in part, that "the fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made," and also authorized jurors, in deciding whether to award punitive damages against Exxon, to consider "not just the fact that [Exxon] may have legal liability for the acts of its employees," but also whether "corporate policymakers actually participated in or ratified" those acts, or conversely, whether the acts were by "lower-level employees" acting "contrary to corporate policy." App. A-3.

The plain language of that instruction contradicts plaintiffs' contention that it required the jury to find Exxon independently reckless. It states that jurors "*may*"—but therefore *need not*—consider more than "just" vicarious corporate liability as a basis for a punitive award. App. A-4. It thus presumes that a *primary* basis for any award would be vicarious liability. And the instruction further states that *if* the jury considers other factors and finds that corporate policymakers did not authorize or ratify the wrongful acts, or affirmatively prohibited them, then the jury "*may*"—but again therefore *need not*—apply this factor "in mitigation" of any punitive award it might otherwise find proper. *Id.* The instruction thus did *not* require the jury to find Exxon independently reckless, but affirmatively instructed the jury that

(1) it was free to base its punitive award against Exxon on "just the fact" that Exxon was vicariously liable for Hazelwood's recklessness, and (2) in setting the amount, the jury was free to ignore the fact that Hazelwood's acts directly violated Exxon's policies.

Finally, there is no merit to any suggestion that this Court may simply presume that the jury found Exxon independently reckless based on the unprecedented size of the jury's ultimate award. It is at least equally plausible that the jury determined the amount of its award based on plaintiffs' arguments about Exxon's wealth, which dominated both the evidence and the arguments in Phase III. JA1182-86, 1297-1301, 1315-20. Asserting that Exxon had earned $5 billion in the year of the spill and enjoyed a $20 billion increase in share value over the next five years (JA1316-17), plaintiffs argued that any award lower than $5 billion would have no impact on Exxon (JA1316). Plaintiffs asked for just $1 of punitive damages against Hazelwood (JA1319), but urged that any meaningful punishment and deterrence of Exxon would require an award of $5 billion *at a bare minimum* (JA1320). The jury's award of $5000 against Hazelwood (much more than plaintiffs sought) and $5 billion against Exxon (the bare minimum they sought) does not even suggest—much less prove conclusively—that the jury found Exxon independently reckless. To the contrary, it suggests that the jury awarded only the minimum plaintiffs requested because it did *not* find Exxon independently reckless.

B. Plaintiffs Offer No Persuasive Reasons For Abrogating The Maritime-Law Rule Prohibiting Vicarious Punitive Damages

1. Plaintiffs' attempt to deny the existence of the maritime-law rule against vicarious punitive damages contradicts 200 years of unbroken maritime decisions. No maritime case has suggested that the rule of *The Amiable Nancy*, 16 U.S. 546 (1818), applies only to privateers, and this Court squarely held otherwise in *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101 (1893), which adopted the *Amiable Nancy* rule as the general rule applicable under pre-*Erie* federal common law:

> Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intention on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*[.]

Id. at 107-08; *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 541 (1999) ("this Court historically has endorsed" the rule that "agency principles limit vicarious liability for punitive awards," citing both *Amiable Nancy* and *Lake Shore*).[2]

Likewise, plaintiffs cannot cite even one U.S. maritime-law case (other than the two recent Ninth Circuit decisions rejecting *Amiable Nancy*) that has allowed vicarious punitive damages. Plaintiffs simply misread cases like *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) ("Undoubtedly, the damages to be awarded must be compensatory, and not exemplary, where recovery is sought against the [owner] for the unauthorized tort of the [ship's master]"), *The Ludlow*, 280 F. 162, 163-64 (N.D. Fla. 1922) (owner not vicariously liable to pay punitive damages for master's torts absent acquiescence, ratification, or authorization), and *Ralston v. The States Rights*, 20 F. Cas. 201, 210 (E.D. Pa. 1836) (no vicarious punitive damages for master's torts when owners, though possibly negligent, were not complicit). Indeed, in *Lake Shore*, this Court cited *The States Rights* as an example of a maritime case applying the *Amiable Nancy* rule. 147 U.S. at 109.[3]

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[2] Plaintiffs' sole contrary authority is *Hopkins v. Atlantic & St. Lawrence Railroad*, 36 N.H. 9 (1857), a *non*-maritime decision from a State which, a few years later, abandoned the doctrine of punitive damages altogether. *See Fay v. Parker*, 53 N.H. 342 (1872). In *Lake Shore*, this Court expressly declined to follow *Hopkins*. 147 U.S. at 116-117.

[3] Plaintiffs cite *Colegrove v. The S.S. "City of Columbia,"* 11 Haw. 693, 700-01 (1899), but that case applies pre-annexation Hawaii law—and applies even that law incorrectly, *see Duncan v. Wilder's Steamship Co.*, 8 Haw. 411, 415 (1892) (shipowner is vicariously liable only for compensatory damages, not punitive damages, for unlawful conduct of captain, citing *Amiable Nancy*).

Notably, all of these decisions applied the rule in cases involving alleged misconduct of ships' masters. And the maritime cases uniformly *reject* plaintiffs' argument that because a master has "sole and absolute command" of the ship, his acts expose its owner to punitive damages. *Pac. Packing & Nav. Co. v. Fielding*, 136 F. 577, 580 (9th Cir. 1905) (citing *Amiable Nancy* and *Lake Shore*); *see U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1147-48 (6th Cir. 1969); *McGuffie v. Transworld Drilling Co.*, 625 F. Supp. 369, 371-73 (W.D. La. 1985) (employee in charge of offshore rig).[4]

Finally, plaintiffs' assertion that no modern maritime-law treatise recognizes the *Amiable Nancy* rule is mystifying. The treatise authored by *plaintiffs' own amicus* states: "[A]dmiralty cases deny punitive damages in cases of imputed fault, holding that a principal or master cannot be liable for an agent or servant's wanton or willful misconduct unless it participated in or ratified the wrongful conduct." Schoenbaum, Admiralty and Maritime Law §5-17 (Supp. 2008).

2. Plaintiffs are wrong, therefore, that the vicarious punishment question requires this Court to look to state or other law as if it were formulating a new maritime-law rule on an issue of first impression. *See*, *e.g.*, *E. River S.S. Co. v. Transamerica Delaval*, 476 U.S. 858 (1986). Plaintiffs instead ask this

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[4] Plaintiffs' attempt to paint Hazelwood as something more than a master (Br. 27) is meritless. Hazelwood was in charge of his vessel, but he was not in any sense senior management of Exxon Shipping Company, and was in fact subordinate to shoreside ship group operators, fleet managers, and company senior management. JA289sa.

Court to abrogate a longstanding maritime-law rule that courts have consistently and unproblematically applied for 200 years. Such a change ought to require compelling reasons, but plaintiffs do not suggest any.

Plaintiffs and their amici argue, for example, that the *Amiable Nancy* rule is anachronistic in light of modern radio communications that may facilitate shoreside supervision of shipboard operations (Br. 32-33). But this does not eliminate the rationale for the rule, as the facts of *Fuhrman*, *supra*, dramatically illustrate. Moreover, the rule against vicarious punitive damages serves other equally important maritime-law policies, such as the avoidance of arbitrary and unnecessary burdens on maritime commerce. *See Norfolk S. Ry. v Kirby*, 543 U.S. 14, 25 (2004) (the "fundamental interest giving rise to admiralty jurisdiction is the protection of maritime commerce"). And more generally, the rule vindicates the basic policy—repeatedly recognized by this Court—that punitive damages generally should not be imposed vicariously on parties who do not themselves commit wrongful acts meriting retributive punishment. *Kolstad*, 527 U.S. at 541-46; *Lake Shore*, 147 U.S. at 107-12; *Amiable Nancy*, 16 U.S. at 558-59; *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) ("[u]nder ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct").

Plaintiffs also argue that the maritime-law rule is undermined by the absence of similar vicarious liability limitations in the civil and criminal penalty provisions of marine pollution statutes like CWA and OPA, which authorize substantial penalties against oil transporters based on the wrongful acts of their employees and agents. Plaintiffs have it backwards. The existence of modern regulatory statutes authorizing vicarious civil or criminal penalties to deter oil spills shows that there is no reason or need to relax the traditional maritime common-law rule. Moreover, regulatory penalties fundamentally differ from punitive damages in that they are capped, subject to prosecutorial discretion, and contain provisions authorizing disinterested regulators to tailor or remit penalties to reward prompt remedial action and achieve other sound regulatory objectives, as was done with Exxon's criminal sentence in this case. JA43-59; 33 U.S.C. §1321(b)(8). Expansion of open-ended vicarious common-law punitive damages at the hands of self-interested private parties would inevitably and needlessly interfere with regulators' ability to implement *calibrated* penalties in the public interest.

Plaintiffs and their amici argue that maritime law is out of step with the land-based law in the various states. But "jurisdictions disagree over whether and how to limit vicarious liability for punitive damages." *Kolstad*, 527 U.S. at 542. And a number of them follow the *Amiable Nancy* rule or something close to it. For example, as then-Judge Scalia wrote:

> [T]he purpose of punitive damages is to punish a wrongdoer, and thus to deter similar action in the future. That purpose is not served by the imposition of such charges upon a person who is responsible for the tort only vicariously, without any personal blame. Thus, in the District of Columbia, a principal will not be held liable for punitive damages for his agent's conduct without a showing that he "participated in

> the doing of such wrongful act or had previously authorized or subsequently ratified it with full knowledge of the facts."

Jordan v. Medley, 711 F.2d 211, 216 (D.C. Cir. 1983).[5]

Moreover, the stated policy reason for adopting a more expansive rule of vicarious punishment—to encourage corporations to exercise care in selecting managerial agents (Br. 32)—has no force in this context. The existing maritime-law rule already allows punitive damages against principals who *recklessly* engage unfit agents. Plaintiffs' proposed change would effectively impose vicarious punitive damages for faultless, or at most negligent, engagement of unfit agents. There is no legitimate retributive purpose for punishment based on mere negligence, *see Smith v. Wade*, 461 U.S. 30, 43 (1983), so the purpose must be deterrence. But neither plaintiffs nor their amici suggest any reason why liability for compensatory damages—and in the oil spill context, substantial vicarious civil and criminal penalties, as well as massive financial losses and cleanup costs—do not already provide more than adequate incentives for care in hiring. The only practical consequence of relaxing the traditional maritime-law rule here would be to confer on fully-compensated plaintiffs an enormous windfall at the expense of a defendant who has already paid billions in damages and penalties. That is not a sufficient reason to change 200 years of well-considered maritime law.

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[5] *See also* Exxon Br. 22 n.7; *Bulgo v. Munoz*, 853 F.2d 710, 716 (9th Cir. 1988) (Hawaii law); Kan. Stat. Ann. §60-3701(d)(1); Ky. Rev. Stat. Ann. §411.184(3); *Shoucair v. Brown University*, 917 A.2d 418, 434-35 (R.I. 2007); *Freeman v. Sproles*, 131 S.E.2d 410, 414 (Va. 1963).

Further, most of the amici States would disallow the punitive damages award imposed here. One prohibits punitive damages altogether, several others authorize them by statute only in circumstances not present here, and most—*including Alaska*—enforce protections (such as capping their amount or requiring proof by clear and convincing evidence) that Exxon was denied here. Kircher & Wiseman, Punitive Damages: Law & Practice §21:15-16 (2007); Blatt et al., Punitive Damages: State-by-State Guide to Law & Practice §3:2 (2008); American Law of Products Liability 3d §60:97 (2008).

3. Finally, plaintiffs do not explain why, if the Court decides to modify the longstanding maritime rule, it should go further than the court in *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), which allowed punitive damages for a shipowner's failure to implement any policy directives guiding the conduct of the ship's master. *Id.* at 705 & n.10. That approach—essentially the rule adopted in *Kolstad*, 527 U.S. at 539-46—would at least focus the inquiry on the existence of adequately enforced policies, the only practical means by which corporations can manage employee conduct.[6]

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[6] *See also White v. Ultramar, Inc.*, 21 Cal.4th 563, 573 (1999) (limiting vicarious punitive damages to employees with "substantial independent authority and judgment over ... corporate policy"). As *CEH* and *Ultramar* illustrate, *Kolstad*'s focus on conduct at a *policymaking* level was not unique to antidiscrimination contexts (Br. 35), but was based on a general recognition that punishment should not be imposed vicariously on parties personally innocent of wrongdoing. 527 U.S. at 544.

II. Punitive Damages Are Not Available Under Federal Maritime Law For Oil Discharges Governed By The CWA

A. The CWA Issue Is Properly Presented

Plaintiffs' renewed waiver argument (Br. 39-44) comes to nothing. "[I]n granting certiorari," this Court "necessarily considered and rejected" the argument. *United States v. Williams*, 504 U.S. 36, 40 (1992). Plaintiffs offer no basis for reconsidering that judgment "at this late stage." *Id.*

As plaintiffs concede, the CWA issue was *both* "pressed" *and* "passed on" in the Ninth Circuit—all that matters for this Court's review. *Id.* at 41. Their newly-asserted claim that the Ninth Circuit had no "power" to pass on the issue is incorrect. *Unitherm Food Sys. Co. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), holds only that non-compliance with Rule 50 precludes appellate review based on *sufficiency of the evidence*. *Id.* at 404-07. The CWA issue presented a pure question of law, unrelated to the evidence. Appellate courts have discretion to review such questions even when not raised in the district court at all. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (review is "left primarily to the discretion of the courts of appeals"); 28 U.S.C. §2106 (appellate court may "affirm, modify, vacate, set aside or reverse any judgment," or order such relief "as may be just under the circumstances").

Nor can plaintiffs seriously claim that the Ninth Circuit abused that discretion. As the panel noted, Exxon "clearly and consistently" put the general question of statutory displacement before the district court, and tendered its CWA-specific motion "before the entry of judgment." Pet. App. 74a. Indeed, the district court denied leave to file the motion after plaintiffs argued that the court had already ruled on the issue. *Id.* at 73a-74a; BIO App. 33a. The Ninth Circuit had ample basis to conclude that the "the issue should not be treated as waived," both because the equities self-evidently favored Exxon and, independently, because "the issue is massive in its significance to the parties and is purely one of law, which requires no further development in the district court." Pet. App. 74a.[7]

B. The CWA Displaces Private Punitive Damages Remedies For Maritime Oil Spills

Plaintiffs likewise have no persuasive support for their contention that the CWA's calibrated scheme of civil and criminal sanctions and penalties—a comprehensive public enforcement scheme specifically addressed to punishing and deterring marine oil spills—leaves room for arbitrary imposition of open-ended punitive damages, under judge-made federal maritime law, for the very same spills.

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[7] Professor Miller urges this Court to rule that the Ninth Circuit abused its discretion merely because the trial court declined to address Exxon's motion. Miller Br. 17. This too is unsupportable. An appellate court may take into account a district court's reasons for refusing to consider an argument, but here the district court gave no reasons. BIO App. 35a. Further, the tendered issue had nothing to do with the trial court's familiarity with the record or docket (Miller Br. 21-22), but was rather about the law that governs the entire case, here affecting the validity of a multibillion-dollar claim. And since the Ninth Circuit would have had discretion to address such an issue if Exxon had never tendered it to the district court *at all*, it plainly could have no *less* discretion to do so when the issue *was* tendered.

1. Plaintiffs first contend that notwithstanding the CWA, the Trans-Alaska Pipeline Authorization Act ("TAPAA") expressly saves federal common-law punitive damages for Alaska oil spills (Br. 45-46). Plaintiffs do not explain how a 1973 statute could revive a remedy that a 1972 statute displaced. But TAPAA's provisions make plain that it speaks to compensation only and, unlike the CWA, does not address *punishment* at all.

TAPAA creates strict liability up to $100 million for "all damages ... *sustained*" from an oil discharge. 43 U.S.C. §1653(c)(1). It does not authorize fault-based claims for punitive damages, but only no-fault claims for "damages sustained." *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1486 (11th Cir. 1989) (provision for "'damage sustained' is entirely compensatory in tone.... Punitive damages are intended to penalize the wrongdoer in order to benefit society, and as such are not 'sustained' by the victim"), *rev'd in part on other grounds*, 499 U.S. 530 (1991). The savings clause provides that if strict liability claims exceed $100 million, the "total claims ... shall be reduced proportionately," and the "unpaid portion of any claim may be asserted and adjudicated under other applicable law." 43 U.S.C. §1653(c)(3). By its plain terms, this clause preserves only the "unpaid portion" of claims otherwise available under TAPAA, *i.e.*, only *compensatory* claims for "damages sustained."

2. Plaintiffs also argue that the CWA does not displace private punitive damages because it does not address private tort remedies for marine oil spills. Br. 48, 50. But again plaintiffs miss the point. The CWA does not create (as TAPAA does) a statutory remedy for compensatory damages from

marine oil spills. But it does comprehensively address the *punishment and deterrence* of such spills, and in so doing displaces any judge-made maritime-law punitive damages. Exxon Br. 31-41.

Plaintiffs insist that private punitive damages redress "different harm[]" (Br. 45) than the CWA, but this simply misunderstands the function of punitive damages. They are not awarded to compensate particular *harms*—but to punish particular *conduct*. "The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Smith*, 461 U.S. at 54. Both the CWA and the punitive award here focused on "the character of [Exxon's] conduct," *i.e.*, what penalties were appropriate, beyond compensation, to punish and deter that conduct. The CWA provided a clear legislative answer to that question; the jury below provided a radically different answer completely at odds with the CWA's punitive framework.

For the same reasons, plaintiffs cannot tenably argue that wildcard punitive-damages fill a "prosecutorial gap" (Br. 51) in the CWA. Plaintiffs assert that the private economic harms caused by reckless oil spills "may take years to measure." Br. 50. But the *conduct* can be investigated and addressed promptly by the Government, which is charged under the CWA with investigating conduct and seeking penalties it deems warranted for punishment and deterrence in the public interest. The extent of private harms may sometimes take longer to establish, but once established those harms are fully redressed by *compensation*. Private punitive damages—on top of substantial penalties the Government has already obtained for the same conduct—serve no identifiable public interest whatsoever.[8]

Moreover, the private harms here did not take years to measure—Exxon immediately paid out $300 million to compensate fishermen for lost harvests. OCCP 5. The 1991 CWA settlement and criminal sentence specifically accounted for those payments, both in calculating the sentence and determining the remittitur. JA44-56. The penalty deemed by Alaska, the United States, and the district court to be *fully sufficient* punishment and deterrence was $150 million (remitted to $25 million). Exxon Br. 5-6. Additional settlements and payments (including the $20 million net damages awarded at trial) brought the final private harm tally up from $300 million to $500 million. Yet the "appropriate" punishment for the same conduct somehow then rocketed from $150 million to $2.5 billion. That unexplained—and unexplainable—leap is irreconcilable with the calibrated interest in punishment and deterrence reflected in the CWA's penalty provisions.

3. Equally baseless is plaintiffs' argument that CWA displacement of judge-made federal law is "really just preemption" (Br. 46) and therefore governed by cases analyzing federal preemption of *state-*

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[8] Further, the CWA does not punish and deter oil spills just to protect "the environment." Br. 48. The statute's oil spill provisions are equally intended to protect "public health and welfare" and "private property." 33 U.S.C. §1321(b)(4). Likewise, that other federal statutes may authorize punishment of the same conduct (Br. 50) does not show that private punitive damages are justified. On the contrary, it shows that Congress has provided numerous public enforcement tools for punishing and deterring oil spills, further undermining any role for private punitive damages.

law claims.[9] When the issue is whether a federal statute preempts state law, federalism principles ordinarily dictate a presumption against preemption. But when the issue is whether a federal statute displaces *federal* common law—including maritime law—there are no federalism interests whatsoever, and separation of powers principles dictate the opposite presumption—that federal statutes displace judge-made federal law. Exxon Br. 29-30.

Likewise, plaintiffs wrongly suggest that unless a federal statute entirely abrogates a federal maritime-law cause of action, a party entitled to pursue such a cause of action "may seek the full panoply of customarily available remedies." Br. 47. Both *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), held otherwise, ruling that plaintiffs who still possessed parallel maritime-law claims could *not* seek remedies beyond those provided by federal statutes. Exxon Br. 34-35. Plaintiffs have no answer to *Miles* and *Mobil*, or to the many circuit-court decisions that have applied the rule to preclude discrete remedies in maritime-law actions—including punitive damages. *Id.* at 36 n.12.[10]

Indeed, plaintiffs' assertion that a party with a cause of action may seek all possible relief does not state the correct rule even outside maritime law. A party has only a “presumption” of entitlement to seek “appropriate relief.” *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69 (1992). As to judicially-created federal causes of action, the scope of “appropriate” remedies is necessarily limited by Congress’s actions. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284-90 (1998).

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[9] *E.g.*, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996); *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238 (1984); *Askew v. Am. Waterways Opers.*, 411 U.S. 325 (1973).

[10] Plaintiffs also cite cases holding that a federal statute providing remedies against one party does not displace a federal common-law remedy against a *different* party. Br. 49. Those cases are irrelevant here, as plaintiffs seek a sanction against Exxon for the same conduct punished by the CWA.

4. Plaintiffs also err in asserting (Br. 50) that the CWA’s savings clause preserves punitive-damage claims as “obligations ... under any provision of law for damages to ... property.” 33 U.S.C. § 1321(o). Plaintiffs’ punitive-damage claims are not based on property damage, but on economic losses. And punitive damages in any event are not “for” damage to property—they are “for” punishing and deterring the conduct that caused the damage. *See O’Gilvie v. United States*, 519 U.S. 79, 83 (1996) (punitive damages are not awarded “on account of” personal injury, but are awarded “on account of” need to punish and deter defendant’s conduct). Nor are punitive damages an “obligation”—they are never a matter of right. Exxon Br. 37. Plaintiffs argue (Br. 50) that punitive damages *become* an “obligation” once a jury awards them, but under the statute the obligation must arise from a “provision of law”—not a jury verdict. And plaintiffs cite no “provision of law”—*i.e.*, statute or regulation (Exxon Br. 38 n.14)—creating such an “obligation.” Nothing about the savings clause saves punitive damages.

5. Finally, plaintiffs mischaracterize Exxon’s position on this Court’s authority to allow punitive damages for oil spills in light of the CWA. Exxon does not contend that punitive damages are displaced because of “the simple fact” that criminal

penalties for oil spills exist. Br. 51. Unlike generic criminal statutes, the CWA is both targeted and comprehensive: it deals specifically with marine oil spills, and provides a wide range of civil and criminal enforcement measures designed to provide the Government flexibility in punishing and deterring such spills while rewarding cleanup and remediation. It thus reflects very significant policy judgments concerning a very specific subject: the extent—and limits—of appropriate punitive measures for marine oil spills.

Allowing arbitrary and unpredictable punitive damages for those same spills would completely obliterate those policy judgments. And for no good policy reason. Punitive damages have never had a significant role in the regulation of maritime commerce—no maritime-law statute authorizes them, and when Congress enacted the CWA, only a handful of cases had awarded them.[11] All involved malicious actions directed at the person or property of another. None involved accidental conduct. And none arose from claims seeking purely economic losses. *See Barber Lines A/S v. M/V Dona Maru*, 764 F.2d 50, 51-57 (1st Cir. 1985) (Breyer, J.) (explaining why maritime-law and common-law tort principles generally preclude recovery for purely economic losses). In the highly unlikely event that Congress thought punitive damage awards could usefully supplement the CWA's calibrated enforcement scheme, it could have said so. It did not. Or Congress could have said so when it enacted TAPAA, which provided expansive compensatory remedies for TAPS oil spills. It did not. Or Congress could have said so when it enacted OPA, the *entire purpose* of which was to significantly increase *punishment* for reckless marine oil spills. Again it did not.

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[11] In the 200 years before the 1970 enactment of the CWA, only *four* U.S. maritime-law cases awarded punitive damages. *See Yankee v. Gallagher*, 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (false imprisonment); *Morrison v. The John L. Stephens*, 17 F. Cas. 838 (N.D. Cal. 1861) (deliberate placement of man in married couple's stateroom); *Roza v. Smith*, 65 F.2d 592 (N.D. Cal. 1895) (false imprisonment); *The Dredge General*, 1944 A.M.C. 948 (S.D. Fla. 1944) (malicious destruction of a cable). An article cited by plaintiffs notes eight additional cases, but the opinions do not support the conclusion that punitive damages were awarded. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997). Including them, however, only brings the total to 12 known maritime-law punitive damage awards in 200 years—and still none involving oil spills or purely economic losses.

This Court should not supplant Congress's policy judgments about the appropriate measures for punishing and deterring oil spills with the Ninth Circuit's opinion that a punitive-damages lottery would better accomplish the objectives of maritime law.

III. Maritime Law Does Not Permit This Award

Plaintiffs and their amici offer no plausible argument that $2.5 billion is allowable under the applicable law and facts. Indeed, on plaintiffs' view, both law *and* facts are irrelevant. Plaintiffs argue that *no* legal standard other than due process ever constrains the amount of punishment a jury may impose. Br. 57. And they ask this Court to affirm the jury award based on contested evidence that the jury never considered, about factual matters the jury was instructed to ignore, drawn from sources never subjected to adversarial scrutiny, concerning issues not in the case.

Plaintiffs' approach is not law but caprice. This case demonstrates that when there are no meaningful standards for punitive damages, juries render arbitrary awards that—as the briefs of plaintiffs and their amici illustrate—cannot be defended on the basis of the trial record.

A. The Award Must Be Reviewed Under Maritime-Law Standards

Misreading mid-19th-century cases, plaintiffs contend that the sole constraint on punitive damages apart from due process is whether a jury's award is supported by "substantial evidence." Br. 54.

This Court rejected plaintiffs' view of common-law procedure in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). "Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Id.* at 421. Even the seemingly deferential common-law "passion and prejudice" review was, in practice, *substantive* review for excessiveness: "Judges would infer passion, prejudice, or partiality from the size of the award." *Id.* at 425. Federal and state courts today routinely conduct this two-tier review, reducing awards under applicable federal or state law before considering constitutional standards. Exxon Br. 44-45; Chamber Br. 19-20; PLAC Br. 5, 13.

This Court has also rejected plaintiffs' contention that punitive damages must be upheld if supported by "substantial evidence." *See Oberg*, 512 U.S. at 429. That standard applies to review of *factual* determinations, *e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999), but "the level of punitive damages is not really a 'fact' 'tried' by the jury," *Cooper Industries,* *Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001) (quoting *Gasperini v. Center for Humanities*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

Contrary to plaintiffs' suggestion that an abuse-of-discretion standard applies to non-constitutional review (Br. 53), this Court has repeatedly explained that punitive damages must be subject to "[e]xacting appellate review" to ensure that the award "is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *see Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991). Substantive governing law must be applied to "constrain[] ... a jury or court's discretion, and thus protect[] against purely arbitrary behavior." *BMW of N. Am. v. Gore*, 517 U.S. 559, 588 (1996) (Breyer, J., concurring). And even if abuse-of-discretion review were nominally the correct standard, "it is a familiar ... maxim that deems an error of law an abuse of discretion," *Gasperini*, 518 U.S. at 448 (Stevens, J., dissenting), and "if an award exceeds what is lawful, legal error has occurred and may be corrected," *id.* at 443 n.2.[12]

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[12] The Limitation Act obviously does not prohibit admiralty courts from exercising their common-law authority to eliminate or reduce excessive punitive damages. Br. 55-56. The Act is not the sole principle of limitation in maritime law; to the contrary, it is but one of *many* that reflect the fundamental maritime-law policy of limiting legal liabilities associated with seagoing commerce, in order to protect and promote (not punish) investment in this critically important but very dangerous commercial activity. Transp. Inst. Br. 11-25; *see Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 270 (1972) ("[t]hrough long experience, the law of the sea ... is concerned with ... limitation of liability").

B. Maritime-Law Standards Prohibit This Award

This Court's cases recognize that the only purpose of punitive damages is to punish and deter the defendant's conduct. *See State Farm*, 538 U.S. at 416; *Smith*, 461 U.S. at 54; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Mass. Bonding & Ins. Co. v. United States*, 352 U.S. 128, 132-33 (1956). Ensuring that punitive damages do not exceed what is necessary to punish and deter is especially important in the maritime-law context, since maritime policies of uniformity, predictability, and liability limitation (Exxon Br. 46) are fundamentally at odds with inherently unpredictable, erratic, and excessive punitive damage awards. *Gertz*, 418 U.S. at 350; *Haslip*, 499 U.S. at 42 (Kennedy, J., concurring).

Plaintiffs have not shown that *any* punitive damages are necessary to provide punishment and deterrence "over and above that provided by" the $3.4 billion Exxon has already paid as a result of the spill. *Smith*, 461 U.S. at 54. They certainly have not explained why *$2.5 billion more* is necessary for punishment and deterrence. And in hundreds of pages of briefs, plaintiffs and their amici cite *not one precedent* awarding punitive damages under maritime law for an accident not involving intentional harm to person or property, or where the defendant's conduct earned it not a single additional dollar. Nor do they cite any maritime-law case awarding punitive damages to plaintiffs who suffered only consequential economic losses. The award is completely without justification or precedent.

1. *The Award Cannot Be Justified By Legally And Factually Baseless Extra-Record Harms The Jury Was Instructed To Ignore*

Plaintiffs' main argument is that $2.5 billion will compensate them for non-compensable emotional and remote economic harms, and will punish harms to the environment and various non-parties, including owners of unoiled property and Alaska Natives. Br. 62-63; Ak. Br. 5-10, 17; Sociologists Br. 3-18; Natural Scientists Br. 7-36; NCAI Br. 12-32; PWS RCAC Br. 12-19. This is indefensible. At least since the 1893 *Lake Shore* decision, this Court has rejected the idea that punitive damages are awardable as *de facto* compensation for non-cognizable injuries. 147 U.S. at 107-08; *see Cooper*, 532 U.S. at 437 n.11; *O'Gilvie*, 519 U.S. at 84; *City of Newport*, 453 U.S. at 266; *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 & n.14 (1979). The jury was instructed to assume that all plaintiffs had been fully compensated, and *not* to award punitive damages either to compensate plaintiffs or remedy environmental harms. BIO App. 14a, 16a.

And it bears emphasis that plaintiffs have, in fact, been *fully* compensated for *all* their economic losses. OCCP 5-8. Plaintiffs falsely assert that "Exxon made some compensatory payments to some commercial fishermen, but it refused to pay anything for most of the harm it caused." Br. 12. In fact, Exxon's claims program *pre*-paid most losses, so they were never suffered at all, and the jury *rejected* most of the rest of plaintiffs' claimed economic losses.[13]

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[13] Plaintiffs claim they were not compensated for fishing losses after 1989. Br. 63; Ak. Br. 18. But plaintiffs tried those claims before the jury and largely lost them. JA1404-07. As

Exxon's claims program thus paid *96% of all required compensation* before judgment here. OCCP 5-7. So when plaintiffs complain about lack of compensation, they are complaining almost entirely about compensation for claims that are *factually or legally baseless.*

This Court rejected one key premise of plaintiffs and their amici—that a punitive damage award can be justified on the basis of harms to parties not before the Court—in *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) ("we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others"). The problem is even worse here because, unlike in *Philip Morris*, the alleged injuries to nonparties *were not even litigated before the jury. See* Exxon's Opposition to Alaska's Motion for Divided Argument ["Opp. Div. Arg."] 4. *Philip Morris* rests on the unfairness of punishing a defendant based on charges it has no opportunity to defend, 127 S. Ct. at 1063; massive monetary punishment on the basis of "facts" never addressed by the defendant *and* never considered by the jury would make a mockery of due process. *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000) (any fact that increases punishment for crime must be determined by jury).

The same principle applies to unproven "harms" to plaintiffs themselves. Plaintiffs asserted claims, based on methodologically and statistically worthless evidence (*see* Dkt.7535), for emotional injuries stemming from lost fishing income, and for more remote economic losses. The lower courts held those claims

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the Alaska Attorney General stated in 1991: "[T]he fish came back to Prince William Sound." JA1538.

not cognizable. JA1380, 1389; Pet. App. 115a-116a. Accordingly, the jury *never heard any evidence* about them. Punitive damages cannot be justified to force Exxon to "internalize" (Br. 69) the costs of emotional and remote injuries the jury never considered, and which plaintiffs could never have proven.

Moreover, and contrary to plaintiffs' contention that punitive damages are needed to make up for specially restrictive rules of maritime law, both courts below held that plaintiffs' claims for emotional injuries and remote economic losses would have been denied under the law of *any* jurisdiction. The emotional-distress claims were dismissed (JA1389) under the federal common-law rule identified in *Consolidated Rail Corp. v. Gottschalk*, 512 U.S. 532 (1994), a non-maritime case. Plaintiffs did not even appeal. OCCP 6-7. Economic-loss claims based on the "stigma" associated with Prince William Sound were dismissed as "too remote" under standard common-law causation requirements. Pet. App. 116; JA1381 n.13. Alaska Natives' claims for "cultural" losses were likewise rejected under standard common-law principles. *In re Exxon Valdez*, 104 F.3d 1196, 1197-98 (9th Cir. 1997). Maritime law thus imposed no unique restrictions on plaintiffs' recoveries.[14]

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[14] If anything, plaintiffs' recovery was uniquely generous. Fishermen recovered for purely economic losses, even though the common law generally "den[ies] plaintiffs compensation for their consequential or 'pure' economic loss" when they "cannot connect [their own] physical injury or property damage to the acts or omission of defendants." Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 Ariz. L. Rev. 773, 773 (2006); *see Dona Maru*, 754 F.2d at 54-56; *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1102-03 (N.Y. 2001); Pet. App. 112a.

Finally, as both courts below also held, environmental harms have no relevance here. The State settled and released them for full compensation, and the jury was instructed not to consider them. Pet. App. 59a; BIO App. 16a; Opp. Div. Arg. 1-4. Amici's arguments about environmental harms thus rely *entirely* on extra-record assertions. And they are exaggerated and often false to boot. The State's own authoritative study of the continuing effects of the spill—ignored by most amici—actually shows that there are *no significant continuing environmental effects from the spill. Id.* at 3 n.2 (quoting report's findings). There is no basis for providing fully-compensated economic-loss plaintiffs an additional windfall to account for the State's own fully-compensated environmental injuries.

2. *No Award On Top Of $3.4 Billion Is Necessary To Punish And Deter Exxon*

The $3.4 billion Exxon has already paid is enough to deter anyone from anything. Punitive damages are economically irrational when the tortfeasor has already borne the costs of wrongdoing and there was no potential profit from the conduct and no likelihood of escaping detection. Exxon Br. 53-54. Plaintiffs do not really disagree. Their real argument is that deterrence is irrelevant. It "should suffice to respond," they say, that "[c]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct." Br. 68 (quoting *Cooper*, 532 U.S. at 439).

But no citizen or legislator has determined that maritime-law punitive damages should overdeter beneficial maritime commerce in the name of subjective and arbitrary moral condemnation. To the extent not resolved by the CWA, this policy decision must be made by this Court, guided by longstanding maritime-law policies, which do *not* "tolerate"—and indeed strongly discourage—losses in the efficiency of maritime commerce. Those policies dictate that punitive damages be awarded only when they are economically rational. As plaintiffs virtually concede, this award is not.[15]

The United States determined in 1991 that Exxon's $3 billion-plus in payments and $150 million criminal fine was "sufficient to provide punishment and deterrence for the unintentional conduct in question." JA49; *see* JA50; JA58-59. The Alaska Attorney General agreed, quite colorfully and passionately. JA1530-40. Plaintiffs offer no serious basis for rejecting the assessment of those senior public officials that the public purposes of punishment and deterrence were fully served by the 1991 fine and civil settlement.

Alaska now suggests that the settlement was focused on environmental harms and was not intended to settle private claims for economic losses (Ak. Br. 12). In fact the fine was deemed fully sufficient to punish and deter Exxon for *all* damage, both public and private. *Supra* at 16-17. But even if Alaska were right, its argument misses the point. If both Alaska and the United States believed that a $150 million fine, remitted to $25 million to reward (and thereby encourage) exemplary cleanup efforts, sufficed to achieve full punishment and deterrence for the environmental damage elaborated at such great length by Alaska and other amici, it is impossible to justify $2.5 billion more for private economic losses—losses largely compensated before they were experienced, and which pale in comparison to the environmental harms.

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[15] Likewise, maritime-law policies should prohibit the economically irrational practice of justifying greater punishment based on a corporate defendant's wealth. *Gore*, 517 U.S. at 591 (Breyer, J., concurring); Exxon Br. 55; PLAC Br. 31-34. Plaintiffs say wealth "obviously" matters (Br. 66), but do not explain why. Nor do they address the opinions of this Court warning that punitive damages inherently pose an "acute danger" that juries will "use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg*, 512 U.S. at 432; *see Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting); *Foust*, 442 U.S. at 50 n.14.

Plaintiffs and Alaska also try to justify the award by attacking Exxon's cleanup efforts. In fact, Exxon's efforts throughout were conducted under the direction of the Coast Guard and Alaska itself. DX3928, DX3958. The responsible federal officer testified at trial concerning Exxon's cleanup efforts:

> A. .... I don't know of one instance in any [cleanup] plan that I submitted that Exxon did not comply with the provisions. I don't know of any.
>
> Q. Was it your experience that Exxon consistently followed the conditions of your approvals of these plans?
>
> A. Yes.
>
> Q. Did Exxon do a good job of keeping you informed of its progress?
>
> A. Absolutely they did.

Tr. 7439-40. Alaska fully agreed. DX3958 ("[E]veryone associated with the cleanup operation did a truly remarkable job .... These efforts coupled with that of 'mother nature' continue to restore the environment impacted by the spill."). The record thus unambiguously refutes plaintiffs' outlandish assertion that the $2.1 billion Exxon spent in coordination with the Government was spent on "appearances" (Br. 10) rather than effective cleanup.[16]

Finally, mischaracterizing the evidence (OCCP 15-24), plaintiffs contend that the award is justifiable to punish Exxon for "reprehensible" conduct prior to the spill, *i.e.*, not removing Hazelwood once Exxon supposedly became aware of his off-duty drinking. Br. 58. But it is not clear the award is based on that conduct at all. API Br. 14. Given the vicarious punishment instruction, the jury could well have decided to punish Exxon *entirely* for recklessness by Hazelwood *imputed to Exxon*, and to impose an award of $5 billion simply because Exxon could afford to pay that much. *Supra* at 1-5.

But even assuming the award was based on a finding that Exxon recklessly supervised Hazelwood, and even accepting the most negative inferences about what Exxon knew about his conduct, this award still cannot be justified. Exxon did not intend to cause any harm, and it did not seek profit from its actions. The spill gained Exxon nothing and cost it dearly. Even if Exxon is fairly deemed reckless for its judgment about keeping Hazelwood in command, plaintiffs cannot explain why $3.4 billion was not already enough to be sure Exxon—and anyone like Exxon—never makes an error like that again.

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[16] Departing from the record yet again, plaintiffs cite two congressional committee reports, issued in July 1989 (four months after the spill), disparaging the initial cleanup efforts as "wholly inadequate." Br. 10, 67. But those reports were criticizing mainly the problems caused by *Alyeska*'s inadequate response. Also mainly directed to *Alyeska's* clean-up are Alaska's complaints (Ak. Br. 2-3), and the isolated comment by an Exxon communications employee plaintiffs cite (Br. 10). These are meaningless compared to the later statements by the court and by the U.S. and Alaska itself about Exxon's exemplary cleanup efforts. Exxon Br. 5-6.

Plaintiffs also assert tendentiously that "Exxon cleaned up only 13-14% of the oil." Br. 10. But the very exhibit they cite shows that *natural processes* of evaporation and degradation quickly eliminated *82%* of the oil, so that by 1991, only 3-4% remained, which continued to degrade. DX5505A.

3. *The Award Improperly Exceeds The Maximum Civil Punishment Congress Prescribed*

Plaintiffs concede (Br. 65), as they did below, that $80.2 million was the absolute maximum civil amount Congress and the Alaska Legislature deemed necessary to punish and deter anyone who spilled this much oil in Prince William Sound. Exxon Br. 51. The $2.5 billion punitive damage award obviously cannot withstand comparison to that legislative judgment.

Unable to achieve their desired result with civil penalties, plaintiffs turn to potential *criminal* penalties, despite *State Farm*'s admonition that criminal penalties have "less utility." 538 U.S. at 428. Plaintiffs insist that criminal penalties are relevant because Exxon pleaded guilty, but then ignore the actual penalty deemed appropriate by both Alaska and the U.S., *i.e.*, $150 million. Plaintiffs also commit the very error *State Farm* warned against, hypothesizing penalties for crimes that are not only "remote," 538 U.S. at 428, but *impossible*: they purport to compute a multibillion dollar maximum penalty by doubling the *same* $500 million pecuniary loss multiple times for multiple counts (Br. 65), which is not how sentencing works. If criminal penalties matter here because Exxon pleaded guilty, the only legitimate comparison is the actual penalty deemed appropriate by the public officials responsible for imposing criminal punishment.[17]

4. *Because Compensatory Damages Here Were Exceedingly "Substantial," Punitive Damages Cannot Exceed Them*

If any punitive damages are permissible under maritime law, the award surely cannot exceed the $500 million in total economic harm caused by the spill. Otherwise this Court's decision in *State Farm* is meaningless. *State Farm* explains that when wrongful conduct causes only a small amount of loss, a higher ratio of punitive damages to compensatory damages may be appropriate to deter and punish the wrongful conduct. But the "converse is also true": "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

State Farm addressed the outermost due process limit; the question here is the limit imposed by maritime law, before one reaches the Constitution. The harm here is 500 times what *State Farm* considered "substantial"; unlike in *State Farm*, *id.* at 429, Exxon's conduct was neither intentional nor aimed at profit. And of course it caused no personal injury. So if there is any meaning at all to *State Farm*'s observation that a 1:1 ratio can reach the "outermost" constitutional limit, surely maritime law imposes such a limit here, given the importance for maritime law of uniformity, predictability, and protection of maritime commerce. Exxon Br. 46-47.

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[17] Even less justifiably, plaintiffs cite civil penalties adopted *after* the spill. Br. 65-66. Those penalties obviously provided Exxon no notice *before* the spill of what standards would guide the imposition of punishment for wrongdoing, as is required for "law" to have meaning. *State Farm*, 538 U.S. at 417.

Plaintiffs say damages were not "substantial" because plaintiffs were aggregated into a class, the "average amount of compensated economic harm per class member ... averaged less than $15,500," and class certification supposedly "cannot reduce the permissible ratio of a punitive award." Br. 60-61. This argument is fundamentally misconceived. Punitive damages are not about how much compensation individual plaintiffs receive—they focus exclusively "on the character of the *tortfeasor's conduct*." *Smith*, 461 U.S. at 54. No individual plaintiff has a right to any particular amount of punitive damages, or to any particular "permissible ratio." *Id.* at 52. The permissible *total* amount for punishment and deterrence cannot vary depending on whether the defendant's conduct is challenged in one aggregated suit or 32,677 individual suits.

Nor could 32,677 plaintiffs have sued individually and each recovered the same multiple of compensatory damages. Payment of prior punitive awards must be considered in mitigation of later awards, *Haslip*, 499 U.S. at 22; *Dunn v. HOVIC*, 1 F.3d 1371, 1389-91 (3d Cir. 1993), and at some point they must reduce later recoveries. Class certification here avoided that problem, leaving the focus where it should be—on the question of what total amount of punitive damages, if any, were necessary to punish and deter the conduct that injured the class as a whole.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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Dated: February 19, 2008

PHASE I JURY INSTRUCTIONS ON VICARIOUS PUNITIVE DAMAGES

JURY INSTRUCTION NO. 33

The Exxon defendants, as corporations, may act only through natural persons, and especially through their officers and employees. A corporation is not responsible for the reckless acts of all of its employees. A corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

JURY INSTRUCTION NO. 34

An employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.

JURY INSTRUCTION NO. 36

Since plaintiffs in this case seek punitive damages against corporations, you must consider whether the actions of employees were in violation of direct instructions or policies of the defendant corporations.

Merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions. It is a question of fact whether a corporation has taken adequate measures to enforce corporate policy in a given area. If you find that adequate measures were taken to establish and enforce the policies or directions, then an employee's acts contrary to such policies or instructions are not attributable to the employer, and you should find that the employer's conduct was not reckless.

However, if the employee was a managerial agent, then as stated in Instruction No. 33, the acts of the employee are attributable to the employer whether or not those acts are contrary to the employer's policy or instructions.

PHASE III JURY INSTRUCTIONS ON VICARIOUS PUNITVE DAMAGES

JURY INSTRUCTION NO. 20

In Phase I of the trial, you determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless, and that such conduct was a legal cause of the oil spill. In Phase II of the trial, you awarded sums of money for actual damages to various commercial fishermen to compensate them for the losses legally caused by the oil spill.

The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them. An award of punitive damages may be made only if you find that plaintiffs have shown by a preponderance of the evidence that an award is proper, applying the instructions that I will give you.

JURY INSTRUCTION NO. 30

In evaluating the degree of reprehensibility of a defendant's conduct, you may take into account the nature of the conduct, the duration of the conduct, and defendant's awareness that the conduct was occurring. The fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made.

In considering whether an award of punitive damages is appropriate against a corporation, you may consider not just the fact that a corporation may have legal liability for the acts of its employees, but also whether corporate policy makers actually participated in or ratified the conduct that was wrongful, and whether the conduct that was wrongful was carried out by a lower-level employees [sic] and was contrary to corporate policies. If you find that corporate policy makers did not actually participate in or ratify the wrongful conduct, this is a factor that you may consider in mitigation or reduction of any award of punitive damages that you might otherwise find proper. Similarly, if you find that wrongful conduct was contrary to company policies, you may take this factor into account in mitigation or reduction of any award of punitive damages that you might otherwise find proper.

In considering whether an award of punitive damages is appropriate against a corporation, you may also consider the number of corporate employees who played some role in the conduct you are considering, the duties and responsibilities of such employees, the nature of their participation in or failure to prevent the wrongful conduct, and whether the wrongful conduct and the participation of the employees in such conduct was in conformity with corporate policies.

If you find that a number of Exxon defendants' employees participated in or failed to prevent the wrongful conduct and that those employees held positions involving significant duties and responsibilities within the corporation, then, in judging the reprehensibility of the Exxon defendants' conduct, you may take these factors into consideration in increasing any award of punitive damages that you might otherwise find proper.

In the alternative, if you find that only a limited number of corporate employees participated in or failed to prevent the wrongful conduct and that these employees had lesser duties or responsibilities within the corporation, and that the wrongful conduct was not in conformity with corporate policies, then, in judging the reprehensibility of the Exxon defendants' conduct, you may take these factors into consideration in mitigation of any award of punitive damages that you might otherwise find proper.

SUPPLEMENTAL
APPENDIX

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No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL JOINT APPENDIX
VOLUME ONE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re) No. A89-095 Civil (HRH)

the EXXON VALDEZ) (Consolidated)

(RE: A89-094; A89-095; A89-106; A89-140; A89-147; A89-200; A89-238; A91-103; A91-136; A91-137; A91-142; A91-416; A91-568; A92-079; A92-081; A92-089; A92-091; A92-092; A92-096; A92-098; A92-099; A92-100; A92-103; A92-105; A92-106; A92-107; A92-110; A92-113; A92-117; A92-120; A92-121; A92-124; A92-126; A92-130; A92-131; A92-133; A92-135; A92-136; A92-138; A92-142; A92-143; A92-145; A92-148; A92-151; A92-154; A92-158; A92-164; A92-167; A92-168; A92-173; A92-178; A92-180; A92-182; A92-183; A92-185; A92-188; A92-190; A92-191; A92-192; A92-194; A92-196; A92-197; A92-198; A92-200; A92-202; A92-203; A92-205; A92-206; A92-213; A92-216; A92-217; A92-219; A92-223; A92-226; A92-278; A92-353; A92-461; A92-584; A93-373; A93-375)

AFFIDAVIT OF STEVEN C. SCHROER IN OPPOSITION TO MOTION OF DEFENDANTS EXXON CORPORATION (D-1) AND EXXON SHIPPING COMPANY (D-2) FOR SUMMARY JUDGMENT ON CLAIMS OF COMMERCIAL FISHERMEN BASED ON THE DIMINISHED VALUE OF LIMITED ENTRY PERMITS AND FISHING VESSELS

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Steven C. Schroer, being duly sworn, deposes and says:

1. I am one of the attorneys representing private plaintiffs in the above-entitled matter. I make this affidavit on the basis of personal knowledge and am competent to testify to the matters stated herein. This affidavit is submitted in opposition to Defendants' Motion For Summary Judgment on Claims of Commercial Fishermen Based on the Diminished Value of Limited Entry Permits and Fishing Vessels.

2. Attached hereto as Exhibit 1 are copies of the title page of an expert report titled "Effect of the 1989 Exxon Valdez Oil Spill on Alaska Limited Entry Permit Values," by Natural

Resources Consultants, Inc., Jonathan Karpoff, and Roger Lohrer, dated February 24, 1993. An entire copy of this report is attached as Exhibit 2 to the Affidavit of Mark Freeberg.

3. Attached hereto as Exhibit 2 is a copy of a supplemental NRC expert report titled "Effect of the 1989 Exxon Valdez Oil Spill on Alaska Limited Entry Permit Values," dated October 29, 1993.

4. Attached hereto as Exhibit 3 is a copy of an expert report titled "The Effect of the Exxon Valdez Oil Spill on Boat Values in Prince William Sound and Kodiak," by Roger Lohrer, dated February 23, 1993.

5. Attached hereto as Exhibit 4 is a copy of a supplemental expert report titled "Supplemental Report of Roger Lohrer," which was served upon defendants on or about November 1, 1993.

6. Attached hereto as Exhibit 5 is a copy of an expert report titled "The Effect of the Exxon Valdez Oil Spill on Commercial Fishing Vessel Values in Cook Inlet, Alaska," by Roseleen L. Moore, dated February 24, 1993.

7. Attached hereto as Exhibit 6 is a copy of a supplemental expert report titled "Supplemental Report of Roseleen Moore," which was served upon defendants on or about November 1, 1993.

8. Attached hereto as Exhibit 7 is a copy of the State/Federal Natural Resource Damage Assessment Draft Preliminary Status Report on Fish/Shellfish Study No. 27: Sockeye Salmon Overescapement, revision of March 15, 1993 ("Fish Study No. 27"). Fish Study No. 27 discusses principal investigators' opinions regarding the mechanism by which Exxon Valdez-induced

overescapement into the Kenai River system (Upper Cook Inlet) and the Red Lake system (Kodiak) in 1989 has caused a decrease in Kenai River and Red Lake smolt production.

9. Attached hereto as Exhibit 8 is a copy of an expert report titled "Long-Term Sockeye Salmon Damages in Upper Cook Inlet, Kodiak and Chignik as a Result of The Exxon Valdez Oil Spill," by Dr. Phillip R. Mundy, dated February 23, 1993.

10. Attached hereto as Exhibit 9 is a copy of the "Supplemental Report of Dr. Phillip R. Mundy Regarding Long-Term Salmon Damages in Upper Cook Inlet, Kodiak and Prince William Sound as a Result of The Exxon Valdez Oil Spill," dated October 31, 1993.

11. Attached hereto as Exhibit 10 is a copy of an expert report titled "Review of Damage Assessment and Population Effects to Herring in Prince William Sound Following the Exxon Valdez Oil Spill of 1989," by Dr. Richard M. Kocan, dated February 23, 1993.

12. Attached hereto as Exhibit 11 is a copy of the "Supplemental Report on the Toxic Effects of Exxon Valdez Oil on Prince William Sound Herring," by Dr. Richard M. Kocan, dated October 29, 1993.

13. Attached hereto as Exhibit 12 is a copy of an expert report entitled "Biological Effects and Impacts of The Exxon Valdez Oil Spill on Prince William Sound Pink Salmon," by Dr. G.L. Thomas, dated February 23, 1993.

14. Attached hereto as Exhibit 13 is a copy of a supplemental expert report entitled "An opinion of long-term damages of the Exxon Valdez oil spill to Prince William Sound pink salmon," by Dr. G.L. Thomas, dated October 30, 1993.

15. Attached hereto as Exhibit 14 is a copy of an expert report entitled "Supplemental Report on the 1993 Loss of Herring to Commercial Fishers in Prince William Sound as a Result of Effects of the Exxon Valdez Oil Spill," by Natural Resources Consultants, Inc., dated October 29, 1993.

16. Attached hereto as Exhibits 15-20 are documents disseminated by Exxon through public sources such as the Oil Spill Public Information Center in Anchorage upon information and belief as part of a public relations effort to downplay long-term biological damage caused by the *Exxon Valdez* Oil Spill:

- Exhibit 15 is a copy of a report entitled "Water Quality in Prince William Sound," by Jerry M. Neff, dated April, 1990.
- Exhibit 16 is a copy of a report entitled "Two Years After: Conditions in Prince William Sound and the Gulf of Alaska," dated October 1991.
- Exhibit 17 is a copy of a report entitled "Alaskan Fisheries -- Two Years After the Spill," by William F. Royce, Thomas R. Schroeder, A.A. "Ole" Olsen, and William J. Allender, dated February 1991.
- Exhibit 18 is a copy of a report entitled "Environmental Recovery in Prince William Sound and the Gulf of Alaska," by Jenifer M. Baker, Robert B. Clark, and Paul F. Kingston, dated June 1990. (This glossy brochure, and the one that follows, Exhibit 19, are of particular interest since the authors never disclose that, upon information and belief, Exxon paid for their work.)

- Exhibit 19 is a copy of a second report by Jenifer M. Baker, Robert B. Clark, and Paul F. Kingston, entitled "Two Years After the Spill: Environmental Recovery in Prince William Sound and the Gulf of Alaska," dated November 1991.

17. Exhibit 20 hereto is a copy of a partial transcript of "The MacNeil/Lehrer NewsHour," dated May 11, 1990 (generated through the LEXIS/NEXIS database), which, upon information and belief, reflects a national television broadcast on or about that date, in which Exxon executive Otto Harrison participated. In the course of the broadcast, a reporter stated:

> Exxon is filling the information vacuum with a controversial public relations campaign in Alaska. Newspaper ads give results of selected studies commissioned by Exxon. The state calls the ads misleading and irresponsible.

During the broadcast, both Governor Steve Cowper of Alaska and Exxon Otto Harrison agreed that scientific information was being withheld from the public due to pending litigation.

18. Attached hereto as Exhibit 21 are copies of pages 1-6, 20-25, 31-43, 56-70, 95-99, 108-109, 116-127, 132-133, 143-146, 151-157, 173-178, 185-186, 218, 232-233, 237-239, 273-274, 292-294 and 321-333 from the Deposition of Roger M. Lohrer, dated July 8, 1993.

19. Attached hereto as Exhibit 23 are copies of pages 1-4, 74-76, 87-88, 104-114, 121-124, 132-135, 145-149, 200-201, 216-217, 234-246, 256-258 and 273 from the Deposition of Roseleen L. Moore, dated May 19, 1993, and a copy of Exh. 104119 to that deposition (Ms. Moore's resumé).

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Privileged and Confidential Attorney Work Product

SUPPLEMENTAL REPORT:

EFFECT OF THE 1989 *EXXON VALDEZ* OIL SPILL ON ALASKA LIMITED ENTRY PERMIT VALUES

Prepared for:

EXXON PLAINTIFFS' LITIGATION JOINT VENTURE

Prepared by:

NATURAL RESOURCES CONSULTANTS, INC.

DR. JONATHAN KARPOFF

MR. ROGER LOHRER

October 29, 1993

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EXECUTIVE SUMMARY

Natural Resources Consultants, Inc., Dr. Jonathan Karpoff, and Mr. Roger Lohrer were retained by the Exxon Plaintiffs' Litigation Joint Venture to investigate possible effects of the 1989 *Exxon Valdez* oil spill on Alaska limited entry permit values. An initial report on salmon limited entry permits in Upper Cook Inlet, Kodiak, and Prince William Sound was published on February 24, 1993. Subsequent to that report the Exxon Plaintiffs' Litigation Joint Venture requested an update of permit price effects on those permits previously studied and an investigation into possible oil spill effects on Prince William Sound herring purse seine limited entry permits.

Studies of factors affecting limited entry permit prices have found perceived future income and collateral loan value are of primary importance in the determination of permit values by sellers and buyers. Alaska Department of Fish and Game future run size projections are the most important information considered in projecting future income from a limited entry permit.

Impacts of the *Exxon Valdez* oil spill on the future run sizes of salmon were outlined in our February 24, 1993, report and included over-escapement, residual oil toxicity, and long-term genetic damage. Impacts of the *Exxon Valdez* oil spill on Pacific herring in Prince William Sound include induced immediate mortality of eggs and larvae present during the spill and exposed to oil, reduced resistance to disease and parasites and resulting mortality by all ages of herring exposed to oil during the spill and in areas of continued oil contamination, and decline in future recruitment due to genetic disruption of surviving adults.

The 1992 and 1993 runs of pink salmon and the 1993 run of herring into Prince William Sound were particularly poor and unexpected. Alaska Department of Fish and Game is projecting weaker than expected runs of sockeye salmon in Kodiak and Upper Cook Inlet in 1994 and possibly 1995 and beyond because of over-escapement which occurred in 1989 from oil spill-induced fishery closures. From February 1992 to the present, fishers, permit owners, buyers and brokers, and loan officers have had substantial information available to them through published literature to incorporate reported residual impacts of the *Exxon Valdez* oil spill into their projections of future run sizes of salmon in Upper Cook Inlet, Kodiak and Prince William Sound. Similar information regarding residual impacts of the spill on Prince William Sound herring fisheries have been available since the disastrous April 1993 herring fishery.

Salmon permit price analyses covering the period from 1989 through mid-year 1992 presented in the February 24, 1992 report have been extended through mid-1993 in this report. Salmon fisheries investigated include the Cook Inlet driftnet, setnet, and purse seine fisheries, Prince William Sound purse seine and driftnet fisheries, and the Kodiak purse seine fishery. Permit prices changes in these oiled-area fisheries have been compared to relevant benchmark non-oiled fisheries in Southeast Alaska and Bristol Bay. Prince William Sound herring purse seine permit value analyses, are also present in this report. The Southeast Alaska herring purse seine fishery is used as the benchmark for the herring permit price effect assessment.

Study results demonstrate that oil spill effects continue to lower limited entry permit values in all salmon fisheries studied. Seasonally measured spill effects on permit values in the Cook Inlet driftnet and setnet fisheries rose from $103,330 and $28,500 as of mid-1992 to $142,000 and $37,000 in mid-1993, respectively. The decline in Prince William Sound salmon permit values due to oil spill effects increased from $132,000 in mid-1992 to $141,000 in mid-1993. Prince William Sound driftnet permit values experienced spill effects that worsened from the mid-1992 level of $45,000 to the mid-1993 value of $64,000. Kodiak salmon purse seine permit value losses rose from $39,400 to $46,000 between mid-1992 and mid-1993 while oil spill induced losses for the Cook Inlet purse seine permit value more than doubled over the same period ($53,000 spill effect in mid-1992, $115,000 spill effect in mid-1993).

Losses were also noted in the Prince William Sound herring purse seine permit value over the period from March 1993 through September 1993. Limited entry permit market conditions are so poor for Prince William Sound herring purse seine permits as of this writing that any reasonable offer is now being considered by permit sellers. Brokers indicate the trading price for Prince William Sound herring purse seine permits is now approximately $90,000 as opposed to the $143,500 price estimate calculated through the use of the Southeast Alaska herring purse seine benchmark. Thus, the permit value loss estimate in the Prince William Sound herring purse seine due to the oil spill is $53,500 as of September 1993.

INTRODUCTION

Dr. Jonathan Karpoff, Mr. Roger Lohrer, and Natural Resources Consultants, Inc., have been retained by the Exxon Plaintiffs' Joint Venture (EPLJV) to investigate possible effects of the 1989 *Exxon Valdez* oil spill on Alaska limited entry permit values. An initial report entitled "Final Report: Effect of the 1989 *Exxon Valdez* Oil Spill on Alaska Limited Entry Permit Values" was published on February 24, 1993 (NRC, Karpoff, and Lohrer, 1993). This report presented information on the operation of the limited entry permit market, a determination of what factors fishers use to establish permit values, a determination of how the *Exxon Valdez* oil spill affected those factors, and an estimate of the dollar value of the spill effect for limited entry permits for salmon fisheries in Upper Cook Inlet (UCI), Prince William Sound (PWS), and Kodiak.

At the conclusion the EPLJV requested Natural Resources Consultants, Inc., Dr. Karpoff, and Mr. Lohrer to update their assessment of the current value of salmon limited entry permits addressed in the February 24, 1993, report. Additionally, the EPLJV asked that the limited entry permits for purse seine herring fisheries in PWS also be analyzed for possible value effects associated with the *Exxon Valdez* oil spill. Using an approach consistent with the methodology used in the February 24 report, the following sections provide an update of published information available to fishermen on the continuing effects of the *Exxon Valdez* oil spill on salmon fisheries in UCI, Kodiak, and PWS, and on the herring fishery in PWS. The report also presents estimates of the effects of this information on the limited entry permit value through the second quarter of 1993 for all salmon fisheries and through the third quarter of 1993 for the PWS herring purse seine fishery.

1989 OIL SPILL EFFECTS ON PERMIT VALUE FACTORS

In our February 24, 1993, report we investigated what factors fishers consider to determine the value of limited entry permits. We determined that perceived future income and collateral loan value were of primary importance in the determination of permit values by sellers, potential buyers, and loan officers. Alaska Department of Fish and Game (ADF&G) future run size projections were determined to be the most important information considered in projecting future income from the ownership and use of a limited entry permit. Ex-vessel product price and historical run sizes were also factors considered in projecting future income, but were not as important as the projected run size of the target species.

Beginning in February 1f992 and continuing to the present, published articles and ADF&G research reports provided substantial information on the effects of the *Exxon Valdez* oil spill on future runs sizes of salmon in UCI, Kodiak, and PWS. These effects included over-escapement, residual oil contamination, and long-term genetic effects. Similar articles and scientific reports indicating oil spill impacts on future herring runs were widely published after the poor 1993 PWS herring run in mid-April 1993 and continue to be reported through October 1993.

The effects of the *Exxon Valdez* oil spill on Pacific herring in PWS were not addressed in our February 24, 1993, report. The failure of the 1993 herring run in PWS resulted in published reports identifying possible causes for the failure of the run, foremost of which were residual effects of the *Exxon Valdez* oil spill. Reports also included projections of the impact of such residual effects on future herring runs.

Herring, primarily caught for roe, is an important resource for subsistence and commercial harvest, as well as an important prey species for marine mammals, birds, and other finfish within PWS. The return of herring to inshore water to spawn each spring corresponds with the migration of seabirds, shorebirds, sea lions, and humpback whales into PWS, along with human fishers.

The grounding of the *Exxon Valdez* on March 24, 1989, and its resulting spill of over 11 million gallons of oil coincided with the annual spring arrival of herring. As a result, adult spawning herring, juveniles, larvae, and eggs were exposed to oil contamination. Over 40% of the traditional herring spawning areas within PWS and over 90% of the areas needed for summer rearing were contaminated (Biggs and Baker, 1993). Adults, juveniles, and larvae swam through oil contaminated waters. Eggs laid down on kelp and other substrate were exposed to surface floating oils by tidal action on a daily basis. Newly hatched larvae containing high concentrations of fat that accumulate oil byproducts were exposed during the most critical period of their life cycle.

In 1989, one-year-old herring (1988 year class) were in PWS during their summer feeding cycle. The 1988 year class has been and is expected to continue to be the dominant year class in the Gulf of Alaska herring run for the next several years (the 1988 year class represented 65% of the total biomass in the 1992 PWS herring run). Offspring from spawning by the particularly strong 1988 year class are expected by ADF&G to produce additional strong year classes early into the next century (large year classes of herring have occurred in PWS every four years since 1976).

Studies on the effects of the oil contamination on herring in PWS were begun almost immediately after the oil spill. Preliminary results indicate that egg and larval mortality, lethal genetic damage, and frequency of physical deformities were higher in the oiled areas than in un-oiled areas. These effects apparently were more prevalent in 1989 than in 1990, but impacts were still measured. In 1989, stress-related hemorrhaging around the vent and enlarged gall bladders were found in adult herring, along with oil in samples of bile. The ADF&G reported that even parasites of adult herring in oiled areas migrated from the gut into the muscle tissue in an apparent attempt to avoid the toxic effects of oil in the gut of adult herring (Biggs and Baker, 1993). Internal damage to adult herring found in 1989 and 1990 suggested that the oil contamination resulting from the *Exxon Valdez* oil spill probably stunted the growth of juvenile herring in 1989 and, based on adult samples collected in 1989 and 1990, probably weakened the fish's ability to resist diseases and parasites (Biggs and Baker, 1993).

When compared with their prevalence in un-oiled areas, herring from the 1989 year class were noticeably lacking in PWS in 1992. The paucity of herring from the 1989 year class was surprising because the 1989 herring run was one of the strongest since the early 1970s and had not been fished due to oil-induced closures of the herring grounds. The low incidence of 1989 year class herring was subsequently attributed to oil-induced mortality on egg and larvae in 1989 and juveniles in 1990. Those mortalities appeared to have affected the overall population size of this year class.

In 1992, herring returning to PWS from the 1988 year class were within the expected range of abundance. However, studies showed that hatching success of eggs collected from an oiled area was less than half that of eggs collected from an un-oiled area. Although the exact cause of this hatching success discrepancy is not yet known, genetic damage to 1988 year class individuals due to exposure to oil as actively feeding and growing individuals in 1989 has been suggested as a possible cause. If this genetic effect is borne out, it may result in a long-term decline in abundance of Pacific herring in PWS and an end to the four-year cycle of particularly strong year classes (Kocan, Baker, and Biggs, 1993).

In 1993, the PWS herring run was characterized as a disaster (*National Fishermen*, July 1993). The pre-season 1993 spawning biomass was forecast by the ADF&G at 134,133 tons, with an expected harvest of 26,827 tons (Funk, 1993). Preliminary ADF&G estimates are that only 30,000 tons of herring actually returned in 1993, with a harvest of about 4,000 tons. Those fish that did return showed an unusually high occurrence of lesions, loss of scales, and abnormal behavior, such as consuming their own spawn.

The 1988 and 1989 year classes were particularly absent in the 1993 run. Prior to the season, the 1988 year class was expected to represent about 81% of the total returning biomass (Funk, 1993). However, from preliminary age and abundance samples, it actually represented less than 50% of the biomass (*National Fishermen* July 1993). Dr. Kocan, an expert on oil effects on herring, believes the oil spill effects have weakened the resistance of herring to disease and parasite infestation resulting in lower natural survival rates and elevated amounts of diseased fish. The ADF&G is concerned that the unexpected decline in the 1988 year class will have lasting effects on future recruitment of herring to the PWS run (*Pacific Fishing*, August 1993). If the 1988 year class does not return to PWS in 1994 in the abundance expected under normal conditions of natural mortality, it is likely that commercial and subsistence harvests of herring will be significantly curtailed and possibly halted for the foreseeable future. Predators may also be affected if herring run sizes decline to levels unable to support the food base.

Herring runs to other areas of Alaska were reasonably close to pre-season forecasts and there was no widespread evidence of similar disease or parasite infection as observed in PWS in 1993.

Additionally, investigators continue to show evidence that residual oil spill effects may be impacting pink salmon (Willette, 1993), particularly in light of the poor run to PWS in 1992 and a very poor run in 1993. Other areas have not experienced similar declines in pink salmon. In fact, many areas in the Gulf of Alaska are experiencing record runs of pink salmon.

Although sockeye salmon runs and harvest were stronger than expected in UCI in 1993, the ADF&G is still projecting a poor run in 1994 and possibly 1995 due to the large over-escapement of sockeye in 1989 caused by the *Exxon Valdez* oil spill (*The Fishermen's News*, August 1993; Schmidt et. al., 1993). Projections are for little, if any, commercial harvest of sockeye salmon in UCI during the 1994 and 1995 seasons.

DOCUMENTATION OF INFORMATION ON 1989 *EXXON VALDEZ* OIL SPILL EFFECTS

In our February 24, 1993, report we compiled copies of media articles available to fishers, permit brokers, and loan officers describing the effects of the *Exxon Valdez* oil spill on salmon fisheries in UCI, PWS and Kodiak (NRC, Karpoff, and Lohrer, 1993). Attached in Appendix 1 of the current report are copies of articles on the effects of the *Exxon Valdez* oil spill on salmon and herring fisheries in Alaska from newspapers, the ADF&G semi-monthly magazine, the *Exxon Valdez* oil spill symposium, and publications commonly read by fishers, limited entry permit brokers, and loan officers. Included in Appendix 1 are articles published in the *Anchorage Daily News* from February 1992 not presented in our original report.

Information on the over-escapement effects of the *Exxon Valdez* oil spill in UCI and Kodiak was available to the public in early 1992, **"Spill damage may show in '94 catch"** (*Anchorage Daily News*,, February 8, 1992), **"Kenai sockeye runs under scrutiny"** (*Anchorage Daily News*, March 12, 1992), and **"Red salmon runs on Kenai may be headed for crash"** (*Anchorage Daily News*, April 28, 1992). Articles related to both pink salmon and sockeye salmon continued to appear periodically throughout 1992 as evidenced in our February 24, 1993, report. Our analysis showed a measurable decline in the permit values of salmon limited entry permits in UCI, Kodiak and PWS compared with benchmark non-oil spill affected areas. These declines in permit values coincided with the release of publicly available information.

Articles on the effects of the oil spill on salmon have continued to appear in 1993. The January/February 1993 edition of *Alaska's Wildlife*, an ADF&G publication, was completely devoted to the effects of the oil spill on Alaska resources. Preliminary results of scientific studies were summarized and projections of future impacts were provided. In February 2-5, 1993, the Exxon Valdez Oil Spill Symposium was held in Anchorage, Alaska. Scientists presented abstracts and gave public talks on the to-date results of their scientific investigations into the effects of the oil spill. This symposium was widely attended and covered in the local and regional press.

In March 1993, an article **"Permit values sinking"** on declining permit values was published in the *Anchorage Daily News* (March 4, 1993). PWS was singled out as a location of particularly severe fishing conditions with the decline in pink salmon runs since 1991 and the *Exxon Valdez* oil spill was used as a benchmark for declining permit prices. In May 1993, *National Fishermen* published an article entitled **"Wrath of Exxon Valdez spill is still taking its toll on fisheries"** describing pink and red salmon and herring effects.

An unexpectedly poor herring fishery in PWS occurred in mid-April 1993. Fishers, members of the local community, and permit price brokers were aware of the poor fishery by April 15. The May 1993 edition of *The Fishermen's News* had a front page article entitled **"Herring bust surprises all."** In June 1993, *Pacific Fishing* published an editorial article entitled **"Alaska's Unsound Salmon Fishery...What Role Did the Oil Spill Play"** which outlined the results of the Exxon Oil Spill Symposium and related those results to the recent (1992) poor pink salmon run and 1993 decline in the herring run in PWS. *National Fishermen* followed in July 1993 with an article entitled "**Disaster marks Prince William Sound herring fishery.**" This article presented an overview of the 1993 run, the condition of the fish, and links with the *Exxon Valdez* oil spill research being conducted, and published quotes about future impacts like **"I think we're going to see some significant problems in the herring future for some years to come"** (Alaska Sea Grant Agent, Rick Steiner). The market for PWS herring purse seine limited entry permits, while always somewhat slow immediately after the fishery, ground to a complete halt by late May or early June.

In August 1993, *The Fishermen's News* published another article on the Kenai over-escapement problem under the title **"Kenai smolt count adds up to bust--Past overescapement haunts future Upper Cook Inlet fishing seasons."** Also in August the *Anchorage Daily News* published an article on the pink salmon decline in PWS entitled " **Sound salmon run crashes--Worst pink return in decade worries fishermen, hatchery.**" The article pointed out that runs of salmon to other areas were strong and PWS stood out as the exception. The article stated that fishermen believe the *Exxon Valdez* oil spill is the problem. This article was the first to publicize the poor 1993 pink salmon run in PWS. *Pacific Fishing* addressed the poor PWS herring run in its August 1993 edition under the title "**Search Continues for Missing Herring.**" The article stated that scientists are not ruling out a link with the effects of the *Exxon Valdez* oil spill.

In August 1993, fishers blockaded the Port of Valdez and got national and international attention as they contended that the effects of the *Exxon Valdez* oil spill were still impacting their salmon and herring runs. Furthermore, they stated that money from the federal and state settlement with Exxon was not being spent appropriately to address the fishery problems. The August 23, 1993, *Seattle Post-Intelligencer* highlighted the fishers' concerns in an article entitled "**Fishermen agree to lift blockade--Babbitt backs oil-spill recovery effort.**"

The *Alaska Fishermen's Journal* of September 1993 published an article on the pink salmon decline in PWS, "**Pink Jitters in PWS--Is it late, or what?**" and on the continued expectation by ADF&G that the UCI sockeye run would be poor in 1994. The *Anchorage Daily News* of September 5, 1993, published an article entitled "**Measuring Up the Sound**" which provided an overview of the fishery problems experienced in PWS since the oil spill and related this to impacts of the *Exxon Valdez* oil spill.

Numerous articles were published in October that discussed the fishers' blockade of the Port of Valdez and their reasons for believing the oil spill is still impacting their fisheries and livelihoods. An example was the front page article in the October 11, 1993, edition of the *Seattle Post-Intelligencer* entitled "**A fish bonanza vanishes--Alaskans blame oil for poor catches of salmon and herring.**"

From February 1992 to the present, fishers, permit owners, buyers and brokers, and loan officers have had substantial information available to them through published literature to incorporate reported residual impacts of the *Exxon Valdez* oil spill into their projections of future run sizes of salmon in UCI, Kodiak, and PWS and herring in PWS.

ANALYSES OF PERMIT VALUES

As in the February 24, 1993, report, the following analysis takes a "benchmark" approach to permit price valuation. Permit prices in un-oiled areas are used as a benchmark of appropriate price changes in oiled areas. Permit values from oiled areas analyzed in this report include the PWS herring purse seine, salmon driftnet, and salmon purse seine, Cook Inlet salmon driftnet, setnet and purse seine, and Kodiak salmon purse seine fisheries. Benchmark permit prices from un-oiled areas include the Southeast Alaska herring purse seine, Southeast Alaska salmon purse seine, and Bristol Bay salmon driftnet and setnet fisheries. The reader is referenced to the February 24, 1993, report for further background on our benchmark approach. In addition, the February 24, 1993, report thoroughly describes the relationship between permit value, long-term expectations of fishing income, and the assessment of spill effects on permit values.

Alaska Commercial Fishery Entry Commission (CFEC) permit prices were used to analyze permit price changes in the February 24, 1993, report. In this report, CFEC permit price series for each of the salmon fisheries (except the Cook Inlet purse seine fishery) have been extended through the second quarter of 1993. Unfortunately, CFEC confidentiality provisions, which specify that at least four permit transactions must take place in a subject time period before information pertaining to the value of those transactions can be released to the public, preclude the use of these data for similar analyses in the PWS herring purse seine fisheries. Lacking an appropriate CFEC price series, permit prices published in *Pacific Fishing*, a fishing industry trade journal, were used to evaluate changes in PWS herring purse seine permit values. However, we encountered a limited dataset due to few permit sales transactions during much of 1993. While we believe "offers" made by potential buyers best reflect perceptions of permit value, the large number of missing values in the "offer" price series for PWS herring purse seine fisheries precludes a quantitative analysis of permit value in this fishery based on "offer" data. State "values" posted in *Pacific Fishing* average over several, often many, months of data for confidentiality reasons and thus can lag behind more recent transactions reflected by brokers in the "market" prices. Consequently, we have used "market" values as the next best alternative to the "offer" prices.

Regardless of the data source, spill effects calculated in this report, as well as the February 24, 1993, report, equal the dollar difference between permit prices reported for a fishery and the price predicted for that fishery using the appropriate benchmark. For example, a 10% increase in permit value in benchmark fishery "A" suggests that permit prices in oiled area "B" should have also risen by 10%. Any decrease, or increase of less than 10%, in oiled area "B" permit values is indicative of a spill effect on the permit values in that fishery. Following this approach, our objectives within the following analysis are to:

1. document actual permit prices observed in benchmark and oiled area fisheries through mid-1993;
2. calculate the rate of change in permit prices in benchmark areas;
3. apply this rate of change to oiled area permit prices and subsequently predict appropriate permit prices for these areas; and
4. for oiled areas, assess the spill effect on permit prices, or the lack thereof, by measuring the difference between actual and predicted permit prices.

Salmon fishery permit price analyses presented in the February 24, 1993, report begin immediately post-spill and are carried through mid-1992. Salmon permit price predictions in this report begin where those in the February 24, 1993, report end and run through mid-1993. Analyses of permit values in PWS herring purse seine fisheries were not conducted in the February 24, 1993, report. PWS herring purse seine permit value assessments begin with the 1993 season in April and run through September, 1993, the most current month for which permit prices are available in *Pacific Fishing*. Permit value changes prior to April 1993 in the PWS herring purse seine fishery have not been ascribed to the oil spill. To the best of our current knowledge, little, if any, information discussing potential deleterious impacts of the *Exxon Valdez* oil spill on the PWS herring purse seine fishery was available prior to the 1993 fishery. Only from that time forward has there been widespread attention paid by the media and herring purse seine fishers in PWS to the problem of reduced future returns of herring to PWS.

Prince William Sound Herring Purse Seine

Based on our review of permit price changes in the Southeast Alaska herring purse seine fishery, herring purse seine permits should have risen by 12.5% between March and September 1993. Starting from a March 1993 price of $127,500, "market" price for PWS herring purse seine permits should have reached $143,500 by September, 1993. However, market activity has slowed so much since the disastrous 1993 fishery that actual September 1993 market conditions were abysmal and the September 1993 *Pacific Fishing* "market" quotes were for "Any Reasonable Offer." Theoretically, since no market for these permits exists, this condition suggests a maximum permit value loss of $143,500 for current of herring purse seine permit holders. Permit brokers suggest that present market conditions would support a price of $90,000. Thus, we have used $90,000 as the current value of PWS permits and estimated the spill effect at $53,500, the difference between what PWS herring purse seine permit price should be based on our benchmark analysis--$143,50--and what the apparent permit price is--$90,000--as of September 1993.

Salmon Fisheries

Benchmark analyses of changes in permit value associated with oiled area salmon fisheries demonstrate a continuing pattern of damage to permit values. In each of the six fisheries analyzed, spill effects worsened between mid-1992 and mid-1993 as concern over future run sizes and harvest access permeated the market.

Salmon Purse Seine Fisheries

Salmon purse seine permit prices rose by 1% in the benchmark Southeast Alaska fishery between mid-1992 and mid-1993. Meanwhile, PWS and Kodiak salmon purse seine permit values dropped 7.5% and 8.5%, respectively. Estimated spill effects on permit values in mid-1993 are $141,000 in the PWS fishery, up from $132,000 in mid-1992. Spill effects on permit values have worsened by over $6,500 in the Kodiak fishery which are valued at $46,000 in mid-1993. Exhibit 1 documents actual and predicted permit prices for PWS and Kodiak salmon fisheries from 1989 through mid-1993. Prices are those at the end of June of each year. With the second year in a row of lower than expected pink salmon runs to PWS, brokers report that the limited entry permit market for PWS salmon purse seine is at a standstill.

Estimates of spill effects on permit values associated with the Cook Inlet purse seine fishery represent a special case for our salmon fishery analysis since low trading volume precluded the application of CFEC data to the permit values in this fishery. *Pacific Fishing* "offer" prices were used to assess spill effect losses in the Cook Inlet purse seine fishery in our February 24, 1993, report and we have followed a similar approach in this report. The mid-1993 estimate of loss is $115,000 (actual is $60,000, predicted equals $175,000). Actual and predicted permit prices since June of 1990[1] are presented in Exhibit 2.

Salmon Driftnet Fisheries

Changes in Cook Inlet salmon driftnet permit values are presented in Exhibit 3, while those for the PWS driftnet fishery are found in Exhibit 4. Quarterly CFEC permit price data are available for the Cook Inlet fisheries, but not for the more thinly traded PWS driftnet fishery where we rely upon seasonal (July through June) information. Consequently, quarterly predicted permit prices are presented for the Cook Inlet fishery. Over the period of July 1992 through June 1993, spill effects on permit prices derived from the average of quarterly differences between actual and predicted prices equal $142,000. Quarter-specific estimates of spill effects on permit prices can be derived by subtracting actual price from the predicted permit prices presented in Exhibit 3. The permit price effects estimated at the end of June 1993 is $126,300. Seasonal permit price data for the PWS driftnet fishery indicate a $64,000 oil spill effect as of June 1993, up from $45,000 in June 1992.

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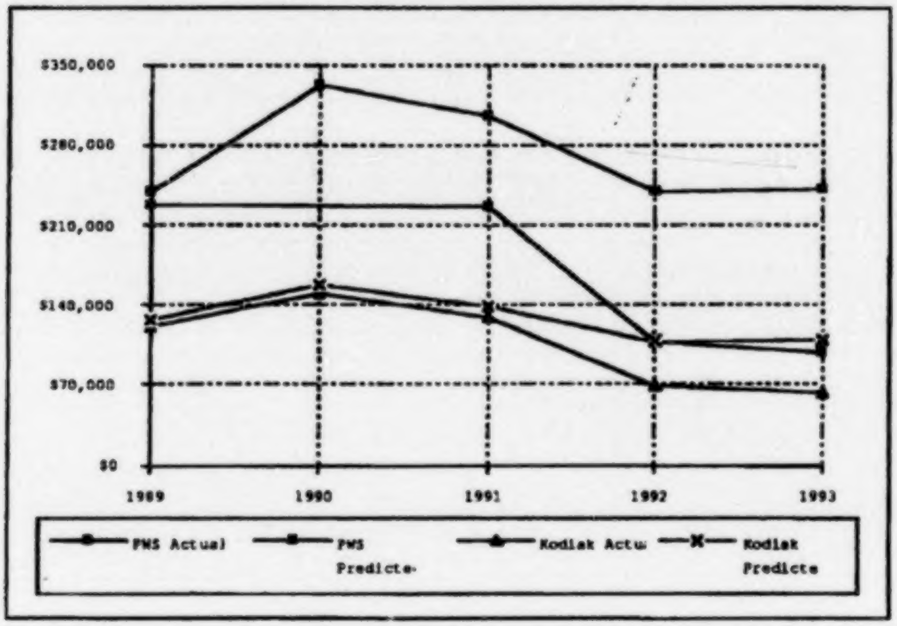
[1] *Pacific Fishing* data extend back only to December of 1989, thus precluding any analysis of price change based on this series prior to that time.

Cook Inlet Salmon Setnet Fishery

Quarterly permit price data are also available for this fishery and quarter-specific estimates of spill effects on permit prices are presented in Exhibit 5, along with seasonal effect estimates and actual and predicted quarterly permit prices. Averaged over the July 1992 through June 1993 period, these quarterly differences suggest a mean permit price spill effect of $37,200, with a current (June 1993) estimate of $44,000.

Exhibit 1. **Actual and predicted value of Prince William Sound and Kodiak salmon purse seine permits by season with seasonal spill effects estimates. Source: Alaska Commercial Fisheries Entry Commission and Natural Resources Consultants, Inc.**

Mid-Year	PWS Actual	PWS Predicted	Kodiak Actual	Kodiak Predicted
1989	$228,500	$239,376	$120,648	$126,391
1990	#N/A	$330,472	$151,050	$158,240
1991	$225,500	$305,210	$129,181	$139,503
1992	$107,000	$238,797	$69,735	$109,148
1993	$99,047	$240,118	$63,779	$109,752



Mid-Year	PWS Spill Effec	Kodiak Spill Effect
1989	($10,876)	($5,743)
1990	#N/A	($7,190)
1991	($79,710)	($10,322)
1992	($131,797)	($39,413)
1993	($141,071)	($45,973)

Exhibit 2. Actual and predicted value of Cook Inlet salmon purse seine permits by season with seasonal spill effects estimates. Source: *Pacific Fishing*, multiple issues; Natural Resources Consultants, Inc.

Mid-Year	Cook Inlet Seine Actual	Cook Inlet Seine Predicted	Spill Effect
1990	$185,000	$185,000	$0
1991	$120,000	$185,000	($65,000)
1992	$60,000	$113,000	($53,000)
1993	$60,000	$175,000	($115,000)

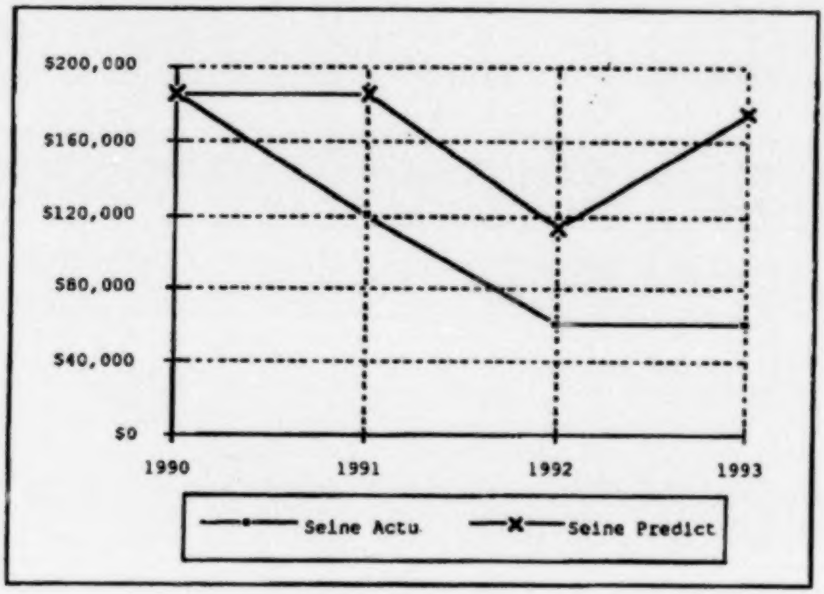


Exhibit 3. **Actual and predicted value of Cook Inlet salmon driftnet permits by quarter with quarterly and seasonal spill effects estimates. Source: Alaska Commercial Fisheries Entry Commission; Natural Resources Consultants, Inc.**

Year.Qtr	Cook Inlet Drift Actual	Cook Inlet Drift Predicted	Quarterly Cook Inlet Drift Spill Effect	Seasonal Cook Inlet Drift Spill Effect
1989.2	$173,353	$184,764	($11,411)	
1989.3	#N/A	$188,573	#N/A	
1989.4	$180,500	$192,381	($11,881)	
1990.1	$197,591	$210,597	($13,006)	
1990.2	$204,800	$218,281	($13,481)	($12,789)
1990.3	#N/A	$227,555	#N/A	
1990.4	#N/A	$233,505	#N/A	
1991.1	$194,444	$230,037	($35,593)	
1991.2	$176,588	$230,756	($54,168)	($44,880)
1991.3	#N/A	$203,485	#N/A	
1991.4	#N/A	$176,215	#N/A	
1992.1	$90,091	$183,651	($93,560)	
1992.2	$89,207	$202,306	($113,099)	($103,330)
1992.3	#N/A	$218,340	#N/A	
1992.4	$83,250	$234,373	($151,123)	
1993.1	$81,250	$229,693	($148,443)	
1993.2	$93,300	$219,569	($126,269)	($141,945)

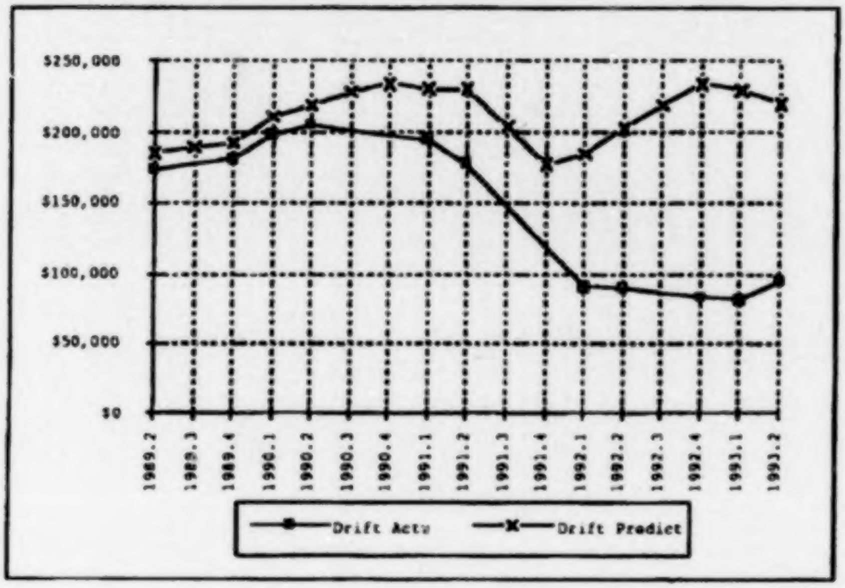


Exhibit 4. **Actual and predicted value of Prince William Sound salmon driftnet permits with seasonal spill effects estimates. Source: Alaska Commercial Fisheries Entry Commission; Natural Resources Consultants, Inc.**

Mid-Year	PWS Drift Actual	PWS Drift Predicted	PWS Drift Spill Effect
1989	$127,794	$136,206	($8,412)
1990	$164,339	$175,157	($10,818)
1991	$141,000	$170,430	($29,430)
1992	$96,107	$140,855	($44,748)
1993	$103,038	$167,054	($64,016)

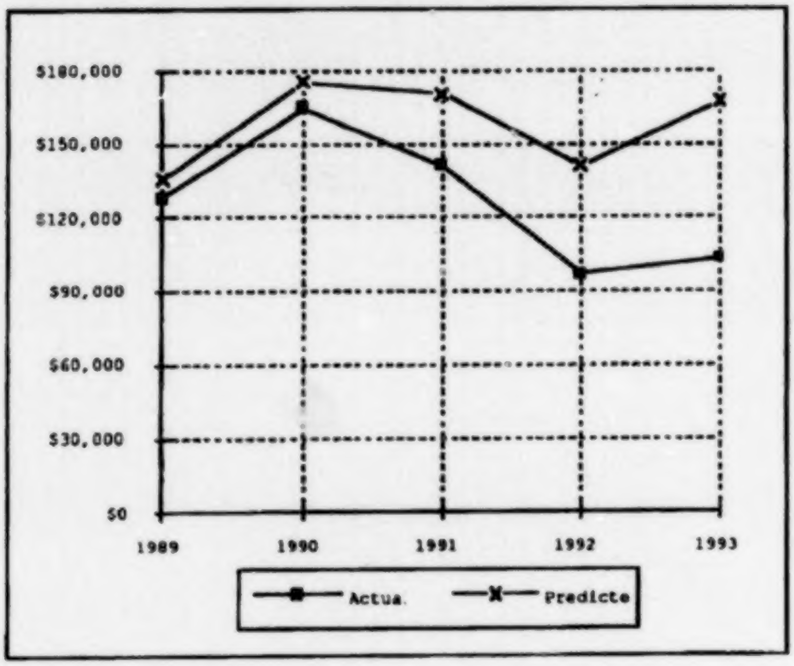
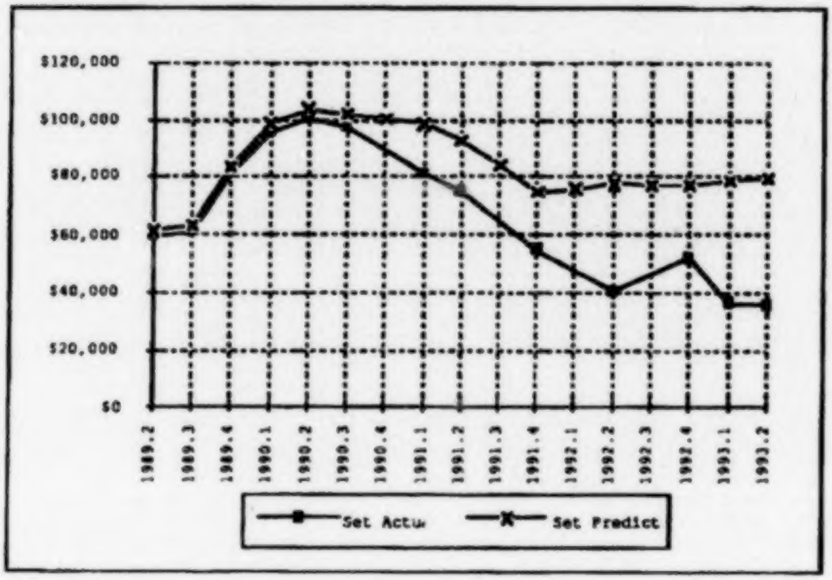


Exhibit 5. Actual and predicted value of Cook Inlet salmon setnet permits by quarter with quarterly and seasonal spill effects estimates. Source: Alaska Commercial Fisheries Entry Commission; Natural Resources Consultants, Inc.

Year.Qtr	Cook Inlet Set Actual	Cook Inlet Set Predicted	Quarterly Cook Inlet Setnet Spill Effect	Seasonal Cook Inlet Setnet Spill Effect
1989.2	$59,476	$61,259	($1,783)	
1989.3	$61,000	$62,829	($1,829)	($1,806)
1989.4	$81,250	$83,686	($2,436)	
1990.1	$95,955	$98,832	($2,877)	
1990.2	$100,550	$103,565	($3,015)	($2,776)
1990.3	$97,500	$101,862	($4,362)	
1990.4	#N/A	$100,160	#N/A	
1991.1	$81,000	$98,452	($17,452)	
1991.2	$74,500	$93,015	($18,515)	($13,443)
1991.3	#N/A	$83,928	#N/A	
1991.4	$55,000	$74,841	($19,841)	
1992.1	#N/A	$75,742	#N/A	
1992.2	$40,196	$77,402	($37,206)	($28,523)
1992.3	#N/A	$77,280	#N/A	
1992.4	$51,763	$77,159	($25,396)	
1993.1	$36,438	$78,662	($42,224)	
1993.2	$35,394	$79,441	($44,047)	($37,222)



REFERENCES

Biggs, Evelyn D., and Timothy T. Baker. 1993. Summary of Known Effects of the Exxon Valdez Oil Spill on Herring in Prince William Sound and Recommendations for Future Inquiries, Alaska Department of Fish and Game, Exxon Valdez Oil Spill Symposium, Program and Abstracts, Anchorage, Alaska, Feb. 2-5, 1993.

Funk, Fritz, ed. 1993. Preliminary Forecasts of Catch and Stock Abundance for 1993 Alaska Herring Fisheries. ADF&G Regional Information Report No. 5J93-06, Juneau, Alaska, May 1993.

Kocan, Richard M., Timothy T. Baker, and Evelyn D. Biggs. 1993. Adult Herring Reproductive Impairment Following the Exxon Valdez Oil Spill. University of Washington, Exxon Valdez Oil Spill Symposium, Program and Abstracts, Anchorage, Alaska, Feb. 2-5, 1993.

Natural Resources Consultants, Inc., Jonathan Karpoff, and Roger Lohrer. 1993. Final Report Effect of the 1989 Exxon Valdez Oil Spill on Alaska Limited Entry Permit Values, February 24, 1993.

Schmidt, Dana C., Ken Tarbox, Gary Kyle, Bruce King, Linda Brannian, and Jeff Koenings. 1993. Overescapement Impacts of Kenai River Sockeye Salmon. Alaska Department of Fish and Game, Exxon Valdez Oil Spill Symposium, Program and Abstracts, Anchorage, Alaska, Feb. 2-5, 1993.

Willette, Mark. 1993. Impacts of the Exxon Valdez Oil Spill on the Migration, Growth, and Survival of Juvenile Pink Salmon in Prince William Sound. Alaska Department of Fish and Game, Exxon Valdez Oil Spill Symposium, Program and Abstracts, Anchorage, Alaska, Feb. 2-5, 1993.

THE EFFECT OF THE EXXON VALDEZ OIL SPILL ON BOAT VALUES IN PRINCE WILLIAM SOUND AND KODIAK

DATED FEBRUARY 23, 1993

PREPARED BY ROGER LOHRER
DOCK STREET BROKERS
5101 BALLARD AVENUE NW
SEATTLE, WA 98107
(206) 789-5101

Dock Street Brokers has been retained by the *Exxon Valdez* Oil Spill Plaintiffs' Committee to investigate the effect of the oil spill on the value of Alaskan fishing vessels. In our best professional opinion the value of a commercial fishing vessel is intrinsically linked to the vessels' earning potential. This opinion is based on years of experience in the boat brokerage business and work with lending institutions, including the State of Alaska Division of Investments.

The majority of vessel buyers are previously committed to fishing a particular area based on their experience and/or proximity to their home. When they are in the market for a boat, it is usually to replace or "upgrade" an existing vessel, but to remain in the area they are familiar with. Obviously if their chosen area of operation has been "spoiled", or has poor predictions and their vessel is best suited for that particular area, the market value will drop accordingly.

The perceived earning potential of a fishing vessel is based on run size predictions and price of product. The *Exxon Valdez* oil spill has had a direct and substantial effect in the long-term effect on price and future harvests as is reported in various fishing journals and as perceived by commercial harvesters, i.e. potential buyers.

Dock Street Brokers has been in the business of brokering permits and vessels since 1976. We are one of the largest brokering firms in terms of volume in the business. Analysis of our vessel price valuation data indicates that we have 400 more vessels listed at the present time than prior to the oil spill. (Dock Street Broker's "Winter 1988-1989 Boat Catalog", and Dock Street Broker's "Fall 1992/Winter 1993 Boat Catalog".) There are very few potential buyers for vessels specifically designed for the oiled fisheries. The market is further complicated by a scarcity of lending institutions willing to finance such vessels. It is our opinion that the decline in available capital for vessel purchases in recent years is a reflection of the uncertainty of earning potential form these fisheries and the general decline of profitability of these fisheries. It is our best professional opinion that the *Exxon Valdez* oil spill was and is a substantial factor in the decline of available vessel-collateralized loan capital. We work extensively with Seafirst National Bank's

PLX 16619

Maritime office and can verify they have ben reluctant to look at loan applicants from Prince William Sound fisheries since the spill.

An analysis of Dock Street Brokers' sales data indicates that vessels in non-oiled fisheries such as Bristol Bay have held fairly constant while vessels designed for oiled areas such as Prince William Sound and Kodiak have declined by as much as 25%. A comparison of sales of vessels designed for these fisheries shows a marked decline in the value of Prince William Sound and Kodiak seiners in the years since the oil spill.

Corroboration of Dock Street's conclusion that the oil spill is a substantial factor with regard to vessel values in oiled vs. non-oiled fisheries can be made by comparing the value of vessels unique to the Bristol Bay and Southeast Alaska purse seine fishery with the value of Prince William Sound seine and gillnet vessels and Kodiak seine vessels. Analysis of Dock Street Broker's sales and listings data indicates that vessels designed for non-oiled fisheries have not declined in value in the last three years as have vessels designed for oil impacted fisheries. In addition, vessels whose design does not limit their use to the Prince William Sound/Kodiak salmon seine fishery, but are also used as crabbers and longliners, have either retained their value or experienced less decline. This sharply contrasts with the decline in value of seiners and gillnetters specifically designed for Prince William Sound and/or Kodiak salmon harvest. Based upon Dock Street vessel price valuation data, Prince William Sound and Kodiak salmon seiners have declined in value between 1990 and 1991, and between 1991 and 1992 from their pre-spill offer and bid prices. We will be able to verify these statements by providing copies of our published catalogs for those periods.

MVV016C3.WPS

SUPPLEMENTAL REPORT OF ROGER LOHRER

It is my opinion, based on our sales and listings, that since 1989 to the present, because of the effects of the Exxon Valdez oil spill, the value of an average seine vessel used in Prince William Sound has decreased about $50,000 per vessel from $350,000 to $300,000. During the same period, Kodiak seine vessels lost an average of $40,000 from $300,000 to $260,000 due to the effects of the Exxon Valdez oil spill.

MVV0399E.WP5

THE EFFECT OF THE EXXON VALDEZ OIL SPILL ON COMMERICAL FISHING VESSEL VALUES IN COOK INLET, ALASKA

Prepared by: Rosaleen L. Moore
Northern Enterprises
41930 Kachemak Drive
Homer, AK 99603
907/235-8234

Dated: February 24, 1993

In my experience, values on commercial fishing vessels in the Cook Inlet area have dropped drastically in the past year, some as much as 30%. It is my opinion that the depressed market in Cook Inlet commercial fishing vessels is the direct result of the Exxon Valdez oil spill.

I base my opinion on my professional experience and knowledge in the Alaska commericial fishing industry. In particular, I have been involved in the Alaska commerical fisheries for over 30 years and have been actively selling vessels for others for 13 years. Our business has specialized in Cook Inlet vessels. I am a past board member and chairman of Alaska Commercial Fisheries and Agriculture Bank which is a cooperative bank dealing in financing commercial fishing activities in Alaska.

Further, I base my opinion on the knowledge that the Cook Inlet drift fishery is facing a very uncertain future because of the Exxon Valdez oil spill. The Upper Cook Inlet drift fleet was not able to fish in 1989 due to oil in the fishing area. It is well understood that far too many fish entered the Kenai river system as a result of the drift fleet not being able to fish in 1989. It is also well understood that such a huge overescapement will have a drastic effect on the run size in the following years.

The outlook is a low return in 1993, and possibly no commercial fishing in 1994, 1995 and 1996.

MVV016D3.WP5

SUPPLEMENTAL REPORT OF ROSELEEN MOORE

Based upon information in our files, the average of Upper Cook Inlet drift vessels sold prior to the Exxon Valdez oil spill (and the two months immediately following) was $72,000. The average price has dropped approximately $20,000 per vessel to $52,000 at this time because of the effects of the Exxon Valdez oil spill.

OIL SPILL CONTINGENCY PLAN

PRINCE WILLIAM SOUND

JANUARY 1987

PRUDHOE BAY
YUKON
RIVER
FAIRBANKS
ANCHORAGE
VALDEZ
GULF OF ALASKA

CIVIL NO. [illegible]
PLAINTIFF'S [illegible]
NUMBER [illegible]

Alyeska pipeline
SERVICE COMPANY

PLEX3-001

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ACE 1286177

BEST AVAILABLE COPY

option that could be used alone or in conjunction with these techniques. To do so in an effective and timely manner, however, requires advance planning.

Government approvals must be in place to assure dispersants will be an option available to Alyeska. Presently, we have an agreement with Biegert Aviation to respond to our request for dispersant application. Mobilization time to Valdez, Alaska may vary from 18 to 72 hours. Due to the location of the dispersant applicator's facilities, i.e., Chandalar, Arizona, it would be difficult to effectively apply dispersants due to the time-consuming decision making process and the travel time of the dispersant applicators. Predetermined dispersant application areas under certain applicable conditions would encourage Alyeska to make the necessary expenditures to shorten the mobilization time.

Presently, Alyeska has approximately 45 barrels of Corexit 9527 located at the Valdez Marine Terminal. There are various other stockpiles located throughout Alaska. The Alaska Clean Seas' *Alaska Oil Spill Chemical Application Manual* gives a thorough review of dispersant application in the state of Alaska.

304 EXCLUSION

Exclusion actions are steps taken to prevent spilled oil from contaminating a specific area. These actions are usually taken for a definite purpose, primarily to protect:

Human life
Wildlife and/or wildlife habitats
Property
Areas of aesthetic beauty

Exclusion actions are also taken to prevent oil from contaminating areas that are very difficult or impossible to clean or for a combination of the above reasons.

Exclusion steps should be taken after the initial response action to contain the spill. Assessment of the spill's size and its possible movement are required for effective, efficient exclusion. If initial containment actions have not contained all the spilled oil, exclusion actions may be required. The Terminal Superintendent or Reconnaissance Supervisor will determine need for exclusion actions during assessment of the spill incident.

Oil-on-water movement depends on the volume of oil, its physical properties, the tidal current, and the wind speed and direction. After initial spreading occurs, the movement largely depends on the tidal current and the wind speed and direction. These two factors must be considered in making exclusion action decisions. If the current and/or wind conditions at the time of a spill indicate that uncontained oil may move to one of the sensitive areas discussed below, appropriate exclusion actions for that area must be taken. Any forecast changes in wind speed and/or direction must also be considered. Exclusion actions for the threatened area must be taken if the spill might not be fully contained when the anticipated change occurs.

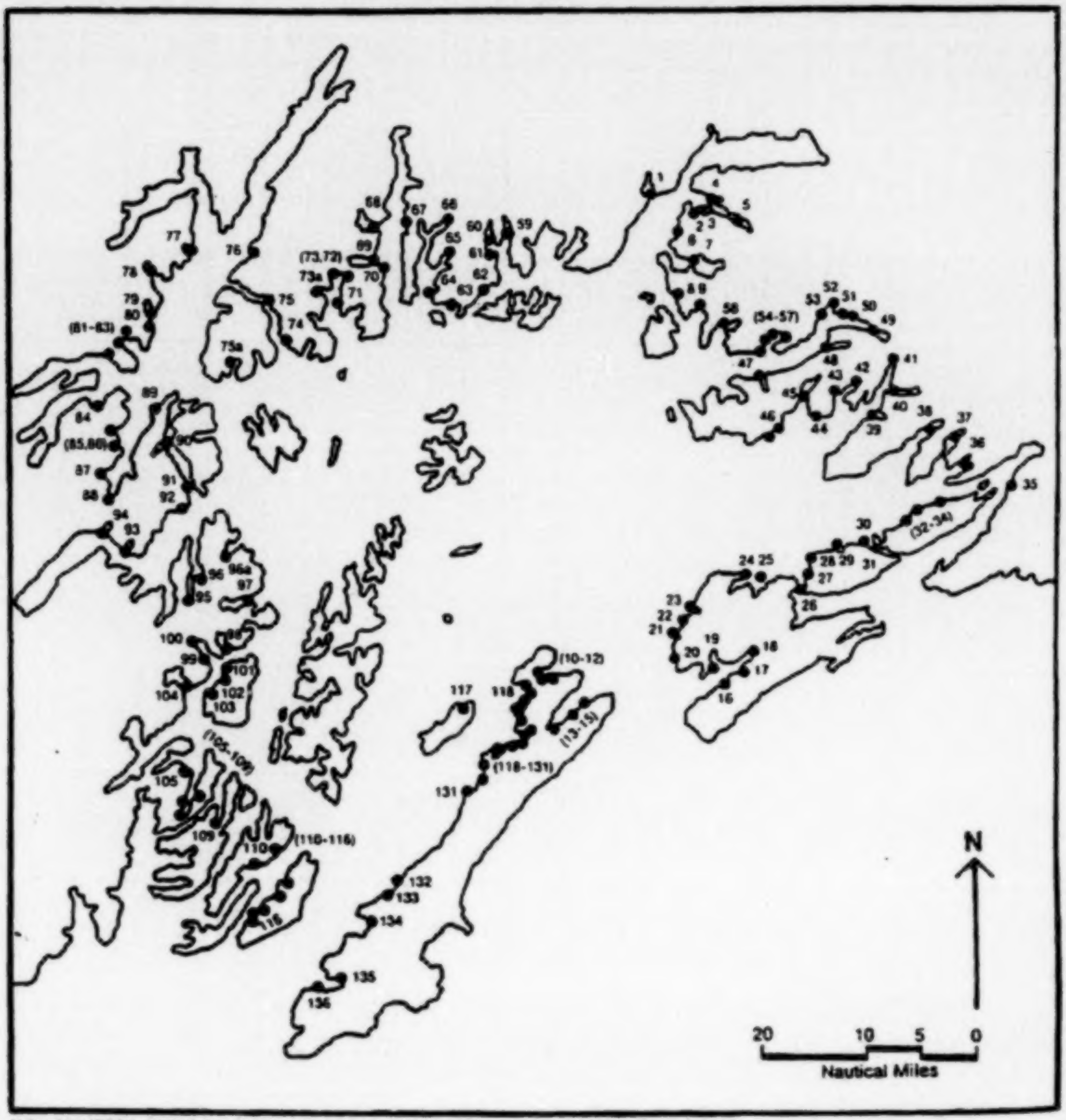
Booms with a cylindrical float and a suspended skirt will generally be used for exclusion. When all available boom is in use, additional booms may be fabricated on site. Annex 905 of the General Provisions discusses the correct use of the various types of booms and gives emergency boom construction information. Booms may be deployed by any of the vessels at the terminal. Mooring launches or tugs should be used for towing booms to the site when the distance is great and/or speed is important.

Two primary methods will be used in exclusion booming—enclosure and diversion. Enclosure involves completely closing off an area, such as a harbor, bay inlet or land form. Diversion booming is used to deflect oil that is moving in a dominant direction from a critical area to a less critical area or further out into the body of water. This method works well in conjunction with cleanup or skimming procedures as it tends to concentrate the oil and direct its path.

It is theorized that the two most probable areas in Prince William Sound that would be subject to oil spills from marine vessels in trade with Alyeska's Valdez Terminal are the Valdez Arm and Hinchinbrook Entrance.

Therefore, the exclusion sites for these two areas are presented in the first of the numerical listing of the predesignated exclusion sites in Prince William Sound. Figure 304-1 shows the numerical location of the exclusion sites. Detailed photo maps are provided showing the exclusion sites. An index of the exclusion sites showing detailed area maps and and exclusion site photos is given in Figure 304-2. Area maps and exclusion site photos follow Figure 304-2. Detailed descriptions of the individual exclusion sites are interspersed with the exclusion site photos. The sensitivity of the exclusion sites by months is given in Figure 304-115 at the end of th site photos.

The scattered communities listed below are located within Prince William Sound. If an oil slick is approaching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Note: NUMBERS REFER TO EXCLUSION SITES AND ACTIONS RECOMMENDED TO PROTECT SENSITIVE AREAS LISTED IN FIGURE 304-2.

EXCLUSION SITES

Figure 304-1

SAWMILL BAY (SITE 1)

Sawmill Bay is a small inlet in the northwestern shore of Valdez Arm. Stellar Creek (ADFG 153), a major salmon spawning stream, drains into the western bay forming a delta. Twin Falls Creek (ADFG 152), a salmon spawning ground, is at the head of Sawmill Bay and forms a large tidal flat. Eelgrass beds and butter clams are found within the bay. Sawmill Bay is used by sport fishermen.

Site 1. Sawmill Bay Entrance (Figure 304-11): To block oil from Sawmill Bay, the oil must be diverted at the entrance to the bay. The anchor point will depend upon the location of the oil as it approaches the entrance. Deploy about 1,000 feet of boom from the west shore or the east shore at the entrance to the bay at an angle to direct the oil toward shore. Depending on slick width, it may be necessary to deploy boom across the entrance from both shores.

JACK BAY (SITES 2, 3, 4 & 5)

Jack Bay is a long, narrow fjord in the eastern shore of Valdez Arm. Harbor seals, crab, black and brown bear, and birds inhabit the area. The southern shore near the entrance is a herring spawning ground. Eelgrass beds are in the heads of the small coves in the bay. During the summer, sport fishing for salmon is common.

There are four salmon spawning streams within Jack Bay—Leushakoff Creek (ADFG 121), Gregorieff Creek (ADFG 123), Vlaskoff Creek (ADFG 129) and Naomoff Creek (ADFG 127).

Site 2. Leushakoff Creek (Figure 304-12): Leushakoff Creek (ADFG 121), a salmon spawning ground, drains into a cove on the south shore of Jack Bay just inside the entrance. This cove is also a herring spawning ground.

To prevent oil from affecting the creek, deploy about 1,500 feet of boom from an anchor point on shore at an angle that will direct the oil toward shore. The location of the anchor point will depend on the location of the slick and its width as it approaches the creek. When diverting from an anchor point on the eastern shore, actions must be taken to prevent oil from reaching Gregorieff Creek in the next cove to the east.

Site 3. Gregorieff Creek (Figure 304-12): Gregorieff Creek (ADFG 123), a salmon spawning stream, empties into a small cove on the southern shore of Jack Bay east of Leushakoff Creek. The cove is also a herring spawning ground. Deploy about 1,000 feet of boom across the cove at the cove narrowing to protect the delta above midtide level.

Site 4. Vlaskoff Creek (Figure 304-13): Vlaskoff Creek (ADFG 129) is a salmon spawning stream on the north shore of Jack Bay. Eelgrass beds occur at its mouth. Deploy about 1,500 feet of boom across the mouth of the creek from the small peninsula on the south shore to the north shore to prevent oil from affecting the delta above midtide level. If this is not possible because of strong currents, deploy about 1,200 feet of boom from an anchor point on the small peninsula at an angle that will divert incoming oil into the small cove to the west of the boom.

Site 5. Naomoff Creek (Figure 304-14): Naomoff Creek (ADFG 127) empties into the head of Jack Bay, forming a large tidal flat. Eelgrass beds occur here. The creek is a major producer of chum and pink salmon.

To prevent oil from affecting Naomoff Creek, diversion booming will be necessary. Location of the anchor point will depend on the location of the slick within the bay. Before the slick reaches the creek delta, deploy about 1,000 feet of boom across the bay at an angle that will direct oil toward shore for pickup. Depending on slick width, it may be necessary to deploy boom from anchor points on both shores.

DONALDSON CREEK (SITE 6: Figure 304-15)

Donaldson Creek (ADFG 120) is a spawning ground for pink salmon located on the east shore of Valdez Arm north of Galena Bay.

Deploy about 1,000 to 1,600 feet of boom in a U-shape in advance of the approaching slick before it reaches the delta. This will contain oil within the boom and prevent oil from affecting the creek delta.

GALENA BAY (SITE 7)

Galena Bay is a large bay in the east shore of Valdez Arm. Hardshell clams are found along its shores and otters frequent its waters. The U.S. Forest Service maintains two recreational cabins in the bay. Galena Bay was named for lead ore deposits in the vicinity and was the location of extensive copper mines. The abandoned townsite of Galena Bay was once an Eskimo village that became a copper mining town during the early 1900s.

Four salmon spawning streams empty into Galena Bay: Turner Creek (ADFG 114), Millard Creek (ADFG 115), Duck River (ADFG 116) and Indian Creek (ADFG 117).

Site 7. The Narrows (Figure 304-16): To prevent oil from reaching these four streams, deploy about 2,500 feet of boom across the Narrows from the southern peninsula to the northern peninsula.

TATITLEK NARROWS (SITES 8 & 9)

Tatitlek Narrows is a long, narrow passage between Busby and Bligh Islands and the mainland. This passage is a bird concentration area and sea otters frequent its waters. The area is also a herring spawning ground. Two salmon spawning streams empty into the Narrows-Gladhaugh Creek in Virgin Bay and Borodkin Creek in Boulder Bay. The Native Village of Ellamar was an abandoned copper mining and fish canning area. It is located in Virgin Bay on the east shore of Tatitlek Narrows. The Native village of Tatitlek is south of Ellamar.

Site 8. Gladhaugh Creek (Figure 304-17): Gladhaugh Creek (ADFG 106), a salmon spawning stream, drains into Virgin Bay on the eastern shore of Tatitlek Narrows just north of Ellamar.

Deploy about 1,000 feet of boom east of the small peninsula on the north shore across the creek delta to the mainland to protect the delta above midtide level.

Site 9. Borodkin Creek (Figure 304-18): Borodkin Creek (ADFG 100), a salmon spawning stream, empties into the head of Boulder Bay, a large bay on the southeastern shore of Tatitlek Narrows.

Deploy about 600 feet of boom across the entrance to the mouth of the creek to prevent oil from affecting the delta above midtide level.

ROCKY BAY (SITES 10, 11 & 12)

Rocky Bay is a large inlet in the northern end of Montague Island, west of Zaikof Bay. Rocky Bay has three salmon spawning areas: Rocky Creek (ADFG 759), Unnamed Creek 758 (ADFG 758), and Curren Creek (ADFG 760). Sea otters and harbor seals frequent its waters. The upper end of the bay is a herring spawning ground. Sea birds concentrate in this area.

Site 10. Unnamed Creek 758 (Figure 304-19): Unnamed Creek 758 (ADFG 758) is a salmon spawning stream at the head of Rocky Bay. Deploy about 1,000 feet of boom from the sandspit east to the mainland.

Site 11. Rocky Creek (Figure 304-19): Rocky Creek (ADFG 759), a major salmon spawning stream, drains into the southern shore of the head of Rocky Bay. Deploy about 1,000 feet of boom across the inlet between the two small peninsulas to prevent oil from affecting the creek delta above midtide level.

Site 12. Curren Creek (Figure 304-19): Curren Creek (ADFG 760) is a salmon spawning stream draining into a small inlet in the south shore of Rocky Bay. Deploy about 1,000 feet of boom from the sandspit south to the mainland.

ZAIKOF BAY (SITES 13, 14 & 15)

Zaikof Bay is a large inlet in the northern end of Montague Island, east of Rocky Bay. Sea otters inhabit the area. There are four salmon spawning streams emptying into the bay—Udall Creek (ADFG 770), McKernan Creek (ADFG 771), Rosswog Creek (ADFG 774), and Pautzke Creek (ADFG 775).

Site 13. Udall Creek and McKernan Creek (Figure 304-20): Udall Creek (ADFG 770) and McKernan Creek (ADFG 771) together form a large delta as they empty into the head of Zaikof Bay. Deploy about 1,000 to 1,600 feet of boom in a U-shape in advance of the slick; contain oil before it reaches creek deltas.

Site 14. Rosswog Creek (Figure 304-20): Rosswog Creek (ADFG 774) is a salmon spawning stream on the south shore of Zaikof Bay. Divert oil before reaching creek delta. Deploy about 1,000 feet of boom from the shore anchor point. The location of the anchor point will depend on the slick location as it approaches the delta. If this is not feasible, deploy about 1,000 to 1,600 feet of boom in a U-shape in advance of the slick to prevent oil from affecting delta above midtide level.

Site 15. Pautzke Creek (Figure 304-21): Pautzke Creek (ADFG 775), a major salmon spawning stream, drains into the eastern shore of Zaikof Bay. Deploy about 750 feet of boom across the entrance to the inlet into which the creek drains to protect the delta above midtide level.

PORT ETCHES (SITES 16, 17, 18 & 19)

Port Etches is a small fjord in southwest Hinchinbrook Island. Sea otters, sea lions and harbor seals frequent its waters. The area is inhabited by brown bear, Sitka blacktailed deer, tufted puffins, Brandt's cormorants and has numerous salmon producing streams. This area is used for recreational purposes, hunting, and commercial and sport fishing.

From the 1790s until 1867, Russia operated a sea otter pelt trading outpost, Fort Constantine, near the Native village of Nuchek. Nuchek was abandoned in 1930.

There are five salmon spawning streams in Port Etches—Etches Creek (ADFG 806), Garden Cove Creek (ADFG 808), Garden Creek (ADFG 810), Nuchek Creek (ADFG 812), and Constantine Creek (ADFG 815).

Site 16. Etches Creek (Figure 304-22): Etches Creek (ADFG 806), a salmon spawning ground, empties into a small, unnamed cove on the southern shore of Port Etches. A spit encloses the cove, except for the creek mouth. Deploy about 1,500 feet of boom from the wooded peninsula west to the mainland to protect the creek delta above the midtide level.

Garden Cove

Garden Cove, a small cove on the south shore of Port Etches, contains two salmon spawning streams—Garden Cove Creek (ADFG 808) and Garden Creek (ADFG 810). These two creeks, together with smaller drainage courses, form a large tidal flat.

Site 17. Offshore Garden Cove (Figure 304-23): Deploy about 1,000 feet of boom from the shore of the cove entrance closest to the approaching oil slick at an angle that will direct oil toward shore and/or away from the cove.

Site 18. Nuchek Creek (Figure 304-24): Nuchek Creek (ADFG 812) is a major salmon spawning ground for pink and chum salmon. The creek enters the head of Port Etches and, together with numerous smaller drainage courses, forms a large tidal flat. Eelgrass beds ring the head of the port.

Deploy about 1,500 feet of boom from the small peninsula on the south shore of the entrance at an angle that will direct oil away from the head and toward shore. It may be necessary to deploy boom from the peninsula on the north shore of the entrance if oil is not entirely diverted by the south boom.

Constantine Harbor

Constantine Harbor is within Port Etches on its northern shore. It is protected from the Sound by a bar more than a mile long that rises approximately 20 feet above high tide. This bar connects the mainland of Hinchinbrook Island with the onetime island of Nuchek. The entrance to Constantine Harbor is approximately 650 feet wide. The harbor provides adequate anchorage for small boats.

The harbor is ringed by eelgrass beds. Sea otters frequent its waters. Brown bear and Sitka blacktailed deer inhabit the area. Constantine Creek (ADFG 815) empties into the harbor at its head and at low tide forms, with smaller creeks entering the head, a large tidal flat. Hardshell clams are found on the flat. Constantine Creek is a major spawning ground for pink and chum salmon.

Site 19. Entrance to Constantine Harbor (Figure 304-25): Deploy about 900 feet of boom across the entrance of Constantine Harbor north of Phipps Point to prevent oil from entering the harbor.

BEAR CAPE CREEK (SITE 20; FIGURE 304-26)

Bear Cape Creek (ADFG 816) is a salmon spawning stream located in a small pocket beach approximately two miles north of Bear Cape on the west shore of Hinchinbrook Island.

Deploy about 300 feet of boom across the creek delta to prevent oil from affecting the delta above midtide level.

DEER CREEK (SITE 21; FIGURE 304-27)

Deer Creek (ADFG 817), a salmon spawning stream, drains into the head of Deer Cove on the west shore of Hinchinbrook Island. Deer Cove is enclosed by a spit except for the cove drainage channel.

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Deploy about 1,600 to 2,000 feet of boom offshore in a U-shape in advance of the approaching slick. This will contain oil within the boom and prevent oil from affecting the creek delta.

JUANIA CREEK (SITE 22; FIGURE 304-28)

Juania Creek (ADFG 818), a salmon spawning stream, empties into an unnamed cove on the west shore of Hinchinbrook Island north of Deer Cove.

Deploy about 1,600 to 2,000 feet of boom in a U-shape in advance of the approaching slick. This will contain oil within the boom and prevent oil from affecting the creek delta.

BROWN BEAR CREEK (SITE 23; FIGURE 304-29)

Brown Bear Creek (ADFG 821) is a major salmon spawning stream located at the head of Shelter Bay on the northwestern shore of Hinchinbrook Island. The entrance to Shelter Bay is between two small spits and is shallow with strong currents. Deploy about 900 feet of boom across the entrance to the bay between the two spits to prevent oil from entering the bay.

ANDERSON BAY (SITE 24; FIGURE 304-30)

Anderson Bay is a large bay in the north shore of Hinchinbrook Island. Oil entering the bay would endanger sea otters and birds and would be difficult to recover. Two salmon spawning streams drain into Anderson Bay—Eagle Creek (ADFG 827) and Anderson Creek (ADFG 828).

Deploy about 1,500 feet of boom from the wooded area at the end of the spit on the west shore of the entrance to the bay. The boom should be angled to direct oil toward shore and away from the entrance to the bay.

DOUBLE BAY (SITE 25; FIGURE 304-31)

Double Bay is a large bay on the north shore of Hinchinbrook Island. Sea otters and harbor seals frequent its waters. The Forest Service maintains a recreational cabin here. Three salmon spawning streams empty into the head of the bay—Bear Creek (ADFG 829), Double Bay Creek (ADFG 830), and Double Creek (ADFG 831).

To prevent oil from affecting these three creeks, oil must be prevented from entering Double Bay. Deploy about 1,500 feet of boom from the wooded end of the spit at the western shore of the entrance to the bay at an angle that will divert oil toward shore and away from Double Bay. It may be necessary to perform the same action from the eastern shore of the entrance if the oil has not been entirely diverted by the west boom.

When diverting oil from the western shore of the entrance, precautions must be taken to prevent oil from entering Anderson Bay to the west.

HAWKINS ISLAND CUTOFF (SITES 26 & 27)

Hawkins Island Cutoff lies between the western shore of Hinchinbrook Island and the eastern shore of Hawkins Island. The passage is shallow with extensive tidal flats.

Three creeks on Hinchinbrook Island in the southern part of the Cutoff are major pink salmon spawning streams—Honker Creek (ADFG 834), Cutoff Creek (ADFG 835), and Dan Creek (ADFG 836). One creek on Hawkins Island in the northern part of the Cutoff is a salmon spawning ground—Hawkins Cutoff Creek (ADFG 843).

Site 26. Entrance Hawkins Island Cutoff (Figure 304-32): The three major spawning streams on Hinchinbrook Island which drain into the Cutoff (Honker, Cutoff and Dan Creeks) can be protected from an oil spill by the same action. Oil must be prevented from entering the Cutoff. Deploy about 1,500 feet of boom from the west shore of the Cutoff entrance at an angle that will divert oil away from the entrance or toward shore. The location chosen as the anchor point will depend on the location of the slick as it approaches the entrance. It may be necessary to perform the same action from the eastern shore if the oil has not been entirely diverted by the west boom.

Site 27. Hawkins Cutoff Creek (Figure 304-33): Hawkins Cutoff Creek (ADFG 843) empties into a large lagoon on the west shore of Hawkins Island. Extensive tidal flats are formed at low tide. Oil should be contained on open waters before it reaches the shore. Deploy about 1,000 to 2,000 feet of boom offshore in a U-shape in advance of the approaching slick. This will contain oil within the boom and prevent oil from affecting the tidal flat.

MAKAKA CREEK (SITE 28; FIGURE 304-34)

Makaka Creek (ADFG 844), a major salmon spawning stream, drains into a long lagoon on the north shore of Hawkins Island and forms a large delta. The lagoon empties during low tide except for the stream drainage channel. Deploy about 250 feet of boom from the spit at the east shore of the entrance to the lagoon west to the mainland.

HAWKINS CREEK (SITE 29; FIGURE 304-35)

Hawkins Creek (ADFG 847) is a major salmon spawning stream on the north shore of Hawkins Island west of Makaka Creek. The creek drains into a small lagoon that empties at low tide. Hawkins Creek joins with an unnamed stream as it emerges into Orca Bay and forms a large delta. Deploy about 350 feet of boom across the entrance to the lagoon from the east spit to the west spit.

ROLLINS CREEK (SITE 30; FIGURE 304-36)

Rollins Creek (ADFG 849) empties into a small lagoon just west of the entrance to Canoe Passage on the north shore of Hawkins Island. To exclude oil from this area, deploy about 1,000 feet of boom from the spit on the west across the entrance of the lagoon to the spit on the east.

CANOE PASSAGE (SITE 31; FIGURE 304-36)

Canoe Passage divides central Hawkins Island. Sitka blacktailed deer and brown bear inhabit the area. The southern section is a bird nesting area. Hardshell clams and eelgrass beds are found along its shores. There are two pink salmon spawning streams draining into Canoe Passage—Canoe Creek (ADFG 850) and Zillesendoff Creek (ADFG 851). To prevent oil from affecting Canoe Passage, deploy about 900 feet of boom across the Passage at the narrowing south of the small cove on the west shore.

CEDAR BAY (SITE 2: FIGURE 304-37)

Cedar Bay is a small bay on the north shore of Hawkins Island. Emptying into the lagoon at the head of the bay are three salmon spawning streams—Cedar Creek (ADFG 856), Spruce Creek (ADFG 857), and Hemlock Creek (ADFG 858). To exclude oil from this area, deploy about 200 feet of boom across the entrance to the lagoon.

WINDY CREEK (SITE 33; FIGURE 304-38)

Windy Creek (ADFG 861), a major salmon spawning stream, empties into the head of Windy Bay, a large inlet in the north shore of Hawkins Island. Deploy about 1,000 feet of boom across the narrow neck of the upper bay to prevent oil from affecting the head.

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ORCA CREEK (SITE 34; FIGURE 304-39)

Orca Creek (ADFG 863) is a salmon spawning stream at the head of a small inlet on the north shore of Hawkins Island. Deploy about 900 feet of boom across the entrance to the inlet to protect the creek delta above the midtide level.

HUMPBACK CREEK (SITE 35; FIGURE 304-40)

Humpback Creek (ADFG 11), a salmon spawning stream, drains into Orca Inlet south of Shepard Point. To prevent oil from affecting the creek delta, deploy about 1,000 feet of boom from the mainland at an angle that will divert oil toward shore. The location of the anchor point will depend on the location of the slick as it approaches the creek delta.

SIMPSON BAY (SITES 36 & 37)

Simpson Bay, located at the head of Orca Bay, is divided into two inlets. Alice Cove, located in the north shore of the entrance to Simpson Bay, is a recreation and hunting resort. Raging Creek (ADFG 23) and Simpson Creek (ADFG 26) are salmon spawning streams at the head of Simpson Bay. These streams will be protected by actions taken at exclusion sites 36 and 37.

Site 36. Raging Creek (Figure 304-41): Raging Creek (ADFG 23), a chum salmon spawning stream, is located in a lagoon at the head of the south arm of Simpson Bay. There are eelgrass beds and hardshell clams in this area. To prevent oil from reaching this creek, deploy about 200 feet of boom across the narrow passage at the entrance to the lagoon into which the creek drains.

Site 37. Simpson Creek (Figure 304-42): Simpson Creek (ADFG 26), a salmon spawning stream, drains into the head of the north arm of Simpson Bay. Deploy about 1,000 to 2,000 feet of boom offshore from the delta in a U-shape in advance of the approaching slick. This will contain oil within the boom and prevent oil from affecting the creek delta.

SHEEP BAY (SITE 38; FIGURE 304-43)

Sheep Bay is a long bay in southeastern Prince William Sound. Brown and black bears, sea otters and harbor seals inhabit the head of the bay. In winter, deer forage on the beaches. Herons, geese and arctic terns nest at the head of the bay. The area is used by recreationists for crabing and claming.

Emptying into the head of Sheep Bay are two major salmon spawning streams—Koppen Creek (ADFG 35) and Sheep River (ADFG 36). These streams will be protected by actions at exclusion site 38.

To prevent oil from reaching the head of Sheep Bay, deploy about 1,500 to 1,800 feet of boom across the entrance to the head.

PORT GRAVINA (SITES 39 THROUGH 46)

Port Gravina is a large fjord in eastern Prince William Sound. In 1790, Salvador Fidalgo, a Spanish explorer, named the port after a prominent Spanish naval officer, Frederico Gravina.

Mountain goats and brown, black and glacier bears inhabit the area. Birdlife, including bald eagles and ducks, is plentiful. Three members of the whale family can be seen during the summer—sei, killer and humpback whales. Sea otters and sea lions frequent its waters. Eelgrass grows at the head of the port and, generally, at the heads of the numerous bays and inlets opening into Port Gravina. Herring roe-on-kelp is harvested in April and June near the southern shore of the entrance to the port. Crab, shrimp, herring, halibut and salmon are the major fisheries.

Within Port Gravina are one important bird and wetland area, Hells Hole, and seven important salmon spawning grounds—Comfort Creek (ADFG 46), Beartrap River (ADFG 48), Gravina River (ADFG 50), Control Creek (ADFG 52), Olsen Bay Creek (ADFG 51), Carlsen Creek (ADFG 57), and St. Matthews Creek (ADFG 56).

Site 39. Comfort Creek (Figure 304-44): Comfort Creek (ADFG 46), a pink salmon spawning stream, is located at the head of Comfort Cove, a small, narrow inlet in the southern shore of Port Gravina. To prevent oil from affecting Comfort Creek, deploy approximately 1,000 feet of boom across the entrance to the cove.

Site 40. Beartrap River (Figure 304-45): Beartrap River (ADFG 48), a major pink and chum salmon spawning stream, drains into the head of Beartrap Bay at the upper end of Port Gravina. To prevent oil from affecting the river, deploy about 600 feet of boom across the bay at its narrowest point from the "island" north to the mainland.

Site 41. Gravina River (Figure 304-46): Gravina River (ADFG 50) empties into the head of Port Gravina forming a large tidal flat. The river is a spawning ground for pink and chum salmon. If oil reaches this area, exclusion will be difficult because of the width of the port at its head.

Deploy about 1,600 to 2,000 feet of boom in a U-shape in advance of the approaching slick. This will contain oil within the boom and prevent oil from affecting the river delta.

If this method is not feasible or does not contain oil, diversion booming should be undertaken before the slick reaches this area. The location of the anchor points will be dependent on the location of the slick and its width as it approaches the Gravina River delta.

Olsen Bay

Olsen Bay is a large inlet in the north shore of Port Gravina. Since 1954, the National Marine Fisheries Service and the Alaska Department of Fish and Game have been using this area to study the spawning and life history characteristics of the pink salmon at Olsen Creek at the head of the bay. Related studies concerning bear feeding habits have also been done. The shores of inner Olsen Bay are lined by eelgrass beds.

Site 42. Control Creek (Figure 304-47): Control Creek (ADFG 52), a major salmon spawning ground, is located on the western shore of Olsen Bay, a large inlet in the north shore of Port Gravina. To prevent oil from affecting the creek, deploy about 750 feet of boom from the small peninsula at the entrance across to the mainland.

Site 43. Olsen Bay Creek (Figure 304-48): Olsen Bay Creek (ADFG 51), a major salmon spawning ground, empties into the head of Olsen Bay forming a large tidal flat. To prevent oil from entering this area, deploy about 1,200 feet of boom across the entrance to the creek between the points where the passage narrows at the delta entrance.

Site 44. Carlsen Creek (Figure 304-49): Carlsen Creek (ADFG 57), a pink salmon spawning ground, is located on the northern shore of Port Gravina east of Saint Matthews Bay. Deploy about 1,000 feet of boom at an angle that will prevent oil from affecting the creek delta above midtide level. The location of the anchor point will be dependent on the location of the slick as it approaches the delta.

Site 45. St. Matthews Creek (Figure 304-50): St. Matthews Creek (ADFG 56), a major salmon spawning stream, empties into the head of St. Matthews Bay, a long inlet in the north shore of Port Gravina. Sea otters inhabit the waters of the bay. To protect the creek, oil should be contained before it reaches the head of the bay. Deploy about 1,600 to 2,000 feet in a U-shape in advance of the approaching slick.

Depending on the width and location of the slick within St. Matthews Bay, diversion booming may be feasible. Divert oil before it reaches St. Matthews Creek delta.

Site 46 (A and B). Hell's Hole: Hell's Hole is a series of lagoons on the north shore of the entrance to Port Gravina. The area is a marsh and is one of the larger wetlands in the southcentral region of Alaska. Hell's Hole is a major bird nesting, resting and feeding area.

Site 46A. Lagoon 1 (Figures 304-51A & 304-51B): To prevent oil from entering this lagoon, deploy about 600 feet of boom between the two spits at the outside entrance to the lagoon.

Site 46B. Lagoon 2 (Figure 304-51B & 304-51C): To prevent oil from entering this lagoon, deploy about 750 feet of boom between the two wooded spits in the entrance to the lagoon.

PORT FIDALGO (SITES 47 THROUGH 58)

Port Fidalgo is a large fjord in eastern Prince William Sound. The port was named after Salvador Fidalgo who explored the Sound for Spain in the late 1700s. Numerous abandoned copper mines can be found in the hills of Port Fidalgo.

Mountain goats and brown and black bears inhabit the area. Waterbirds and bald eagles are numerous. Humpback whales can be seen in the summer. Sea lions follow the herring into Port Fidalgo in late fall and early spring. Harbor seals and sea otters inhabit its waters. Eelgrass grows at the head of the port and numerous bays and inlets open into it. Herring, roe-on-kelp is harvested in April and June in the shallow waters near the entrance to Port Fidalgo. Clams, crab, herring and salmon are the major fisheries.

Within Port Fidalgo are fourteen important salmon spawning grounds: Irish Creek (ADFG 76), Whalen Creek (ADFG 80), Unnamed Creek 82 (ADFG 82), Keta Creek (ADFG 83), Fidalgo River (ADFG 85), Sunny River (ADFG 87), Unnamed Creek 86 (ADFG 86), Short Creek (ADFG 88), Fish Creek (ADFG 89), Unnamed Creek 90 (ADFG 90), Unnamed Creek 91 (ADFG 91), Kirkwood Creek (ADFG 93), Rock Creek (ADFG 94), and Lagoon Creek (ADFG 99).

Site 47. Irish Creek (Figure 304-52): Irish Creek (ADFG 76), a major pink salmon spawning stream, drains into the head of Irish Cove, a small inlet in the south shore of Port Fidalgo. The entrance to the cove is a herring spawning area. To prevent oil from entering this area, deploy about 800 feet of boom across the cove at the narrows inside the entrance.

Site 48. Whalen Creek (Figure 304-53): Whalen Creek (ADFG 80) is a major pink salmon spawning ground at the head of Whalen Bay, a small, narrow inlet in the south shore of Port Fidalgo. To prevent oil from reaching this area, deploy about 1,800 feet of boom across the upper end of the bay from the south shore to the small peninsula on the north shore.

Site 49. Unnamed Creek 82 (Figure 304-54): Unnamed Creek 82 (ADFG 82) is a salmon spawning stream in the southeastern arm of the head of Port Fidalgo. To prevent oil from affecting the creek delta, deploy about 1,600 to 2,000 feet of boom in a U-shape in advance of the approaching slick.

Site 50. Keta Creek (Figure 304-55): Keta Creek (ADFG 83), a major salmon spawning stream, drains into the head of Port Fidalgo, east of Fidalgo River. To prevent oil from affecting the creek delta, deploy about 1,600 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain the oil within the boom.

Site 51. Fidalgo River (Figure 304-55): Fidalgo River (ADFG 85), a salmon spawning ground, drains into the head of Port Fidalgo forming a large tidal flat. To prevent oil from affecting the river, deploy about 1,500 feet of boom from the eastern shore of the island (on the west side of delta) at an angle that will divert oil toward shore and/or away from the mouth of the river. Deploy about 300 feet of boom from the north shore of the island to the peninsula to prevent oil from entering through the small passage between them.

If this is not practical, deploy about 1,600 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain oil within the boom.

Site 52. Sunny River and Unnamed Creek 86 (Figure 304-55): Sunny River (ADFG 87) and Unnamed Creek 86 (ADFG 86) enters the northern shore of the head of Port Fidalgo forming a large tidal flat. The two streams are spawning ground for chum salmon. Harbor seals frequent this area.

To prevent oil from affecting this area, deploy about 1,600 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain the oil within the boom. If this is not feasible, actions should be taken to protect the river mouths. Deploy about 2,000 feet of boom north from the island at the mouths to the mainland and deploy about 600 feet of boom south from the island to the mainland.

Site 53. Short Creek (Figure 304-56): Short Creek (ADFG 88) is a salmon spawning stream emptying into the north shore of Port Fidalgo. To prevent oil from affecting Short Creek, deploy about 1,000 to 1,600 feet of boom from the mainland, west of creek delta, at an angle that will direct oil toward shore and away from the delta.

Fish Bay

Fish Bay is an inlet in the north shore of Port Fidalgo. Eelgrass beds and hardshell clams are found along its shore. Emptying into the bay are five salmon spawning streams—Fish Creek (ADFG 89), Unnamed Creeks 90 and 91 (ADFG 90, 91), Kirkwood Creek (ADFG 93), and Rock Creek (ADFG 94).

Site 54. Fish Creek and Unnamed Creek 90 (Figure 304-57): Fish Creek (ADFG 89), a major salmon spawning ground, empties into the head of Fish Bay forming a large delta. Unnamed Creek 90 (ADFG 90), a salmon spawning stream, empties into the head of Fish Bay just west of Fish Creek. To prevent oil from affecting this area, deploy about 1,600 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain oil within the boom.

Site 55. Unnamed Creek 91 (Figure 305-57): Unnamed Creek 91 (ADFG 91), a salmon spawning stream, drains into the northern shore of Fish Bay. Deploy about 1,500 to 1,800 feet of boom around the delta to protect the delta above midtide level. Boom should be anchored on shore and in water out from delta.

Site 56. Kirkwood Creek (Figure 304-58): Kirkwood Creek (ADFG 93), a salmon spawning stream, drains into Fish Bay. To prevent oil from affecting the creek, deploy about 1,500 of boom at an angle that will divert oil toward shore and/or away from the mainland. Anchor point should be located south of the creek delta.

Site 57. Rock Creek (Figure 304-58): Rock Creek (ADFG 94), a salmon spawning stream, empties into the west shore of the entrance to Fish Bay. To prevent oil from affecting this creek, deploy about 1,600 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain oil within the boom.

Site 58. Lagoon Creek (Figure 304-59): Lagoon Creek (ADFG 99), a major salmon spawning ground, drains into the head of Landlocked Bay forming a large tidal flat. Landlocked Bay is a large bay in the north shore of Port Fidalgo. To prevent oil from entering the head of the bay, deploy about 2,100 feet of boom across the bay from the mainland to the peninsula in the narrows. If this is not feasible due to currents, divert oil toward shore before it reaches the creek delta.

LONG BAY (SITES 59, 60 & 61)

Long Bay is a large bay in northern Prince William Sound, west of Columbia Bay. The bay is divided at its head into two long arms. Harbor seals frequent its waters.

There are five salmon producing streams within Long Bay. Salmon producing streams located within the west arm are Billy's Hole (ADFG 219) and Vanishing Creek (ADFG 216), major salmon producers, and West Long Bay Creek (ADFG 217). Salmon producing streams located within the east arm are Long Creek (ADFG 214) and East Long Bay Creek (ADFG 215).

Site 59. Entrance East Arm (Figure 304-60): To prevent oil from affecting Long Creek (ADFG 214) and East Long Bay Creek (ADFG 215) at the head of the east arm of Long Bay, oil should be contained before reaching this area. Deploy about 1,500 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain oil within the boom.

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Site 60. Billy's Hole (Figure 304-61): To prevent oil from affecting Billy's Hole (ADFG 219), a major salmon spawning ground, deploy about 300 feet of boom from the large island west to the mainland and about 300 feet of boom east to the mainland.

Site 61. Head West Arm (Figure 304-61): To prevent oil from affecting Vanishing Creek (ADFG 216) and West Long Bay Creek (ADFG 217), deploy about 1,800 feet of boom across the entrance to the head of west arm at the narrows. If this is not possible, deploy about 900 feet of boom from the large island east to the mainland and about 1,800 feet of boom from the southern end of the island west to the mainland.

EICKELBERG CREEK (SITE 62; FIGURE 304-62)

Eickelberg Creek (ADFG 221) drains into the northeast shore of the head of Eickelberg Bay. To prevent oil from affecting the creek, deploy about 1,000 feet of boom from the mainland east of the creek at an angle that will divert oil toward shore.

BACKYARD CREEK (SITE 63; FIGURE 304-63)

Backyard Creek (ADFG 224), a salmon spawning ground, empties into the east shore of Fairmount Bay. Deploy approximately 600 feet of boom across the narrows from the peninsula to the mainland.

WELLS BAY (SITES 64, 65 & 66)

Wells Bay is a bay in north Prince William Sound, west of Glacier Island. The area is a bird habitat, particularly for bald eagles and Canadian geese. Sea otters frequent its waters. Four salmon spawning streams drain into Wells Bay—Granite Creek (ADFG 227), Cedar Creek (ADFG 229), Wells River (ADFG 234), and Unnamed Creek 233 (ADFG 233).

Site 64. Granite Creek (Figure 304-63): Granite Creek (ADFG 227) is a salmon spawning stream at the head of Granite Bay, an inlet in the east shore of Wells Bay. Deploy about 600 feet of boom across the narrows in the center of the bay to prevent oil from reaching the head of the bay.

Site 65. Cedar Creek (Figure 304-64): Cedar Creek (ADFG 229) is a major salmon spawning ground at the head of Cedar Bay, a small inlet in the east shore of Wells Bay. Deploy about 200 feet of boom from the island west to the mainland and about 300 feet of boom from the island east to the mainland.

Site 66. Wells River and Unnamed Creek 233 (Figure 304-65): Wells River (ADFG 234) drains into the head of the eastern arm of Wells Bay. The river is the third largest producer of pink and chum salmon in Prince William Sound. Deploy about 2,000 to 3,000 feet of boom in a U-shape in advance of the approaching slick to contain oil within the boom.

This action will also protect Unnamed Creek 233 (ADFG 233), a salmon spawning ground at the head of Wells Bay, south of Wells River.

UNAKWIK INLET (SITES 67 THROUGH 70)

Unakwik Inlet is a long, narrow fjord in north Prince William Sound. The inlet is inhabited by numerous wildlife species: clams, crabs, shrimp, salmon, sea otters and harbor seals. The inlet is a bird concentration area, particularly Kittlitz's murrelets. Icebergs are numerous in its waters. The northeast shore near Miner's Lake was the epicenter for the 1964 Alaska earthquake.

Important salmon spawning grounds within Unakwik Inlet are Cannery Creek (ADFG 241), Jonah Creek (ADFG 259), Siwash River (ADFG 264), and Unakwik Creek (ADFG 265).

Site 67. Cannery Creek (Figure 304-66): Cannery Creek (ADFG 241) is a major salmon spawning stream on the eastern shore of Unakwik Inlet. To prevent oil from affecting the creek, deploy about 1,500 feet of boom from the mainland south of the stream delta but north of the small island at an angle that will direct the oil toward shore.

The Alaska Department of Fish and Game's Cannery Creek Hatchery is located in Unakwik Inlet across from Jonah Bay on the eastern side of the inlet. The hatchery raises pink salmon primarily, with a small population of chum salmon. The fry are released to open salt water in April and May. Adult salmon return in July and August.

Although it would require unique wind and current conditions to move oil into Unakwik Inlet, the hatchery could be protected by deflective booming. During April or May, diversion booming near the mouth of Unakwik Inlet would probably be most effective.

Site 68. Jonah Creek (Figure 304-67): Jonah Creek (ADFG 259) is a major salmon spawning stream that empties into the head of Jonah Bay on the west shore of Unakwik Inlet. At the entrance to the bay, deploy about 300 feet of boom west from the small island to the mainland and about 900 feet of boom east from the small island to the mainland.

Site 69. Siwash River (Figure 304-68): Siwash River (ADFG 264) is a major salmon spawning stream at the head of Siwash Bay in the western shore of Unakwik Inlet. To prevent oil from affecting the river, oil should be diverted toward shore. Deploy about 1,000 feet of boom across the entrance to the bay from two locations—the small peninsulas on the north and south shore.

Icebergs are present in this area and should be avoided.

Site 70. Unakwik Creek (Figure 304-68): Unakwik Creek (ADFG 265) enters the western shore of Unakwik Inlet just south of the entrance to Siwash Bay. Deploy about 900 feet of boom across the entrance to the small inlet into which the creek drains from the peninsula north to the mainland.

EAGLEK BAY (SITES 71, 72 & 73)

Eaglek Bay is a bay in north Prince William Sound, west of Unakwik Inlet. Harbor seals frequent its waters.

There are three important spawning streams in Eaglek Bay—Blackbear Creek (ADFG 276), Canyon Creek (ADFG 279), and Eaglek River (ADFG 282).

Site 71. Blackbear Creek (Figure 304-69): Blackbear Creek (ADFG 276) is a salmon spawning stream draining into the eastern shore of Eaglek Bay. Deploy about 900 feet of boom across the entrance to the delta area.

Site 72. Canyon Creek (Figure 304-70): Canyon Creek (ADFG 279) is a salmon spawning stream at the head of Eaglek Bay. Deploy about 300 feet of boom from the island north to the mainland and about 300 feet of boom south from the island to the mainland.

Site 73. Eaglek River (Figure 304-70): Eaglek River (ADFG 282) is a salmon spawning stream at the head of Eaglek Bay. Deploy about 1,500 feet of boom from the mainland south of the delta at an angle that will direct oil toward shore.

Site 73a. Eaglek Bay (Figure 304-70a): The Prince William Sound Aquaculture Hatchery Association's Cascade Falls Hatchery is located in northwest Prince William Sound in Eaglek Bay. This hatchery will be developed over the next several years and anticipates having fish in the water in 1990. The hatchery plans to raise salmon very similar to the Esther Lake Hatchery. Fry, juvenile fish or returning adult salmon are expected to be in the hatchery tidewater area from mid-March through early October. Juvenile salmon are held in rearing ponds from mid-September and released in late June.

This hatchery will be a considerable distance from the tanker traffic lane. However, should an oil spill threaten the hatchery, the holding areas would be boomed to protect the ponds. Boom could also be deployed to divert oil away from the hatchery area.

ESTHER PASSAGE (SITES 74 & 75)

Esther Passage is a narrow passage between Esther Island and the mainland in northwest Prince William Sound. Because the waters are protected, the passage is used by recreational boaters for hunting black bear, salmon fishing, camping and sightseeing.

Two important salmon spawning grounds empty into the east shore of the passage—Esther Passage Lake (ADFG 300) and Triple Creek (ADFG 303).

Site 74. Esther Passage Lake (Figure 304-71): Esther Passage Lake (ADFG 300) is located on the eastern shore of Esther Passage and is a major producer of sockeye salmon. To protect this area, deploy about 300 feet of boom across the mouth of the drainage channel from the lake.

Site 75. Triple Creek (Figure 304-72): Triple Creek (ADFG 303) is a pink salmon producing stream on the eastern shore of Esther Passage, north of Esther Passage Lake. The creek forms a large delta as it empties into a small inlet in the passage. To protect the creek delta, deploy about 1,500 to 1,800 feet of boom around the delta to protect the delta above the midtide level. Boom should be anchored on shore and in water out from the delta.

Site 75a. Esther Island (Figure 304-72a): The Prince William Sound Aquaculture Hatchery Association's Esther Lake Hatchery is located on salt water at a tail end of Esther Lake near Wells Passage. Five species of Pacific salmon are raised at this hatchery. Fry, juvenile fish or returning adult salmon are in the hatchery tidewater area from mid-March through early October. Juvenile salmon are held in rearing ponds from mid-September and released in late June.

This hatchery is a considerable distance from the tanker traffic lane. However, if an oil spill is threatening this hatchery, the holding areas would be boomed to protect the ponds. Boom could also be deployed at the small inlet to divert oil away from the hatchery area.

COGHILL RIVER AND LAKE (SITE 76; FIGURE 304-73)

The Coghill River and Lake system is located on the eastern shore of College Fjord north of Port Wells and is the second largest producer of commercially fished pink and chum salmon and a large producer of sockeye salmon. The area has a large concentration of black bear.

If an oil spill occurs from tanker traffic in the tanker route, it is highly unlikely that oil will reach this area. If oil is approaching this area, actions should be taken that will prevent oil from affecting the tidal flat at the mouth of the river. The tidal flat area is extensive and will require protection by containing oil on open water before it reaches this area.

PORT WELLS (SITES 77 THROUGH 82)

Port Wells is a long fjord in northwest Prince William Sound, west of Esther Island. Its waters are inhabited by numerous wildlife species: crab, shrimp, harbor seals and birds. There are six important salmon spawning grounds within Port Wells—Lagoon Creek (ADFG 414), Mill Creek (ADFG 421), Hummer Creek (ADFG 425), Pirate Cove Creek (ADFG 428), Meacham Creek (ADFG 430), and Swanson Creek (ADFG 432).

If an oil spill occurs from tanker traffic in the tanker route, it is highly unlikely that oil will reach Port Wells.

Site 77. Lagoon Creek (Figure 304-74): Lagoon Creek (ADFG 414) is a salmon spawning ground at the head of Harrison Lagoon in the west shore of Port Wells. To prevent oil from reaching this stream, deploy about 600 feet of boom across the entrance to the lagoon.

Site 78. Mill Creek (Figure 304-75): Mill Creek (ADFG 421) is a major salmon spawning stream at the southwestern end of the head of Bettles Bay, an inlet in the west shore of Port Wells. The mouth of Mill Creek is a large tidal flat. Oil should be contained on open water, or diverted away from the tidal flat, before it reaches this area.

Site 79. Hummer Creek (Figure 304-76): Hummer Creek (ADFG 425) is a salmon spawning ground at the head of Hummer Bay, an inlet in the west shore of Port Wells. The mouth of Hummer Creek is a large tidal flat. Oil should be contained on open water, or diverted away from the tidal flat, before it reaches this area.

Site 80. Pirate Cove Creek (Figure 304-77): Pirate Cove Creek (ADFG 428) is a salmon spawning ground at the head of Pirate Cove, a small inlet in the western shore of Port Wells. Deploy about 300 feet of boom from the small peninsula on the north shore south to the mainland to protect this area.

Site 81. Meacham Creek (Figure 304-78): Meacham Creek (ADFG 430) is a salmon spawning ground at the northwestern end of the head of Pigot Bay, an inlet in the west shore of Port Wells. To protect the mouth of this creek, oil should be contained on open water, or diverted, before reaching this area.

Site 82. Swanson Creek (Figure 304-78): Swanson Creek (ADFG 432) is a major salmon producing stream at the southwestern end of the head of Pigot Bay, an inlet in the west shore of Port Wells. Deploy about 600 feet of boom from the peninsula at the entrance north to the island and about 150 feet of boom west from the island to the mainland.

LOGGING CAMP CREEK (SITE 83; FIGURE 304-79)

Logging Camp Creek (ADFG 435) is a salmon spawning ground at the head of Logging Camp Bay, a small inlet in the north shore of Passage Canal. To protect Logging Camp Creek, deploy about 900 feet of boom across the entrance to the bay.

TEBENKOFF CREEK AND BLACKSTONE CREEK (SITE 84; FIGURE 304-80)

Tebenkoff Creek (ADFG 450) and Blackstone Creek (ADFG 451) are salmon spawning grounds in the south shore of the entrance to Blackstone Bay. Oil should be contained on open water before reaching the stream mouths. If this is not feasible, exclusion actions should be taken at the stream mouths to protect the deltas above midtide level.

COCHRANE BAY (SITES 85 THROUGH 89)

Cochrane Bay is a large bay south of Port Wells in northwestern Prince William Sound. Harbor seals frequent its waters. Within the bay are located five important salmon spawning streams—Halferty Creek (ADFG 454), Paulson Creek (ADFG 455), Parks Creek (ADFG 458), Cochrane Creek (ADFG 461), and Wickett Creek (ADFG 469).

Site 85. Halferty Creek (Figure 304-81): Halferty Creek (ADFG 454) is a salmon spawning stream in the western shore of Cochrane Bay. To protect this area, deploy about 900 feet of boom across the entrance to the inlet into which the creek drains.

Site 86. Paulson Creek (Figure 304-81): Paulson Creek (ADFG 455) is a major salmon spawning stream in the western shore of Cochrane Bay. To protect this area, deploy about 600 feet of boom across the entrance to the small inlet into which the creek drains.

Site 87. Parks Creek (Figure 304-82): Parks Creek (ADFG 458) is a major salmon spawning ground in the west shore of Cochrane Bay. Oil should be diverted before it reaches this area. Deploy about 1,500 feet of boom from two locations—the north and the south shore of the entrance to the creek—at an angle that will direct oil toward shore and/or away from the creek.

If this is not feasible, contain oil on open water before it reaches the area.

Site 88. Cochrane Creek (Figure 304-83): Cochrane Creek (ADFG 461) is a salmon spawning stream at the head of Cochrane Bay. To protect this area, deploy about 1,800 feet of boom across the head of the bay at its narrowing. If this is not feasible, oil should be diverted away from the head of the bay, or contained on open water, before it reaches the area.

Site 89. Wickett Creek (Figure 304-84): Wickett Creek (ADFG 469) is a salmon spawning stream in the eastern shore of Cochrane Bay. Deploy about 300 feet of boom across the inlet into which the creek drains. Boom should be deployed from the small peninsula inside the inlet on the north shore across to the south shore.

CULROSS PASSAGE (SITES 90 & 91)

Culross Passage is a long, narrow passage between Culross Island and the mainland. The passage heads south from the Port Wells area and enters Port Nellie Juan. The passage is a bird concentration area. There are two important salmon spawning streams draining into the passage—Shrode Creek (ADFG 476) and Culross Creek (ADFG 479).

Site 90. Shrode Creek (Figure 304-85): Shrode Creek (ADFG 476) is the number one pink salmon producing stream in Prince William Sound. Shrode Creek is located at the head of Long Bay in the western shore of Culross Passage. Deploy about 300 feet of boom across the narrows at the entrance to the upper bay.

Site 91. Culross Creek (Figure 304-86): Culross Creek (ADFG 479) is a salmon spawning ground in the western coast of Culross Passage. To protect this creek, deploy about 300 feet of boom across the entrance to the delta.

PORT NELLIE JUAN (SITES 92 THROUGH 96)

Port Nellie Juan is a large fjord in western Prince William Sound south of Culross Island. Harbor seals inhabit its waters. There is herring fishing near East Finger Inlet within the Port. Five important salmon spawning grounds are located within the Port—Mink Creek (ADFG 480), East Finger Creek (ADFG 484), West Finger Creek (ADFG 485), Chimensky Lagoon (ADFG 495), and McClure Creek (ADFG 498).

Site 92. Mink Creek (Figure 304-87): Mink Creek (ADFG 480) is a salmon spawning stream in the west shore of Port Nellie Juan. To protect this area, deploy about 600 feet of boom from the small island south to the mainland and about 450 feet of boom north to the mainland.

Site 93. East Finger Creek (Figure 304-88): East Finger Creek (ADFG 484) is a salmon spawning stream at the head of East Finger Inlet, a small inlet in the north shore of Port Nellie Juan east of Kings Bay. Deploy about 1,200 feet of boom across the inlet at its narrowing.

Site 94. West Finger Creek (Figure 304-89): West Finger Creek (ADFG 485) is a major salmon spawning stream located at the head of West Finger Inlet, a small inlet in the north shore of Port Nellie Juan east of King's Bay. Deploy about 1,500 feet of boom from the peninsula on the east shore of the entrance at an angle that will direct oil toward shore. If this is not feasible, it may be possible to enclose the inlet at its narrowing by deploying about 1,200 feet of boom across the inlet.

Site 95. Chimensky Lagoon (Figure 304-90): Chimensky Lagoon (ADFG 495) is a major salmon spawning ground at the head of the western arm of McClure Bay. Deploy about 1,000 feet of boom across the entrance to the western arm between the two small peninsulas. If this is not feasible, deploy about 300 feet of boom across the narrow entrance to the lagoon.

Site 96. McClure Creek (Figure 304-90): McClure Creek (ADFG 498) is a salmon spawning stream at the head of the eastern arm of McClure Bay.

Deploy about 1,500 feet of boom across the entrance to the eastern arm. If this is not feasible, deploy about 600 feet of boom across the central arm at its narrowing.

Site 96a. Main Bay (Figure 304-90a): The Alaska Department of Fish and Game's Main Bay Hatchery is located in western Prince William Sound between Port Nellie Juan and Knight Island Passage. The hatchery primarily raises chum salmon with a small pink salmon population. It has one holding pond and expects to increase the holding area to 5-10 acres in the future. The facility may also develop a deep (75') small quantity (100 gpm) salt water intake in the future. The salmon are placed in the holding ponds in early April and held through May. The adult salmon return in July and August.

This hatchery is a considerable distance from the tanker traffic lane. However, should oil threaten the holding ponds during April or May, the ponds would be protectively boomed. Diversion booming at or near the mouth of the bay may also be helpful to divert oil from the facility.

ESHAMY LAGOON (SITE 97; FIGURE 304-91)

Eshamy Lagoon is a major salmon spawning area in Eshamy Bay in the west shore of Knight Passage in western Prince William Sound. Whales frequent its waters. Within Eshamy Lagoon are three major salmon spawning streams and one salmon spawning lake—Self Creek (ADFG 508), Eshamy River (ADFG 511), Ellshansky Creek (ADFG 510), and Eshamy Lake. Eshamy River and Lake are the largest producer of sockeye salmon in Prince William Sound.

To exclude oil from this area, deploy about 800 feet of boom across the entrance to Eshamy Lagoon.

DANGEROUS PASSAGE (SITES 98 THROUGH 104)

Dangerous Passage is a long, narrow passage between Chenaga Island and the mainland. Harbor seals frequent its waters. Within Dangerous Passage are ten important salmon spawning grounds—Paddy Creek (ADFG 601), Ewan Creek (ADFG 603), Erb Creek (ADFG 694), Unnamed Creek 620 (ADFG 620), Totemoff Creek (ADFG 621), Brigaloff Creek (ADFG 623), Jackpot Lakes Creek (ADFG 608), Kompkoff Creek (ADFG 610), Jackpot Bay Creek (ADFG 611), and Jackpot Creek (ADFG 613).

Site 98. Paddy Creek (Figure 304-92): Paddy Creek (ADFG 601), a salmon spawning stream, empties into the head of the east arm of Paddy Bay, a bay in the north shore of Dangerous Passage. To protect Paddy Creek, deploy about 400 feet of boom across the entrance to the narrow inlet into which the creek drains.

Site 99. Erb Creek (Figure 304-93): Erb Creek (ADFG 604), a major salmon spawning ground, empties into the western shore of Ewan Bay in the north coast of Dangerous Passage. To protect Erb Creek, deploy about 1,000 feet of boom from the peninsula at the mouth of the stream west to the mainland and about 750 feet of boom from the peninsula east to the mainland.

Site 100. Ewan Creek (Figure 304-93): Ewan Creek (ADFG 603), a major salmon spawning stream, empties into the head of Ewan Bay on the north shore of Dangerous Passage. To protect Ewan Creek, deploy about 400 feet of boom at the narrow entrance between the two peninsulas at the head of the bay.

Site 101. Unnamed Creek 620 (Figure 304-94): Unnamed Creek 620 (ADFG 620) is a salmon spawning stream on Chenega Island emptying into the south shore of Dangerous Passage. To protect this creek above midtide level, deploy about 500 feet of boom across the small cove into which the creek drains.

Site 102. Totemoff Creek (Figure 304-94): Totemoff Creek (ADFG 621), a major salmon spawning stream on Chenega Island, empties into the south shore of Dangerous Passage. Deploy about 500 feet of boom across the entrance to the creek mouth to prevent oil from affecting the delta above midtide level.

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Site 103. Brigaloff Creek (Figure 304-94): Brigaloff Creek (ADFG 623), a salmon spawning ground on Chenega Island, empties into the south shore of Dangerous Passage. To protect this area, deploy about 400 feet of boom across the entrance of the inlet into which the creek drains.

Site 104. Jackpot Bay (Figure 304-95): Jackpot Bay is a bay in the north shore of Dangerous Passage. Within the bay are four important salmon spawning grounds—Jackpot Lakes Creek (ADFG 608), Kompkoff Creek (ADFG 610), Jackpot Bay Creek (ADFG 611), and Jackpot Creek (ADFG 613). To protect this area, deploy about 1,100 feet of boom across the narrow entrance to the head of Jackpot Bay.

WHALE BAY (SITES 105, 106, 107 & 108)

Whale Bay is a large bay in southwestern Prince William Sound, southwest of Chenega Island. Harbor seals frequent its waters. Four important salmon spawning streams empty into Whale Bay—Claw Creek (ADFG 632), Pablo Creek (ADFG 633), Unnamed Creek 634 (ADFG 634), and Whale Creek (ADFG 636).

Icebergs often obstruct the entrance to Whale Bay.

Site 105. Claw Creek (Figure 304-96): Claw Creek (ADFG 632), a salmon spawning stream, empties into Whale Bay, a bay southwest of Chenega Island. To protect the creek delta above midtide level, deploy about 900 feet of boom from the wooded island west to the mainland and about 200 feet of boom east to the mainland.

Site 106. Pablo Creek (Figure 304-97): Unnamed Creek 634 (ADFG 634), a salmon spawning ground, drains into the head of the south arm of Whale Bay, a bay southwest of Chenega Island. To protect this area, deploy about 1,500 feet of boom from the mainland north of the creek delta at an angle that will direct oil toward shore and away from delta.

Site 107. Unnamed Creek 634 (Figure 304-97): Unnamed Creek 634 (ADFG 634), a salmon spawning ground, drains into the head of the south arm of Whale Bay, a bay southwest of Chenega Island. To protect this creek, deploy about 750 feet of boom from the small peninsula at the creek mouth north to the mainland to protect the delta above midtide level.

Site 108. Whale Creek (Figure 304-98): Whale Creek (ADFG 636), a salmon spawning ground, empties from the east shore of the south arm of Whale Bay, a bay southwest of Chenega Island. To protect this area, deploy about 1,000 feet of boom across the entrance to the small inlet into which the creek drains.

BAINBRIDGE PASSAGE (SITE 109)

Bainbridge Passage is a long, narrow passage in southwestern Prince William Sound between Bainbridge Island and the mainland. The passage leads from Knight Passage into Port Bainbridge. Within Bainbridge Passage are two important salmon spawning grounds Johnson Creek (ADFG 655) and Halverson Creek (ADFG 656).

Site 109. Johnson Creek and Halverson Creek (Figure 304-99): Johnson Creek (ADFG 655) and Halverson Creek (ADFG 656) are salmon spawning streams that empty into the head of an unnamed bay in the north shore of Bainbridge Island. To prevent oil from affecting these creeks, oil should be contained on open water before reaching the area. If this is not feasible, enclosure booming should be undertaken at the entrance to the inlet into which each creek drains.

EAST EVANS ISLAND (SITES 110 & 111)

Evans Island lies east of Bainbridge Island in the southwestern corner of Prince William Sound. Sawmill Bay on the east shore of Evans Island is the site of numerous abandoned canneries and the Prince William Sound Aquaculture Corporation. Two important salmon spawning streams are found on the east shore of Evans Island--Bjorne Creek (ADFG 665) and O'Brien Creek (ADFG 666).

Site 110. Bjorne Creek (Figure 304-100): Bjorne Creek (ADFG 665), a salmon spawning stream, empties into a small cove on the east shore of Evans Island. To protect this area, deploy about 1,500 feet of boom from the peninsula north to the mainland to protect the delta above midtide level.

Site 111. O'Brien Creek (Figure 304-101): O'Brien Creek (ADFG 666), a major pink salmon spawning ground, empties into the head of Crab Bay, a small bay within Sawmill Bay on the east coast of Evans Island. To protect this creek, deploy about 1,000 feet of boom from the small peninsula at the entrance to the inlet into which the creek drains west to the mainland.

Site 111a. San Juan (Figure 304-101a): The Prince William Sound Aquaculture Hatchery Association's San Juan Hatchery is located on Evans Island in Southwest Prince William Sound. It is located on salt water in Sawmill Bay. This is primarily a pink salmon hatchery with a small population of chum salmon. Young salmon are in the hatchery tidewater area from mid-March to the first of June and mid-July to the first of September.

It is highly unlikely any oil from the tanker traffic lane would impact this hatchery. However, if oil threatens the hatchery, the holding areas would be boomed to protect the ponds. Diversion booming may also help protect the hatchery facilities.

WEST LATOUCHE ISLAND (SITES 112 THROUGH 116)

Latouche Island lies west of Montague Island in the southwestern corner of Prince William Sound. Harbor seals and sea otters frequent the waters off the west shore. Herring fishing occurs off the northern end of the island. Located on the west shore of the island are six important salmon spawning grounds—Hayden Creek (ADFG 677), Horseshoe Creek (ADFG 676), Falls Creek (ADFG 673), Latouche Island Creek (ADFG 674), Big Bay (ADFG 672), and Montgomery Creek (ADFG 670).

Site 112. Hayden Creek (Figure 304-102): Hayden Creek (ADFG 677), a salmon spawning ground, empties into a small inlet in the west shore of Latouche Island. To protect this stream, deploy about 750 feet of boom across the entrance to the small inlet.

Site 113. Horseshoe Creek (Figure 304-102): Horseshoe Creek (ADFG 676), a salmon spawning ground, empties into Horseshoe Bay on the west shore of Latouche Island. To protect this area, deploy about 1,500 feet of boom across the entrance to Horseshoe Bay.

Site 114. Falls Creek and Latouche Island Creek (Figure 304-103): Falls Creek (ADFG 673), a major salmon spawning stream, drains from the west shore of Latouche Island into Latouche Passage. Latouche Island Creek (ADFG 674) empties into Latouche Passage north of Falls Creek. The deltas of the two creeks merge during ebb tide. To protect this area, deploy about 1,500 to 2,000 feet of boom in a U-shape in advance of the approaching slick. This will contain oil within the boom and prevent oil from affecting the creek deltas.

Site 115. Big Bay (Figure 304-103): Big Bay (ADFG 672), a salmon spawning stream, drains into a small lagoon on the west shore of Latouche Island. Deploy about 1,200 feet of boom around the delta to protect the delta above midtide level. Boom should be anchored on shore and in water out from delta.

Site 116. Montgomery Creek (Figure 304-104): Montgomery Creek (ADFG 670), a salmon spawning ground, drains into a lagoon on the west shore of Latouche Island. To protect the creek delta, deploy about 1,500 feet of boom from the mainland north of the creek delta at an angle that will direct oil away from the delta and toward shore.

GREEN CREEK (SITE 117; FIGURE 304-105)

Green Creek (ADFG 788) is a major pink salmon spawning ground on the west coast of Green Island, north of Gibbon Anchorage. The northwestern shores of Green Island are herring spawning grounds. Sea otters and harbor seals inhabit the waters around the smaller island along its coast. Green Island is a bird concentration area.

To protect Green Creek, deploy about 1,500 feet of boom from shore at an angle that will direct the oil toward shore. Location of the anchor point will be dependent on the location of the slick as it approaches Green Creek.

WEST MONTAGUE ISLAND (SITES 118 THROUGH 136)

Stockdale Harbor

Stockdale Harbor is located in the northwest shore of Montague Island. Harbor seals and sea otter frequent its waters. Eelgrass beds line its shores. Herring spawn along the shores of the harbor and its small islands. Four salmon spawning grounds are located within the Stockdale Harbor—Dry Creek (ADFG 754), Unnamed Creek 753 (ADFG 753), Stockdale Creek (ADFG 752), and Unnamed Creek 751 (ADFG 751).

Site 118. Dry Creek (Figure 304-106): Dry Creek (ADFG 754), a salmon spawning stream, empties into a small inlet in Stockdale Harbor. To protect this area, deploy about 400 feet of boom across the entrance to the inlet into which the creek drains.

Site 119. Unnamed Creek 753 (Figure 304-106): Unnamed Creek (ADFG 753) is a salmon spawning ground in Stockdale Harbor. To protect this stream delta above midtide level, deploy about 1,100 feet of boom around the delta. Boom should be anchored on shore and in the water out from the delta.

Site 120. Stockdale Creek (Figure 304-16): Stockdale Creek (ADFG 752) is a salmon spawning ground in Stockdale Harbor. To protect this stream delta above midtide level, deploy about 1,100 feet of boom around the delta. Boom should be anchored on shore and in the water out from the delta.

Site 121. Unnamed Creek 751 (Figure 304-106): Unnamed Creek 751 (ADFG 751) is a salmon spawning ground in Stockdale Harbor. To protect this stream delta above midtide level, deploy about 1,100 feet of boom around the delta. Boom should be anchored on shore and in the water out from the delta.

Port Chalmers

Port Chalmers is a number of small inlets and coves in the west coast of Montague Island south of Stockdale Harbor. Herring spawn in the shallow waters near Shad Creek. Sea otters and harbor seals frequent its waters. Hardshell clams can be found from Cabin Creek south to Wilby Creek. Within Port Chalmers are ten important salmon spawning streams—Unnamed Creek 750 (ADFG 750), Shad Creek (ADFG 749), Unnamed Creek 748 (ADFG 748), Cabin Creek complex (ADFG 747, 747-1, 747-2), Schumann Creek (ADFG 746), Wild Creek (ADFG 745), Wilby Creek (ADFG 744), and Chalmers River (ADFG 741).

Site 122. Unnamed Creek 750 and Shad Creek (Figure 304-107): Unnamed Creek 750 (ADFG 750) and Shad Creek (ADFG 749) are important salmon spawning grounds in Port Chalmers on the west coast of Montague Island. The deltas of these two creeks merge during low tide. To prevent oil from affecting this area, deploy about 1,800 feet of boom around the delta area to protect it above midtide level. Boom should be anchored on shore and in water out from the delta.

Site 123. Unnamed Creek 748 (Figure 304-107): Unnamed Creek 748 (ADFG 748), a salmon spawning stream, empties into a small inlet in Port Chalmers. To protect this area, deploy about 1,000 feet of boom across the inlet at the narrowing near the delta.

Site 124. Cabin Creek complex (Figure 304-107): The Cabin Creek complex is a major salmon spawning area. The complex is a number of streams that have a common outlet into Port Chalmers—Cabin Creek (ADFG 747), Unnamed Stream 747-1 (ADFG 747-1), and Unnamed Stream 747-2 (ADFG 747-2). To protect this area, deploy about 750 feet of boom across the entrance to the inlet into which the complex drains.

Site 125. Schumann Creek (Figure 304-107): Schumann Creek (ADFG 746), a salmon spawning stream, empties into a small inlet in Port Chalmers on the west shore of Montague Island. Deploy about 1,500 feet of boom across the entrance of the inlet from the peninsula on the south shore north to the mainland to prevent oil from affecting the delta above midtide level.

Site 126. Wild Creek (Figure 304-107): Wild Creek (ADFG 745) is a salmon spawning stream draining into a small inlet in Port Chalmers. Deploy about 1,800 feet of boom from the peninsula on the north shore to the peninsula on the south shore to prevent oil from affecting the delta above midtide level.

Site 127. Wilby Creek (Figure 304-107): Wilby Creek (ADFG 744) is a salmon spawning stream draining into Port Chalmers on the west shore of Montague Island. To protect this creek, deploy about 1,800 feet of boom around the delta, which will protect the delta above midtide level. Boom should be anchored on shore and in water out from delta.

Site 128. Chalmers River (Figure 304-108): Chalmers River (ADFG 741), a major salmon spawning ground, forms a large delta as it empties into Port Chalmers on the west coast of Montague Island. To protect this river delta, oil should be contained on open water before reaching the area. Deploy about 1,500 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain the oil within the boom. If this is not practical, oil should be diverted to shore and/or away from the delta before it reaches the Chalmers River delta.

Midwest Montague Island

Site 129. Kelez Creek (Figure 304-109): Kelez Creek (ADFG 740), a salmon spawning stream, drains from a small lagoon that empties during low tide on the west coast of Montague Island, south of Port Chalmers. To protect this stream, deploy about 2,500 feet of boom around the delta, which will protect the delta above midtide level. Boom should be anchored on shore and in water out from the delta.

Site 130. Swamp Creek (Figure 304-109): Swamp Creek (ADFG 739), a major salmon spawning stream, drains from a small lagoon on the west coast of Montague Island, south of Port Chalmers. To protect this stream, deploy about 2,500 feet of boom around the delta, which will protect the delta above midtide level. Boom should be anchored on shore and in water out from the delta.

Site 131. Unnamed Creek 735 (Figure 304-110): Unnamed Creek 735 (ADFG 735), a salmon spawning ground, flows from a small lake on the west shore of Montague Island. To protect this stream, deploy about 1,500 feet of boom around the delta, which will protect the delta above midtide level. Boom should be anchored on shore and in water out from the delta.

Site 132. Unnamed Creek 719 (Figure 304-111): Unnamed Creek 719 (ADFG 719), a salmon spawning stream, drains from the west coast of Montague Island. To protect this stream, deploy about 2,500 feet of boom around the delta, which will protect the delta above midtide level. Boom should be anchored on shore and in water out from the delta.

Site 133. Unnamed Creek 717 (Figure 304-111): Unnamed Creek 717 (ADFG 717), a salmon spawning stream, drains from the west coast of Montague Island. To protect this stream, deploy about 2,500 feet of boom around the delta, which will protect the delta above midtide level. Boom should be anchored on shore and in water out from the delta.

Site 134. Quadra Creek (Figure 304-112): Quadra Creek (ADFG 711) is a salmon spawning ground at the head of Hanning Bay in the west coast of Montague Island. Sea otters frequent the waters of the bay. To protect this stream, oil should be contained on open water before it reaches this area. Deploy about 1,500 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain oil within the boom.

MacLeod Harbor

Site 135. MacLeod Creek (Figure 304-113): MacLeod Creek (ADFG 707) is a salmon spawning ground at the head of MacLeod Harbor in the west shore of Montague Island. Sea otters frequent the waters of the harbor. MacLeod Creek, together with numerous other streams, forms a large tidal flat. To protect this area, oil should be contained on open water before it reaches this area. Deploy about 1,500 to 2,000 feet of boom in a U-shape in advance of the approaching slick to contain oil within the boom.

Site 136. Trap Creek (Figure 304-114): Trap Creek (ADFG 701), a salmon spawning stream, empties into a lagoon on the south shore of the entrance to MacLeod Harbor. Sea otters frequent the waters of the harbor. To protect Trap Creek, deploy about 1,500 feet of boom around the delta, which will protect the delta above midtide level. Boom should be anchored on shore and in water out from the delta.

Prince William Sound Tanker Casualty: Spill Amount 200,000 Barrels

Alyeska Pipeline Service Company has been requested to respond to a scenario of a 200,000-barrel spill in Prince William Sound. APSC believes it is highly unlikely a spill of this magnitude would occur. Catastrophic events of this nature are further reduced because the majority of tankers calling on Port Valdez are of American registry and all of these are piloted by licensed masters or pilots. Nonetheless, should such an incident occur, the following is our overview of the initial response to that scenario. Attached is an oil spill trajectory of the oil movement. A spill of this magnitude would require considerable resources and logistical operations, the minute details of which are not included in this scenario because the details are not useful in long-term response planning. This scenario will not address the circumstances responsible for the loss of cargo or of the fate of the tanker. Once a tanker is immobilized, the U.S. Coast Guard will determine future movement of the vessel.

Assumptions

The following assumptions are made in presenting the response to the scenario: The sea state and weather conditions are in and remain in a state conducive to oil containment and cleanup. For example, winds less than 15 knots, sea state less than 5 feet, currents less than 1.6 knots, waves less than 2 feet, visibility equal to or greater than 2 miles.

The spill incident occurs through some failure of the tanker crude tanks and does not discuss other disaster possibilities such as collision or fire.

Conditions

In addition to the above assumptions on sea state, the weather is assumed to be conducive to oil spill cleanup and remains in this mode for the response actions. For this particular scenario and trajectory input, the date of June 22 at 6:00 a.m. was chosen for the spill incident with winds from the east at 5 knots. The location is 60° 30' 5" North, and 147° 2' 0" West longitude. The tanker has a cargo amount of 550,000 barrels. The trajectories show two possibilities—one is an instantaneous spill of 200,000 barrels and a second is a 10,000 barrel per hour spill that continues for 20 hours. Figure 306-6 shows the trajectory oil spill movement. It is approximately 30 miles to the site from the Valdez Terminal; an average speed of 12 knots is used to determine the travel time to the area for the Crowley tugs. An approximate speed of 8 knots is used for towed equipment and 20 knots for the workboats without tows. Figure 306-4 is a summary of equipment capacity and response times. Figure 306-5 is a table of equipment in the first response effort.

Immediate Response Actions

On notification of the pollution incident, the following response actions would be simultaneously initiated. The closest empty or light loaded tanker will be directed to the spill site with an estimated maximum arrival time of 12 hours. The initial response would include moving containment booms, skimmer equipment, support equipment and personnel to the site. Additional backup personnel and equipment from the pump stations along the line would be mobilized. Private commercial vessels from the Valdez small boat harbor would be employed to assist in booming and logistical support. Aircraft in Valdez would be employed to assist in the response with overflights, communication or logistics. This would immediately be backed up with air support from our eleven on-call flight services contractors. APSC would request U.S. Coast Guard Pacific Strike Team assistance through the Valdez U.S. Coast Guard office. In addition, all oil spill contractors in the state of Alaska would be asked to mobilize and move to the site as soon as possible to respond to the spill. Also, a request to the local cooperatives, CIRO and Alaska Clean Seas, would be made for any additional equipment that they could supply to this area. See Figure 607-1 for a summary of air transport response times and Figure 607-2 for vessel response times. A request would be made to the Association of Petroleum Industry Co-op Managers to respond with available equipment and personnel that can be located in the West Coast area. The International Bird Rescue Research Organization would be immediately requested to mobilize and prepare for movement to Prince William Sound. A request would be made immediately to the OSC to apply dispersants to the oil slicks. Biegert Aviation and other dispersant contractors would be requested to mobilize in Valdez and be prepared to apply dispersants. A request to open-burn slicks on the ocean and debris and oil on the shoreline would also be made immediately to the OSC.

to open-burn slicks on the ocean and debris and oil on the shoreline would also be made immediately to the OSC.

It is expected the agencies response actions would include the following: The regional response team would be immediately mobilized. The decision process on dispersant application would be begun immediately. There would be a joint meeting between the U.S. Coast Guard, EPA, Alyeska, Alaska Department of Environmental Conservation, U.S. Fish and Wildlife Service and possibly other government entities, to keep all affected parties apprised of the situation and, hopefully, to facilitate the decision making on the response alternatives.

As a result of the initial coordination meeting, it was decided certain response priorities would have to be made as this would be a long-term impact and cleanup situation.

The trajectories indicate that oil will threaten Eleanor Island, Naked Island, Lone Island, Perry Island and the Pigot Bay area, Culross Island and the Main Bay area shorelines. Although it is unlikely oil will reach Main Bay, as a precaution the fish hatchery will be boomed immediately. Some of the exclusion area numbers 79 through 92 may be impacted by the oil movement. The first areas of consideration would likely be exclusion areas 81, 82 and 83.

Second considerations would include areas 79, 80, 89, 90, 91 & 92, and third consideration would likely be sites 84 through 88. These sites are considered sensitive, primarily because they are salmon spawning areas. Additional sites or other areas may have a higher priority, depending on the oil movement and other additional information that may become available. The oil spill trajectory indicates the above priorities are likely to be the most significant. This information is listed in Section 300. One of the oil spill response contractors would be directed to Whittier with the sole task of providing exclusion booming in these areas with the above-listed priority, unless other priorities were agreed to among the agencies and Alyeska at the coordination meeting.

300

PRINCE WILLIAM SOUND SCENARIO RESPONSE TIMES

Vessel	Storage Cap. (bbls)	Recovery Rate (bbls/hr)	Vessel Speed/Prep Time (knts)	(hrs)	Travel to Spill with Prep Time (hrs)
Tugs	N/A	N/A	12	0	2.5
2 Mooring Launches	N/A	N/A	8	0.5	3
Towing:					
Marco Class V	40	428			
Marco Class VII	80	428			
2 Vikoma Seapacks	w/1500' boom each				
2-21' Monarks	N/A	N/A	20	0	1.5
1-26' Monark	N/A	N/A	20	0	1.5
1-26' Monark	N/A	N/A	8	0.25	2.75
Towing:					
1 Vikoma Seapack	w/1500' boom				
Tug & Contingency					
Barge with/	4700	N/A	8	2.5	5.0
Sea Skimmer	N/A	536			
Equipment	1976 (bladders)				
Towing:					
2 Vikomas	w/1500' boom each				

PRINCE WILLIAM SOUND SCENARIO RESPONSE TIMES

Figure 306-4

Distribution of Oil

It is estimated that approximately 50% of the oil will be recovered at sea, either directly after the spill or at a later time by being washed off of the rocks, contained and skimmed off of the water. Approximately 15 percent of the spill will evaporate during the time it is moving toward the shoreline and prior to removal. Of the oil that remains approximately 15 percent of the oil will be recovered from the shore, primarily by washing the oil off of the rocks and recovering it on the water. Fifteen percent of the oil will naturally disperse and approximately 5 percent will remain in the environment.

Environmental Considerations

Along with the salmon spawning areas and the sea bird colony areas there are some purse seine and drift gill net areas around Esther Island in the Port Wells area. There is also some ground fish activity on the west side of Naked Island, Eleanor Island, Ingot Island and the Port Wells area.

Section 600 of the Prince William Sound Contingency Plan gives us the Sea Bird colony areas that would likely be impacted by a spill of this nature. The Naked Island group, Eleanor Island, Bald Head Criss Island, Dutch group, Perry [illegible] Fool Island, Egg Rock, and Esther Rock are likely impact areas of the sea bird colonies. There is a possibility that Smith Island and Little Smith Island sea bird colonies may also be impacted with a slight wind change. The most likely effective protection of the sea bird colonies is to prevent the oil from impacting the shore lines at all. This can be done of course only by dispersing the oil at sea, or allowing an open burn of the oil at sea. Since the timely application of dispersants is so important it is necessary that the decision process for allowing dispersant application be approved prior to an incident such as this. It will allow the oil industry to stockpile the necessary dispersants and application means so that resources such as the sea bird colonies can be protected in the most reasonable manner.

This has been a brief initial response to the spill scenario of a 200,000 barrel catastrophic event. There would, of course, be a long term cleanup of the spill on the various beaches of Prince William Sound. In reviewing the aspects of this size spill it becomes very apparent how important it is to have dispersants approved so that they can be used very effectively to prevent the continuing input of oil into the small bays and shorelines in Prince William Sound. Burning also has to be looked at as a very good alternative to the cleanup in Prince William Sound on the various inlets and bays in which oil may accumulate.

PRINCE WILLIAM SOUND SCENARIO INITIAL EQUIPMENT

Initial Equipment to Prince William Sound Oil Spill:

2 Terminal Tugs and Two Mooring Launches

Contingency Barge B&R 126-1 with the following:

- Vikoma seaskimmer and power unit
- Marco power block
- Life raft
- Inflated fenders
- 2 Stop systems (Tanker Lightering Systems)
- 3,000 feet containment boom
- 1,000 feet sorbent boom
- 20 bales sorbent pads
- 1 50,000 gallon bladder
- 1 20,000 gallon bladder
- 1 10,000 gallon bladder
- 1 3,000 gallon bladder
- 2 3" diesel pumps (Komara skimmer pumps) & 100 feet 3" hose

2 21' Monark workboats

2 26' Monark workboats

Towed:
- Marco Class V skimmer
- Marco Class VII skimmer
- 5 Vikoma seapacks (7500' of boom)

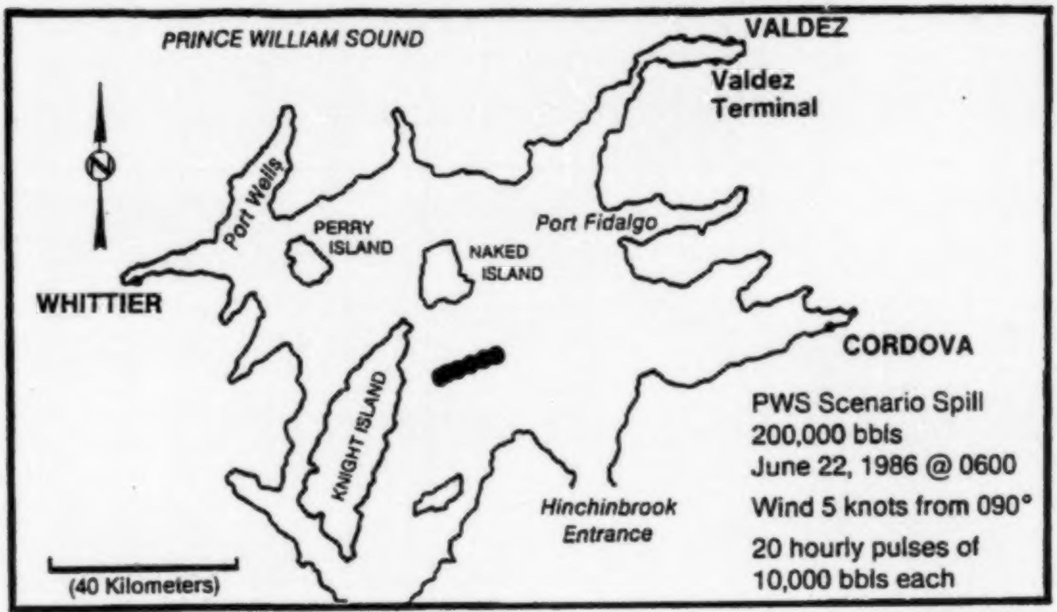
Initial Manpower: 15 minimum and tug crews

Supplies:

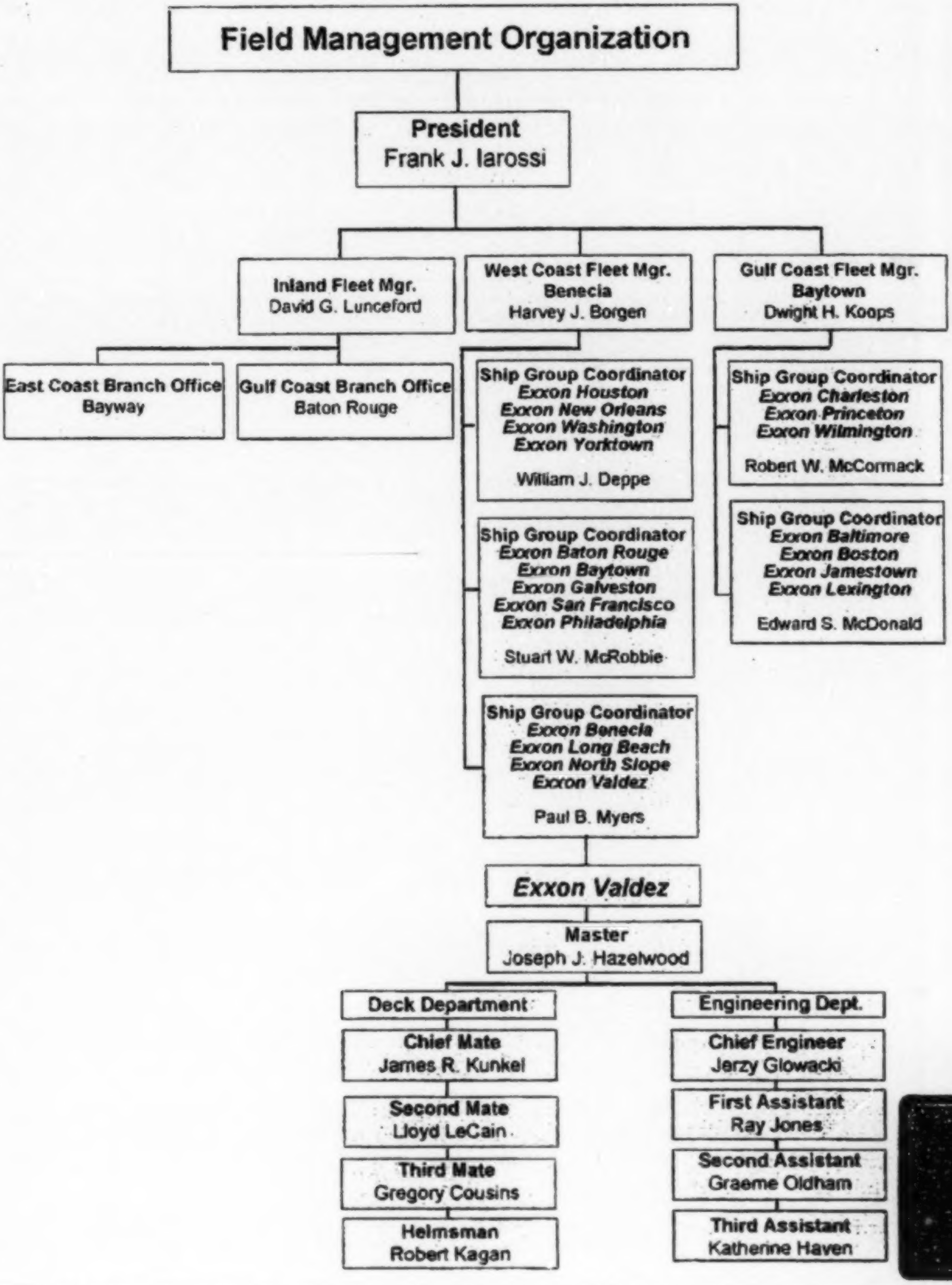
- Radios
- Fuel and oil
- Anchors and line
- Life lines
- Life jackets
- Rubber gloves
- Rain suits
- Rubber boots
- Plastic bags
- Cleanup tools
- Batteries

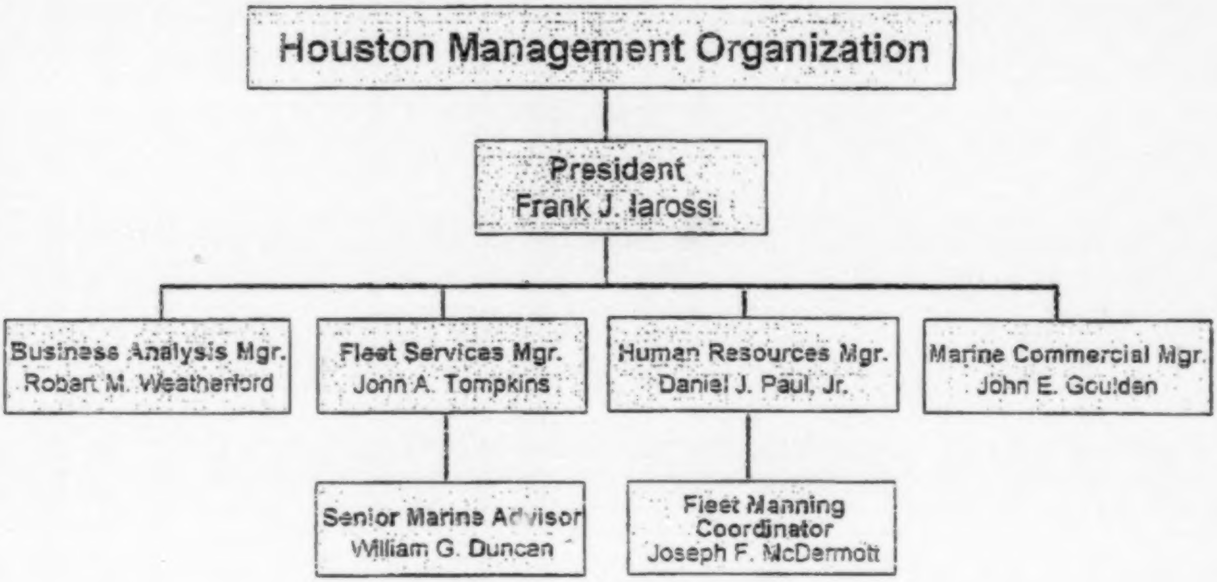
PRINCE WILLIAM SOUND SCENARIO
INITIAL EQUIPMENT

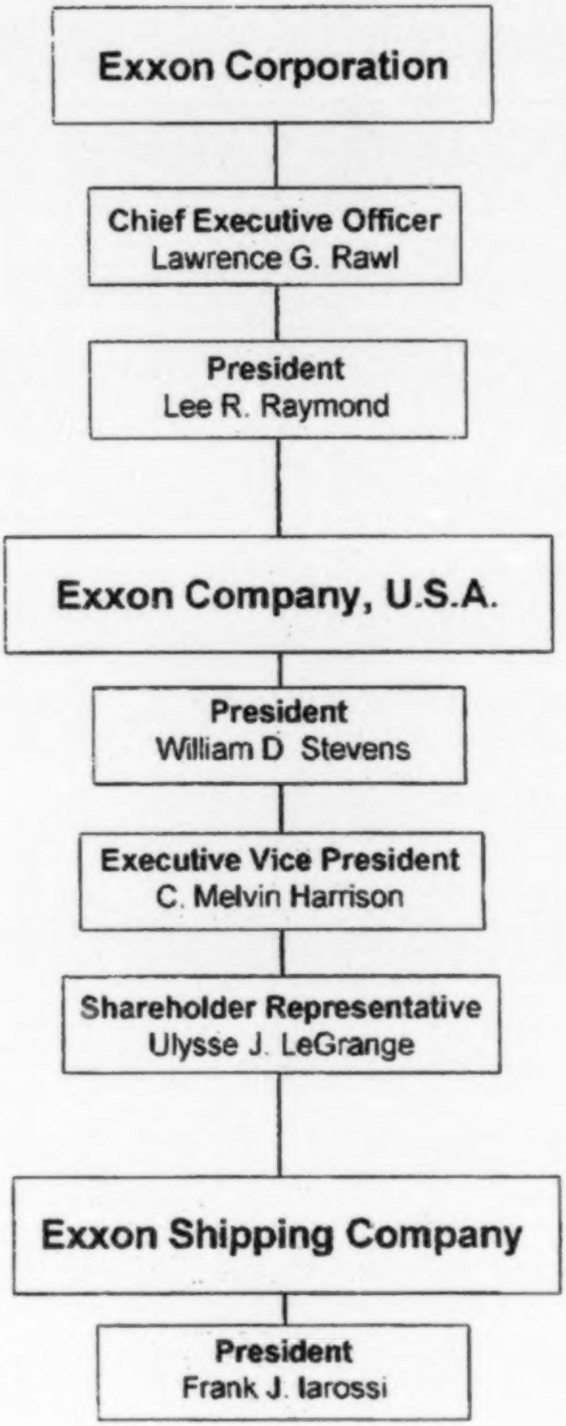
Figure 306-5


PRINCE WILLIAM SOUND
VALDEZ
Valdez Terminal
N
Port Wells
PERRY ISLAND
NAKED ISLAND
Port Fidalgo
WHITTIER
CORDOVA
KNIGHT ISLAND
PWS Scenario Spill
200,000 bbls
June 22, 1986 @ 0600
Wind 5 knots from 090°
20 hourly pulses of
10,000 bbls each
Hinchinbrook Entrance
(40 Kilometers)

PRINCE WILLIAM SOUND OIL SPILL SCENARIO Figure 306-6


Field Management Organization
President
Frank J. Iarossi
Inland Fleet Mgr.
David G. Lunceford
West Coast Fleet Mgr.
Benecia
Harvey J. Borgen
Gulf Coast Fleet Mgr.
Baytown
Dwight H. Koops
East Coast Branch Office
Bayway
Gulf Coast Branch Office
Baton Rouge
Ship Group Coordinator
Exxon Houston
Exxon New Orleans
Exxon Washington
Exxon Yorktown
William J. Deppe
Ship Group Coordinator
Exxon Baton Rouge
Exxon Baytown
Exxon Galveston
Exxon San Francisco
Exxon Philadelphia
Stuart W. McRobbie
Ship Group Coordinator
Exxon Benecia
Exxon Long Beach
Exxon North Slope
Exxon Valdez
Paul B. Myers
Ship Group Coordinator
Exxon Charleston
Exxon Princeton
Exxon Wilmington
Robert W. McCormack
Ship Group Coordinator
Exxon Baltimore
Exxon Boston
Exxon Jamestown
Exxon Lexington
Edward S. McDonald
Exxon Valdez
Master
Joseph J. Hazelwood
Deck Department
Chief Mate
James R. Kunkel
Second Mate
Lloyd LeCain
Third Mate
Gregory Cousins
Helmsman
Robert Kagan
Engineering Dept.
Chief Engineer
Jerzy Glowacki
First Assistant
Ray Jones
Second Assistant
Graeme Oldham
Third Assistant
Katherine Haven


Houston Management Organization
President
Frank J. Iarossi
Business Analysis Mgr.
Robert M. Weatherford
Fleet Services Mgr.
John A. Tompkins
Human Resources Mgr.
Daniel J. Paul, Jr.
Marine Commercial Mgr.
John E. Goulden
Senior Marine Advisor
William G. Duncan
Fleet Manning Coordinator
Joseph F. McDermott


Exxon Corporation
Chief Executive Officer
Lawrence G. Rawl
President
Lee R. Raymond
Exxon Company, U.S.A.
President
William D Stevens
Executive Vice President
C. Melvin Harrison
Shareholder Representative
Ulysse J. LeGrange
Exxon Shipping Company
President
Frank J. Iarossi

BEST AVAILABLE COPY

1. TO BE COMPLETED BY EMPLOYEE

Joseph J. Hazelwood

071-38-8376

☑ SEAGOING ☐ INLAND EAST COAST BRANCH

☐ INLAND GULF COAST BRANCH

4-7-85

I hereby authorize the attending physician to release the information requested below to determine my eligibility for payment under the Company's disability plan. I understand this information must be proved within fifteen (15) days, if appropriate, each Thirty (30) days thereafter, or disability payments may be withheld.

EMPLOYEE'S SIGNATURE DATE

2. TO BE COMPLETED BY EXXON SHIPPING COMPANY REPRESENTATIVE

TYPE OF DISABILITY ☐ OCCUPATIONAL INJURY ☐ NON—OCCUPATIONAL INJURY ☐ SICKNESS

3. TO BE COMPLETED BY ATTENDING PHYSICIAN

CIVIL NO. 89-095
PLAINTIFFS' EXHIBIT
NUMBER 010

HISTORY

EXXON COMPANY, U.S.A.
MAY 14 1985
MEDICAL DEPARTMENT
HOUSTON, TEXAS 77252-2180

DIAGNOSIS

300.40 and 305.02 (DSM-III)

TREATMENT

① Individual psychotherapy
② Group Therapy
③ Marital Therapy
④ AA
⑤ Lectures, seminars, workshops pertaining to alcoholism

TREATMENT DATES

☐ YES ☑ NO ☐ YES ☑ NO

If still not now able, I estimate patient may return to full duty on ______ In the meantime, any restrictions recommended as a result of this disability are:

Mr. Hazelwood will complete our 28 day program. It is recommended (given the nature of his job) that after discharge, Mr. Hazelwood be given a leave of absence to get involved in AA + Aftercare.

MD

Box 426 Amityville N.Y. 11701

5/11/85

PHYSICIAN: You or the patient please return this form to the proper address corresponding with branch location above

1. Exxon Shipping Company, Compensation & Benefits, P. O. Box 1812, Houston, Texas 77251-1812
2. Exxon Shipping Company, Personnel Assistant, P. O. Box 64, Linden, N.J. 07036-0064
3. Exxon Shipping Company, Personnel Assistant, P. O. Box 411, Baton Rouge, La. 70821-0411

(516) 264-4000

Date: 3/27

Memo From: D. H. KOOPS

To: WJD/SWM

OIL SPILL LITIGATION
WORK PRODUCT OF EXXON

Prepared for Counsel
Do Not Reproduce or Circulate
Do Not Place In Unprotected Files

Bill & Stu -

Attached is a first-pass analysis by Mike Stalzer of the officer work hour data for January.

I'll express this to you today and give copies to Bob & Joe.

- Dwight

Save Energy!

cc: RWM/JFH w/att.

EXXON SHIPPING COMPANY

PLEX13-001

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Pursuant To Protective Order
in the Exxon Valdez Oil Spill Litigation

CIVIL NO. 89-095
PLAINTIFFS' EXHIBIT
NUMBER 13

MEMORANDUM

TO: Dwight H. Koops

SUBJECT: Fleet Licensed Officer Analysis of Work Hours

FROM: Michael A. Stalzer

DATE: March 19, 1990

OIL SPILL LITIGATION
WORK PRODUCT OF EXXON
Prepared for Counsel
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Background

There are safety concerns about the number of hours individuals have been working in the fleet. These concerns arose in the 80's when manning reductions were occurring and additional responsibilities were being shifted to the fleet officers with no accounting for the additional time required to do these tasks. Workshops were held concerning fatigue during the Fleet Conferences in 1988 and in small groups in August and November of 1989. The purpose of these group meetings was to identify specific tasks which could be eliminated or modified and to make recommendations as to how the work load could be reduced. In October and November of 1989 supplemental deck officers were stationed in the ports of San Francisco and Valdez and extra third mates were assigned to the Exxon Baytown and Exxon Galveston. In November a draft circular letter concerning maximum work hours was sent to the fleet which the fleet officers were instructed to follow. Recently the fleet officers have documented their work hours for January 1990 and added suggestions for reducing the work load.

Analysis

The data received confirms managements own observations and the feed back which the fleet has provided to management concerning the number of hours worked.

- Complete data was received for 94 positions, incomplete data was received for 6 positions, and no data was received from 2 positions.
- The work rule guidelines were violated 74 out of the 94 positions or 78.7% of the time.
- The data indicates that the work load is heaviest in the deck department when compared to the engine department. The deck department had 123 incidents of 15 work hours or more per day verses 47 for the engine department. The deck department had 32 incidents of 340 work hours or more per month verses 24 for the engine department.
- The data indicates that the work load is heaviest for the senior officers in each department.
- Of the 20 positions which did comply with the guidelines 7 of these or 35% were concentrated on the Exxon Baytown and the Exxon Galveston which have four mates.

This was a first pass effort to analyse the data. Substantial additional time and effort would be required to further analyse the 200 plus pages of data.

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Recommendations

In the interest of safety it is management's responsibility to insure that the guidelines are followed. The additional tasks were assigned by management and as such management must prioritize them and decide which ones will be eliminated or reduced. The changes must be consistent throughout the fleet. As a suggestion management should ask: "Would we be willing to pay overtime to an officer to do this task?" The fleet feels strongly that:

- A return to overtime for the master and officers will eliminate the unnecessary and redundant work, it will improve efficiency and it will provide a better mechanism for stewardship.
- The deck department needs to get back to the basics of navigating the vessel without expending so much time on other activities.
- The engine department needs to get back to the basics of keeping all mechanical equipment operating.

The suggested tasks for reduction or elimination are listed below and have not been prioritized.

Adminstration

- Stop or reduce licensed evaluations to a yearly occurence.
- Stop or reduce unlicensed evaluations to only those individuals seeking promotion or to a yearly occurence.
- Stop or simplify the Safety Awards Programs and the required record keeping.
- Stop or reduce on board Stewardship process.
- Stop the detailed on board forecasting, budgeting, tracking, and reviewing.
- Find a better solution to the travel agent duties of the master.
- Send all the reliefs at one time to a vessel rather than one at a time over three or four days.
- Stop or reduce the number of shore requests to the vessels without providing the manpower to carry out the request.
- Eliminate lengthily justifications of requests required of vessels.
- Put all paperwork on the computer including port logs and all requisitions.

Radio/Telex

- Reduce shore staff message requests from the vessels.
- Reduce or eliminate the sending of messages from the vessel to multiple addresses.
- Reduce the message content and duplication.
- Further automate weather reports and Nav. area bulletins.

Computer

- Provide more flexibility in the time permitted in the posting of the overtime.
- Improve the speed of the computer system.
- Train vessel personnel better in the use of the computer system.
- Stick with the computer software for four years before changing.

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Operational

- Contract out safety gear checking and cleaning quarterly. This includes cleaning and waxing of the zippers of the survival suits.
- Contract out lifeboat quarterly check and survey.
- Contract out all interior and exterior painting and chipping during shipyards.
- Contract out selected Planned Maintenance items.
- Adjust the Planned Maintenance man hour requirements to what is available on the vessel.
- Contract out diesel service to main engines and generators.
- Contract out to have all MSA air bottles filled and Mako compressor tested every six months.
- Improve continuity in all ratings.
- Add extra personnel for tank inspections.
- Add extra personnel for all special projects.
- Add extra personnel for tank cleaning.
- Add an extra third mate to all vessels.
- Add an extra third engineer to all vessels.
- Reduce the number of shipboard meetings. Posted notices should suffice.
- Reduce the number of shipboard/shore staff meetings on board.

Training

- Do not conduct training on board.
- Do not conduct training on board while in port.
- Reduce the safety training to what is required by law under CFR regulations and USCG NAVICs.
- Provide better training to the users of any new equipment prior to having to use the equipment on board. Both the Net 90 and the SIMS/SPAS computer systems are examples where users indicated they were not adequately trained.
- Eliminate First Responder training unless an additional person is added to the vessel to do the training.

Labor Flexibility

- Bargain an unlicensed position to assist with the daily supervision. ie. bosun?
- Continuity in unlicensed assignments.

Mechanical Improvements

- Have a REO float between the vessels keeping the radios, telex, and walkie talkie equipment operational.
- Put the mercury vapor light ballasts in a weather tight enclosure such as the rope locker on the 75's.

Reassignment of Duties

- Reassign the Safety Officer's duties to the engine department.
- Reassign the Steward Department Designee to the engine department as they have to handle repairs to the ovens or freezers.

NUMBER OF INCIDENTS 15 HOURS OR MORE WORKED PER DAY
JANUARY 1990

	M	CM	2M	3M	XM	CE	1AE	2AE	3AE	XAE
Jamestown	X	1	0	0		1	2	1	0	0
New Orleans	1	3	/	0		3	1	0	0	
Baytown	0	2	0	0		1	0	1	1	
Galveston	/	5	0	0	0	3	2	2	/	
Benicia	0	0	0	0		0	0	0	0	
North Slope	7	5	0	0		4	3	0	0	
Long Beach	6	4	0	0		0	2	/	0	
Philadelphia	4	3	1	/		4	0	0	0	
San Francisco	3	5	2	0		3	1	1	0	/
Baton Rouge	/	12	3	0		2	7	0	0	
Wilmington	7	14	2	0	1	X	0	0	0	
Charleston	2	29	0	0	1	2	0	0	0	
Total	30	83	8	0	2	23	18	5	1	0
Average	3.3	6.9	0.7	0	0.6	2.1	1.5	0.4	0.1	0

Days

ACTUAL REPORTED WORK HOURS
JANURAY 1990

	M	CM	2M	3M	XM	CE	1AE	2AE	3AE	XAE
Jamestown	XXX	339	347	351		334	341	340	336	327
New Orleans	292	361	///	332		325	346	284	344	
Baytown	290	350	326	328	///	326	310	316	288	
Galveston	///	328	309	290	304	342	337	339		
Benicia	389	345	348	326		384	365	360	347	
North Slope	404	397	325	360		369	372	299	333	
Long Beach	374	389	333	344		331	365	266	285	
Philadelphia	369	388	321	///		374	356	331	315	
San Francisco	345	390	365	344		374	370	355	341	///
Baton Rouge	///	398	355	385		341	375	358	377	
Wilmington	398	449	380	401	384	XXX	350	386	360	
Charleston	357	479	379	359	357	328	310	303	289	
Incidents > 340	7	10	6	7	2	6	9	4	5	0

The work guidelines limit the maximum number of work hours per month to 340.

Compliance	1	0	4	4	1	1	1	3	4	1

‾ = Positions which complied with the 15 hour and 340 hour guidelines.

7 = Incomplete data received.

X = No Data received from the Master Exxon Jamestown or C/E Exxon Wilmington.

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JANUARY LICENSED FLEET WORK HOURS

SUGGESTIONS, COMMENTS, AND CRITICISMS RECEIVED

Administrative

- Stop evaluations for unlicensed.
- Put all paperwork on the computer - requisitions, port logs, etc.
- Port logs should be computerized. The Galveston"s are. Why not everyone else?
- Reliefs arriving throughout the entire port stay increases the paper work administration duties.
- Remove or find a better solution to the travel agent duties of the master.

Radio/Telex

- Reduce sending of message to multiple locations.
- Radio duties are taking on average 1 hour per day with 2 hours required for arrival and departure.
- Reduce amount of port information sent via telex.

Computer

- SPAS/SIMS computer system is time consuming and not time saving. It now takes twice the time to enter crew o.t. There were many complaints that the SPAS/SIMS computer system was not working properly, was slow and individuals were not adequately trained.
- The randomly assign "SIMS" parts numbers increases time to find the parts.
- When SIMS or the computer system does not work double record keeping is necessary.
- SIMS is slower than ZILOG for locating parts.
- Don't change computer systems so frequently. Better training would help.
- The deadline for the posting of overtime creates peak excessive hours.

Operational

- In locations when only one shore gang available for docking only call half the crew. This may be a labor issue.

Labor/Personnel

- Bargain a "Bosun/AB" to assist with daily supervision.
- Continuity would help reduce work load.
- Add additional 3 mate to vessels.
- Add additional 3 AE to vessels.
- Adjust PM requirements of man-hours to the actual hours permitted by current crew size.
- Add extra personnel to handle special projects and tank inspections.

Mechanical

- A REO floating between vessels to keep equipment operational.
- It is unsafe and a waste of time to write up shipyard items when some items seem to be arbitrarily canceled.
- Put Mercury vapor light ballasts in a weather tight enclosure such as the rope locker (on 75's).
- Consider shore side contract labor to do selected PM's.
- Set up a service contract for the diesel vessels.
- Set up a "Exxon" service team for the diesel vessels.
- Supply a good engine room logging system to take care of the log book record keeping duties of the engineers.

Other

- Supplemental deck officers in S.F. and VDZ a great improvement toward reducing deck department workload.
- Re-assign Safety Officer duties to the engineers.
- Higher work hours for the Master and deck officers likely in summer on the west coast due to fog. Suggest another survey in the month of July.
- Do NOT conduct training on board and while in port. It is extremely time consuming.
- The 150 mile restriction has increased weather time on the bridge for the master and deck officers. 1
- Under current ESC guidelines the officers may not get a chance to go ashore for many weeks. Consideration should be given to shorter sea tours. 1
- Get back to the basics of the Deck Department navigating and the Engine Department keeping the vessels mechanical systems running and reduce or eliminate other duties.
- Return to Paid OT for the officers which would eliminate redundant work and improve efficiency. 1
- Eliminate time sheets, steward department designee, computer files and hard copies, cell phones, reduce/review labor intensive safety and training programs.

CONFIDENTIAL
Pursuant To Protective Order
in the Exxon Valdez Oil Spill Litigation

TRANSCRIPT OF RADIO TRANSMISSIONS RECORDED BY THE VESSEL TRAFFIC CENTER, VALDEZ ALASKA ON MARCH 23 AND 24, 1989, RELATING TO THE GROUNDING OF THE EXXON VALDEZ

CIVIL NO.: A89-095
PLAINTIFFS' EXHIBIT
NUMBER 90 A

2124.28 - EV ... traffic. EXXON VALDEZ.

VTC EXXON VALDEZ Traffic.

EV Underway from berth 5. Estimating Entrance Island at 2215.

AJ Valdez Traffic. The ARCO JUNEAU.

2124.55 - VTC EXXON VALDEZ. Valdez traffic. Roger that, sir underway. Ah she's clear for the oneway zone. And inbound--the BARTLET's inbound. They've got Entrance Island 2150. Ah you're clear as soon as they're through. Over.

EV Roger that for the BARTLET. Thank you. Out.

VTC Traffic clear.

2125.09 - EV Break. Calling the ferry E. L. BARTLET. EXXON VALDEZ.

AJ ... Calling Valdez Traffic.

2125.32 - EV E. L. BARTLET. EXXON VALDEZ.

EV ... Channel 13.

ELB BARTLET, back to the call on 13.

2125.38 - EV E.L. BARTLET, Ah EXXON VALDEZ. We are just underway from Ah berth 5 here. We'll favor the north side and ah meet you port to port. Ah we'll ah be at Entrance Island at 2215, so you should be through and well clear. Okay?

2125.50 - ELB Real fine. Thanks for the call. BARTLET clear.

EV EXXON VALDEZ standing by.

ELB Valdez traffic. BARTLET

VTC BARTLET Traffic.

2147.43 - ELB BARTLET back. We're clear of the Narrows at Entrance Island. Ah we'll give you a call call when we're all passed.
VTC ... Traffic. Roger out.
ELB BARTLET

ELB Valdez Traffic. BARTLET.

	VTC	BARTLET. Traffic.
2224.44 -	ELB	BARTLET back. We're ah alongside. Checking all the system ... - tonight.
	VTC	Have a good evening. Valdez Traffic out.
	ELB	Roger, out.
	EV	Pilot boat BERING. EXXON VALDEZ.
	BE	EXXON VALDEZ. BERING.
2229.12 -	EV	Yeah, we're at ah ah Middle Rock here. See you in about 50 minutes. Okay?
	BE	Okay, one five minutes. Ah BERING out.
	EV	Five zero, 50.
	BE	Okay, thank you. BERING
	EV	EXXON VALDEZ.
2249.31 -	EV	... - out Traffic. EXXON VALDEZ. Potato Point outbound increasing speed.
2249.36 -	VTC	Traffic. Roger out.
2249.37	EV	.... Report please.
2249.38	VTC	Traffic. Roger out.
2249.40	EV	Yeah, ah Ice report please.
2249.45 -	VTC	There are numerous small pieces of ice ah from Freemantle all the way down to Glacier Island, and they had to deviate over into the Northbound lane ah for about a half an hour. Over.
2249.56 -	EV	Err Roger that. Ah EXXON VALDEZ.
2249.56 -	VTC	Traffic clear.
2324.50 -	EV	Ah, Valdez Traffic. EXXON BA ah VALDEZ.
2324.54 -	EV	EXXON VALDEZ traffic.
2324.58 -	VTC	Valdez Traffic. Go ahead.

2325.01 - EV	Yes. We've ah departed the pilot or disembarked the pilot. Excuse me. And this time hooking up to sea speed and ETA Naked Island 0100. Over.
2325.19 - VTC	Roger that, sir. Request an updated ice report when you get down through there. Over.
2325.24 - EV	Okay. I was just about to tell you that, ah, judging by our radar, I will probably divert from, ah, the TSS and end up in the, ah, inbound lane if there's no conflicting traffic. Over.
2325.42 - VTC	Ah no reported traffic. I've got the CHEVRON CALIFORNIA ah ah one hour out. Then the ARCO ALASKA is ah right behind them, but they're an hour out from Cape Hinchinbrook. Ah out on that. Over.
2325.53 - EV	That'd be fine. Yeah. We we may end up over in the, ah, inbound lane, outbound transit. Ah, we'll notify you when we leave the, ah, TSS and, ah, cross over the separation zone. Over.
2326.07- VTC	Roger that. Be waiting your call. Traffic out.
2326.10 - EV	Okay. EXXON VALDEZ over. Standing by 13 and 16.
2330.45 - EV	Ah, Valdez Traffic. EXXON VALDEZ. W-H-C-B. Over.
2330.50 - VTC	Valdez Traffic. Over.
2330.54 - EV	Yeah At the present time, ah I'm going to alter my course to two, zero, zero and reduce speed to about 12 knots to, ah, wend my way through the ice, and ah, Naked Island ETA might be a little out of whack but, ah, once we're clear of the ice out of Columbia Gla... Bay, we'll give you another shout. Over.
2331.16 - VTC	Roger that, sir. Be awaiting your call. Traffic standing by.
2344.45 - ST	Valdez Traffic. The STALWART.
2344.51 - VTC	STALWART Traffic.
2344.53 - ST	... Yes, was that 0100 for the CHEVRON CALIFORNIA.

2345.03 - VTC They got 00 ah 15.

2345.07 - ST Ah could you repeat that?

2345.08 - VTC They're showing 0015 for Cape Hinchinbrook.

2345.12 - ST Thank you. STALWART.

2345.13 - VTC Traffic clear.

Date: March 24, 1989

0017.21 - CC Calling Valdez Traffic. CHEVRON CALIFORNIA.

0017.35 - VTC CHEVRON CALIFORNIA. Valdez Traffic.

0017.38 - CC CHEVRON CALIFORNIA to Valdez Traffic. Ah abeam Cape Hinchinbrook at 0015, ah estimating Naked Island about 0200.

0017.53 - VTC CHEVRON CALIFORNIA. Valdez Traffic. Err Roger. We have the EXXON VALDEZ outbound estimating Naked Isling, Naked Island 0100, and he should be able to give you a pretty good ice report. Over.

0018.07 - CC Yeah. Okay. Sounds good. Ah we'll talk to him on his way out then. Ah thank you very much.

0018.11 - VTC Traffic out.

0026.41 - EV Yeah, Valdez Traffic. EXXON VALDEZ. Over.

0026.46 - VTC EXXON VALDEZ. Valdez traffic.

0026.55 - EV Yeah. Ah, it's VALDEZ back. Ah, we've--ah, should be on your radar there--we've fetched up, ah, hard aground north of, ah, Goose Island off Bligh Reef. And, ah, evidently, ah, leaking some oil, and, ah, we're gonna be here for a while. And, ah, if you want, ah, so you're notified. Over.

0027.44 - VTC EXXON VALDEZ. Valdez Traffic. Ah roger. Are you just about ah about a mile north of Bligh Reef?

0027.57 - EV Yeah. That's correct. Over.

0028.01 - VTC Roger that.

0028.03 -	EV	Okay. I'll give you a status report, ah, ascertain the situation. Over.
0028.10 -	VTC	Standing by.
0031.35 -	VTC	Tug STALWART. Valdez Traffic.
	ST	The STALWART back to Valdez Traffic. Go ahead.
	VTC	Ah we have the ah EXXON VALDEZ aground at ah Bligh Reef. Ah request you proceed ah for possible assist. Over.
	ST	Roger, Roger. We'll be underway in just a few minutes.
	VTC	EXXON VALDEZ. Valdez Traffic.
	EV	EXXON VALDEZ back. Over.
	VTC	Yes, sir. Could you give me the on-scene weather down there?
0038.47 -	EV	Ah, it's blowing, ah, northerly a little bit, ah, drizzle, visibility, ah, two miles. Over.
	VTC	Roger. What was the wind speed?
	EV	Ah, ten knots right now. Over.
	VTC	Roger that. Ah slight sea?
	EV	Yeah, it's kinda indeterminate, ah, right now. It's ... ah, slight sea. Over.
	VTC	Roger that. Thank you very much. Traffic out.
	VTC	CHEVRON CALIFORNIA. Valdez traffic.
	CC	Ah CHEVRON CALIFORNIA back to Valdez traffic. Go ahead.
0041.55 -	EV	Yes, sir. Good morning. Ah pending ah disposition of the EXXON VALDEZ sir--as soon as ah we get his situation resolved. Ah the Captain of the Port has closed the port to ah all traffic in and out. Over.
	CC	Okay. Roger, copy that. Ah any idea on ah expected ah reopening of the port there? Over.
	VTC	Ah not at this time. Ah we'll have to get some further information. Traffic out.

CC Okay. Roger. We'll go down to a slow bell then, and ah we'll probably be proceeding over towards Knowles Head then. CHEVRON CALIFORNIA W-C-G-N.

VTC CHEVRON CALIFORNIA. Valdez traffic.

VTC CHEVRON CALIFORNIA traffic.

0048.00 - CC CHEVRON CALIFORNIA. Ah I just wanna confirm ah the port is closed, and ah and we are to proceed to Knowles Head. Is that correct?

VTC Roger that.

CC Ah roger. We'll be ah--we'll ah ... Knowles Head. We'll, do you wanna get up on the track line there, and we'll ah let you know when we get up there.

VTC Roger that. Traffic out.

ST Ah Valdez traffic. The STALWART.

VTC STALWART traffic. Go ahead.

ST Ah we're underway heading toward the VALDEZ now.

VTC Traffic. Roger.

VTC Pilot boat BERING. Valdez traffic.

BE Traffic. BERING.

BE Valdez Traffic. BERING.

VTC Bravo. BERING. Valdez Traffic. Shift to channel two two, please.

BE Roger.

BE BERING on 22.

VTC Bravo BERING. Valdez traffic. Ah have you been copying ah, ah the EXXON VALDEZ?

BE Yea, that's a roger. Ah understanding ah STALWART'S on their way out and the port is closed 'til further notice.

0059.41 - VTC Roger, ah we'd like you ah to get underway ah in the--either the BARONOF or CHIRIKOF or whatever you have, and ah, ah do a ah little reconnaissance of the situation for us, if you could?

BE Ah, yea. Ah any particulars? Yea, we'll head out ah, ah. Okay. I'll go wake everybody up and we'll head out.

VTC So Roger that. Ah do you also have ah enough people on board to possibly send the SILVER BULLET in to pick up some Coast Guard ah personnel?

BE Ah yeah. When? Ah, ah ASAP on that?

VTC Roger that. Ah yeah, if you could get the SILVER BULLET underway and send her into town and ah pick up a couple of Coast Guard people to ah go to the scene, and if you could ah give us a recon report on the ah amount of oil, particularly that ah might be leaking out. Ah over.

BE Yeah. Roger that. Um I'll, I'll get right back to you. Okay? Stand by. Um Are they pretty hard aground? They are leaking oil?

VTC Roger. At first report that seems to be the situation.

BE Okay. Ah stand by. Ah I'll get back to you in a couple of minutes. Okay.

VTC Roger that. Swish, shifting back to 13. Out.

AA Valdez Traffic. Valdez Traffic. ARCO ALASKA KSBK.

VTC ARCO ALASKA Traffic.

0102.03 - AA ... personnel. We'll be departing the lanes in about half an hour. We'll give you a call when we do.

0102.27 - VTC ARCO ALASKA. Valdez traffic, roger. We also have the CHEVRON CALIFORNIA departing the lanes and heading to Knowles Head also. Traffic out.

CC Ah CHEVRON CALIFORNIA to Valdez traffic. Ah we'll be departing the lane here ah in 2 or 3 minutes. Over.

VTC Traffic, roger out.

BE Valdez Traffic. The BERING.

VTC BERING Traffic.

BE Ah 22.

VTC Two Two.

VTC BERING traffic.

BE Traffic BERING.

VTC BERING Traffic. Go ahead.

BE Valdez Traffic. BERING.

VTC BERING Traffic. Go ahead.

0105.58 - BE Yeah, I understand ah you want ah to take some people out to ah to ah, ah--somewhere.

VTC Roger. We have the EXXON VALDEZ hard aground on Bligh Reef and presumably leaking oil. If you have enough people, ah we'd like you to go down there with the pilot boat ah to evaluate the situation, ah see what kind of damage they've sustained. And, if you have enough people, if you could send the SILVER BULLET into town to pick up some Coast Guard people.

0106.54 - BE Yeah, roger, okay. Ah we'll do that and ah I guess you can figure that there'll be somebody in there ah within the hour. Okay?

VTC Roger that. Thanks very much, and we'll be standing by on 13. Traffic out.

BE Out BERING.

0107.29 - COTP EXXON VALDEZ. This is the Captain of the Port on channel 13. Over.

EV EXXON VALDEZ back. Over.

COTP EXXON VALDEZ. This is ah the Captain of the Port, Commander McCall. Good evening. Ah do you have aaa anymore of an estimate as to your situation at this time? Over.

EV Ah, not at the present, ah, Steve. Ah, ... or ah, a little problem here with the third mate, but ah, we are working out way off the reef. We've ah, the vessel's been holed, and, ah we're ascertaining-- right now we're trying to just to get her off the reef and, ah, we'll get back to you as soon as we can. Over.

COTP Roger on that. Ah yeah, I've got you know -- we've got all our our plan mechanisms in way to give you what assistance we can, ah, ah, ah you know take it take it slow and easy, and ah you know ah I'm telling you the obvious, but you know take it slow and easy ah and we're getting help out as fast as we can. Ah and I'd appreciate ah when you get around, if you can give me a fairly good-- if you can give me an update whenever as to ah the general location where you suspect it might be ah and ah and ah of the stability info. Over.

EV Okay. We're, ah, pretty good shape right now stability-wise. We're, ah, just trying to extract her off the, ah, shoal here, and, ah, you can probably see me on your radar and, ah, once we get underway, I'll let you know. Do another, ah, damage control assessment. Over.

COTP Ah roger, Yeah. Ah and let me know--again, ah before you make any drastic attempt to get underway, you make sure you don't you know start start doing any ripping. You got a rising tide. You got about another--about an hour and a half worth of worth of tide in your favor. Ah once you hit that max, ah I wouldn't recommend ah, ah doing much wiggling. Ah over.

EV Okay. Yeah, I think it's, ah, major damage is kinda been done. We kinda rock and rolled over it, and, ah, we're just kinda hung up in the stern here. We're just, ah, we'll drift over it. I'll get back to you. We'll be standing by thirteen sixteen EXXON VALDEZ clear.

COTP Captain of the Port. Out.

BE Valdez Traffic. BERING.

VTC BERING Traffic.

0110.07 - BE Yeah, how many ah personnel are you going to have coming out?

VTC Ah two Coast Guard and one ADEC.

BE Roger. Okay.

VTC Ah BERING Traffic. Ah Coast Guard dock okay?

BE Yeah. Roger. That'd be just fine.

VTC Traffic out.

CH Calling the BERING. This is the CHIRIKOF.

0118.12 - BE CHIRIKOF. This is BERING. Go ahead. 12. Over.

CH 12.

AA Valdez Traffic. ARCO ALASKA K-S-B-K.

VTC ARCO ALASKA. Valdez Traffic. Over.

0126.54 - AA We will depart the lanes in 10 minutes.

VTC Traffic. Roger. Out.

CH EXXON VALDEZ. ... CHIRIKOF.

EV Yeah, VALDEZ back. Over.

0131.36 - CH Yeah. This is CHIRIKOF back. Ah I'm just ah about a mile away ah heading in your direction. Ah do you want to send a man down ah for any kind of a visual?

EV Ah, not at this time. Ah, got a pilot aboard us? Over.

CH Ah, okay. Ah I'll be there in just a second.

EV Ah, okay. Ah, we'll ... there'll be a ladder on the port side. Over.

CH Is it my understanding you have a pilot on board?

EV Ah, no. Not at this time. Ah, I do have the pilotage for this area, but, ah, no pilot, ah. Southwest Pilot on board. Over.

CH Yeah, Roger. I neither have a pilot on board myself. So, ah I'll be there in just a minute.

EV **Very well, EXXON VALDEZ standing by thirteen and sixteen.**

AA Valdez Traffic. ARCO ALASKA.

VTC ARCO ALASKA traffic.

0139.01 - AA We are exiting the lanes. Will give you a call when we get the anchor down.

VTC Traffic. Roger, out.

VTC SILVER BULLET. Valdez traffic.

SB Ah traffic. That is SILVER BULLET.

0151.26 - VTC SILVER BULLET Traffic. Could I have an ETA please?

SB Ah yeah. It looks like maybe 20 to 30 minutes. We're just coming up on Middle Rock.

VTC Roger that. Thank you. Traffic out.

SB Bullet out.

0159.03 - COTP EXXON VALDEZ. This is Valdez Traffic. Channel 13. Over.

EV The EXXON VALDEZ.

COTP Ah Valdez. Ah Valdez. EXXON VALDEZ. Valdez Traffic. Yeah. Ah any update captain yet?

EV We're ah still surveying ah tanks ah trying to assess the damage. Over.

COTP Ah roger. Ah do you have capacity on board to ah internally transfer if you need to? Over.

EV Yes, ah we could do that.

COTP Okay. That's ah --obviously, you know better than I do, but that's highly recommended if ah once you determine ah which tanks are holed, to drop the head if you can. Over.

EV Yes, roger that.

COTP And you're still working at trying to get off? Over.

EV No. Our engines are stopped right now. Ah we're going to wait ah til ah there's a little more water underneath us.

COTP Ah, roger on that. Ah we've got negative further. Standing by. Out.

EV VALDEZ clear.

CC Valdez Traffic. CHEVRON CALIFORNIA.

VTC CHEVRON CALIFORNIA Traffic.

0215.48 - CC CHEVRON CALIFORNIA. We're at anchor at Knowles Head at this time. Ah redhead is bearing ah 075. 4.1 miles.

VTC CHEVRON CALIFORNIA. Valdez Traffic roger, and you'll be joined by the ARCO ALASKA shortly. Have a good day. Traffic out.

CC Roger, ah CHEVRON CALIFORNIA clear and standing by.

0223.12 - VTC Pilot boat CHIRIKOF. Valdez traffic.

CH Valdez Traffic. CHIRIKOF.

VTC Ah Two Two, please.

CH Roger.

VTC Pilot boat CHIRIKOF. Valdez Traffic.

CH Valdez Traffic. CHIRIKOF. Go ahead.

0223.25 - VTC Yes, sir, ah could you ah give us initial assessment of ah what's going on down there?

CH Well, ah I just made a little survey around the ship here, ah, around the edge of the shoal. Ah, there's quite a bit of oil extending down, ah, more than half a mile, about a half mile or so south of the ship and ah quite a bit of oil out that way. It looks like it's all heading that direction too. Nothing headed ah ah north okay.

VTC Roger. Was that ah straight south?

CH Ah, just relatively. Ah I don't know exactly ah, ah what the compass heading would be but ah pretty much, yes, ah due south.

VTC Roger that. Ah one other question. Do you happen to ah or could you determine if ah Bligh Reef buoy is ah okay?

CH I'm sorry. Bligh Reef buoy is which?

VTC Is ah Bligh Reef buoy on station and ah watching properly?

CH Ah, yeah, it's lighted. I'm not ah certain that it's on station, but I know it is lighted.

VTC Roger that. Stand by one, please.

VTC Ah CHIRIKOF Traffic ah -- is Busby Island light also watching properly?

CH Affirmative.

VTC Stand by one please.

0228.05 - VTC Ah CHIRIKOF. Valdez Traffic. Ah roger. Thank you very much. Ah we've got a whole bunch of people heading in that direction. Ah and I'm assuming that ah Lieutenant Commander Falkenstein will be ah on the ah SILVER BULLET, and he'll be ah representing the Captain of Port and the on-scene commander. Ah so if you could stand by until ah they get there, see if ah if they need you for anything else. Over.

CH Yes, roger that. Ah we'll be standing by here.

VTC Thanks again. Traffic out.

CH CHIRIKOF.

0241.42 - ? Radio traffic (garbled static).

VTC Vessel calling. This is Valdez Traffic. Over.

0242.28 - AB ... Valdez Traffic. Valdez Traffic. This is the ADMIRALTY BAY KILO ALFA Charlie KILO. Over.

0244.27 - ST EXXON VALDEZ. STALWART. Channel 10.

EV VALDEZ back on 13. Over.

ST You want to go over to channel 10? This is STALWART.

EV Sure thing.

0247.25 - SB	CHIRIKOF. Calling the CHIRIKOF. SILVER BULLET.
SB	CHIRIKOF. Calling the CHIRIKOF. This is the SILVER BULLET.
0250.26 - SB	No contact. All clear.
0250.49 - ST	SILVER BULLET. This is STALWART. Can I help you?
0251.32 - CH	EXXON VALDEZ. The CHIRIKOF on 13.
SB	CHIRIKOF. Calling the CHIRIKOF. SILVER BULLET.
CH	SILVER BULLET. SILVER BULLET. This is CHIRIKOF.
SB	... Ah lines are pretty broken up. Ah should we go back into the Hole or head down to Bligh Reef, or what?
CH	Do you have men on board?
CH	Yeah, come on out here, Julie.
0259.53 - SB	CHIRIKOF. SILVER BULLET.
CH	SILVER BULLET. This is CHIRIKOF.
0300.24 - SB	.... Ah approaching down here. Are you still down here by the tanker or are we going to board these guys onto the CHIRIKOF, or what?
CH	Ah, what what time are you going to be here? What's your ETA?
0311.22 - SB	Ummm, CHIRIKOF, I don't know how you're reading me. You're broken and unreadable so ah, yeah, ah BULLET clear.
CH	CHIRIKOF.
VTC	EXXON VALDEZ. This is Valdez Traffic. Over.
EV	The EXXON VALDEZ.
0319.20 - COTP	EXXON VALDEZ, roger. This is the Captain of the Port. Ah have you had a chance to ah, ah detect whether or not any any noticeable amount of oil has dropped out of any tanks, and, if so, which tanks are they? Over.

EV Yes, ah let me talk to the chief mate. Ah he can give me exact ah amounts.

COTP Roger.

EV Valdez Traffic. EXXON VALDEZ.

COTP EXXON VALDEZ. This is Valdez traffic. Over.

0321.47 - EV Yes. Ah the initial figure is ah 138,000 and these-- ah the chief mate's taking ah another check on it right now.

COTP Ah, which tank is that or tanks? Over.

EV Right now ah umm our starboard slop tank, 2 starboard wing tank, and possibly 5 center.

COTP Roger. And you said starboard? Over.

EV Roger.

COTP Ah roger on that. Ah and that was barrels correct?

EV It's correct.

COTP Roger. Thank you much.

EV Valdez out.

VTC EXXON VALDEZ. Valdez Traffic.

EV EXXON VALDEZ.

0323.06 - VTC Yes, just to inform you if you need -- ah if you need him, we have your agent ah here at traffic center. Over.

EV Okay, thank you.

VTC Traffic out. Base clear.

AA Valdez Traffic. ARCO ALASKA.

VTC ARCO ALASKA Traffic.

0325.14 - AA Yes. Ah we anchored ah 0315 at Redhead's BEARING 060, 2.75 miles.

VTC Ah this is BERING. 060. Can you say again distance?

AA 2.75.

That's 2 decimal 7? Over.

AA Decimal 75.

VTC ARCO ALASKA. Valdez traffic ah roger. Thank you very much. Ah you'll be joined also by the ADMIRALTY BAY a little bit later. Have a good day. Traffic out.

CH Ah EXXON VALDEZ. CHIRIKOF.

EV EXXON VALDEZ.

0327.10 - CH Is there a possibility of getting a ladder over on ah the starboard side?

EV We have ah a ladder rigged on the ah port side.

CH Yeah, roger. Copy that. Fine. Ah I'm trying to stay out of the oil. That's where most of the oil is. Over on the port side.

EV Okay. Ah we could rerig it for you on the starboard side if that's better.

CH Ah that's what I'd like to do is kinda stay out of the oil as much as possible. Ah, let me go over and take a little look, port side.

EV Okay.

EV CHIRIKOF. EXXON VALDEZ.

CH VALDEZ. CHIRIKOF.

0329.25 - EV We're shifting that ah pilot ladder over to the starboard side now.

CH Roger. Okay. Thank you.

0346.19 - VTC ADMIRALTY BAY. Valdez Traffic one three.

0407.21 - BE CHIRIKOF. BERING.

CH BERING. CHIRIKOF.

BE Channel nine.

VTC EXXON VALDEZ. Valdez Traffic.

EV EXXON VALDEZ.

0408.0 -	VTC	EXXON VALDEZ. Valdez Traffic. Ah request to know ah how much lightering hose you have on board over.
	EV	Stand by one.
	EV	Valdez Traffic. EXXON VALDEZ.
	VTC	Traffic. Go ahead.
0409.36 -	EV	Yeah, we have 2 50-foot, ah 6-inch hoses. Over.
	VTC	Thank you very much. Traffic out.
	EV	VALDEZ out.
	VTC	ADMIRALTY BAY. VALDEZ TRAFFIC.
	AB	ADMIRALTY BAY.
0449.37 -	VTC	Yes sir. We have the ARCO ALASKA 060, 2.75 to Redhead. The CHEVRON CALIFORNIA 075, 4.1 miles. Over.
	AB	Ah roger that Traffic.
	VTC	Roger that. We'll be waiting your call when anchored with bearing and range. Traffic out.
	AB	ADMIRALTY BAY. KILO ALFA CHARLIE KILO standing by on 13, 16, 22. Out.
	VTC	CHEVRON CALIFORNIA. Valdez Traffic.
	CC	CHEVRON CALIFORNIA. Go ahead.
	VTC	Channel two two please.
	CC	Roger two two.
	VTC	CHEVRON CALIFORNIA. Valdez Traffic.
	CC	CHEVRON CALIFORNIA. Go ahead.
0458.00 -	VTC	Yes sir. Ah we'd like to know if you have any lightering hose on board ah and, ah if so, how much and what size?
	CC	Stand by please.
	CC	Ah CHEVRON CALIFORNIA to Valdez Traffic.
	VTC	Traffic. Go ahead.

CC Ah, the chief mate just went down ah check his records ah there ah. We've got we've got ah I think about ah a couple of 4-inch and a couple of 6-inch hoses, and I'll ah confirm the length to you as soon as he comes back up.

VTC Ah roger. Standing by.

VTC ARCO ALASKA. Valdez Traffic.

AA ALASKA K-S-B-K.

0459.44 - VTC Ah channel two two please.

AA ARCO ALASKA back on two two.

VTC ARCO ALASKA. Valdez Traffic. Ah request to know if you have any lightering hose on board and, if so, how much and what size. Over.

AA ARCO ALASKA back. Ah we got ah 2 ah twenty-five foot length of 6-inch hose.

VTC That was 2 twenty-five foot lengths of 6-inch. Is that correct?

AA Correct.

VTC Ah roger. And do also ah have reducers for those?

AA Ah roger. We should have reducer for that ah ...

VTC Ah roger that. Ah you may be contacted later on ah -- by Exxon to ah to see ah about borrowing them for this transfer operation that they have planned. Over.

AA Roger that.

VTC Thank you very much. Traffic out.

CC CHEVRON CALIFORNIA to Traffic.

VTC CHEVRON CALIFORNIA. Go ahead.

0501.16 - CC Yeah, those ah hoses we have are 2 four-inch twenty-five footers and 2 six-inch twenty-five footers.

VTC Roger that. Thank you very much. Ah as I told the ARCO ALASKA, you may be contacted by Exxon later on to see about ah borrowing them. Over.

CC Roger. We'll be standing by.

VTC Thank you very much. Traffic out.

VTC ADMIRALTY BAY. Valdez Traffic.

AB This is ADMIRALTY BAY.

0502.01 - VTC Ah channel two two please.

AB Two two.

VTC ADMIRALTY BAY. Valdez Traffic.

AB This is ADMIRALTY BAY Traffic. Go ahead.

VTC Yes sir. Did you copy ah what I just passed to the ARCO and the CHEVRON?

AB Yes I did traffic, and we have about the same on board. We have 2 twenty-five foot sections of six-inch hose and we also have any -- most any type reducers that you would need.

VTC Ah roger that. Thanks very much. And ah we'll if necessary, you'll probably be contacted by Exxon to ah use them later on today. Traffic out.

AB Okay thank you. ADMIRALTY BAY out.

? Valdez (broken transmission) HELENKA B BYE 6137 channel 22 do you receive?

0511.06 - CG Radio HELENKA B. This is Coast Guard Valdez radio. Stand by one.

HB Coast Guard. This is HELENKA B (broken transmission) on channel 22. Do you copy?

CG Radio HELENKA B. Valdez radio. Over.

CG Radio Valdez Coast Guard. HELENKA B on 22 (broken transmission).

HB Ah this is ah HELENKA shifting back to channel 16.

0513.27 - AB HELENKA B. The traffic's trying to call you on channel 22.

HB Ah HELENKA B. Roger. Thank you. I can't copy them.

AB HELENKA B the traffic is trying to call you on channel 22.

HB Ah HELENKA B. Roger. Thank you. I can't copy them.

0513.55 - VTC HELENKA B. Valdez Traffic. Channel one three.

VTC HELENKA B. Valdez Traffic. Channel two two.

HB Ah Coast Guard. Valdez. HELENKA B. Ah I have you ah fine now. Ah are you receiving me? Over.

VTC Loud and clear. Go ahead.

HB Yeah, roger. Ah I'm wondering ah we're just ah passing Knowles Head enroute to ah Two Moon Bay and ah did you have a ship aground in the vicinity? Over.

VTC Ah, we have a ship aground at Bligh Reef. Over.

HB Yeah, roger. Is there any danger of ah any oil spill? Over.

VTC Roger, that.

HB Okay, I got ah I recovered some 2,700 logs. They're not ah ah I was going to tow them to ah Two Moon but if there's oil in the water, I'm not going to ah contaminate them and if that's going to pose a problem for our company, ah, could you tell me when this happened? Over.

VTC Approximately 0030.

HB Yeah, okay. I'm sorry to hear that sir. Ah It's -- ah real sorry to hear that, but ah I guess we'll stay in touch with you when the coast is clear for ah towing those logs in so we don't want to contaminate them. Over.

VTC Roger that. Ah are you running light right now?

HB Yeah, roger. Just few pieces of heavy equipment on deck from ah Cordova to ah Two Moon Bay. Ah no tow. Over.

VTC Ah roger that. Ah we may be contacting you later on ah to possibly transfer some ah lightering hoses from the vessels at Knowles Head ah to ah Bligh Reef so that ship can be unloaded. Over.

HB HELENKA B. Roger. We'll be ah Two Moon Bay unloading this stuff. Ah we should be unloaded by ah 0830 and ah free at that time to assist, and ah we'll just be standing by ah channel 16 and 13. Over.

VTC Roger, that. Thank you very much. Traffic out.

HB Yeah, okay. Yeah. Fine. Thank you ah. HELENKA B.

0517.37 - CG Radio ... This is 323. Valdez radio. Eighty One. Over.

Fox .... This Trooper Fox. Are you on there?

CG Radio Trooper Fox. Valdez Traffic. Go.

Fox Yes. Ah I was briefly talking with Bob ... there about the use of dispersants. I just wanted to make sure that before anybody does anything like that, ah to contact James Brady. I'll say again -- James Brady. B-R-A-D-Y. In Cordova. He's the Fish and Game ... biologist and ah he'd be the person who could advise on ah security status. Okay?

VTC Trooper Fox, Valdez Traffic. Yeah, Mike, thanks thanks a lot on that. Yeah, we'll we'll take of that.

Fox That's all. Thanks.

Roger out.

JF Valdez Traffic. The tug JEFFREY FOSS.

0524.08 - VTC Vessel calling us. Valdez Traffic. Stand by one please.

VTC Vessel calling us. This is Valdez Traffic. Over.

0525.51 - JF This is Valdez Traffic. This is the tug JEFFREY FOSS. Our present position is 60 degrees, 24 minutes north, 147 degrees, 07 minutes west, off of Montague Point. We have the ah FOSS 255 loaded oil barge in tow, my SOA is 10 knots, my length overall is 1,400 feet, and my draft is 14 feet. We have dangerous cargo on board. Our destination is Cordova. Our last port of call is Kodiak. We have no impairments. We have alternate communications, and we have a manual on board.

VTC JEFFREY FOSS. Valdez Traffic. Roger. What's your next port of call call after Cordova? Over.

JF Guess we will be ah headed to Seattle.

VTC JEFFREY FOSS. Valdez Traffic. Roger. Do you have ETA for the traffic lane?

JF Yes Traffic. We'll be at the lanes at 0-5-50. I'll be crossing the lanes at 0-6-05 and at Johnstone Point at 0-6-55.

VTC JEFFREY FOSS. Valdez Traffic. Roger. Thank you very much and we have no opposing traffic, and ah we'll be waiting your call 10 minutes prior crossing lanes. Traffic out.

JF This is JEFFREY FOSS standing by.

VTC EXXON VALDEZ. This is Valdez Traffic.

EV This is EXXON VALDEZ. Go ahead.

0541.34 - VTC Yes sir, I was wondering if we might get an updated weather report from you. Over.

EV Give me about 5 minutes and I'll give it to you.

VTC Traffic out.

EV Valdez Traffic. EXXON VALDEZ.

VTC This is Traffic. Go ahead.

0543.32 - EV Yes, ah weather report here. Barometric pressure is 29.6, 34 degrees, it's ah partly cloudy out here, and the wind is from the northeast at about 5 knots.

VTC Roger. Ah how's your visibility?

EV It looks like ah 12 miles plus. Pretty clear out here.

VTC Thank you very much. Traffic out.

EV Would you like a ah weather report at 2 hourly intervals or something like that?

VTC I think ah every 4 would be sufficient. Over.

EV Okay, fine. Every 4 we'll plan on. If you want any other information, let us know. We'll give it to you right away.

VTC Roger that. Thank you very much. Traffic out.

EV EXXON VALDEZ clear.

0547.01 - 323 Traffic 3-2-3, 13. Over.

JF Valdez Traffic. The JEFFREY FOSS.

VTC JEFFREY FOSS. Valdez Traffic.

0550.58 - JF Thought we would request permission to cross the lanes at this time?

VTC Roger that. We have the ah tanker EXXON BATON ROUGE inbound. He will be at Hinchinbrook at 7:30. Traffic out.

JF Roger. Thank you. Standing by.

VTC 3-2-3. Valdez Traffic.

323 Traffic. 3-2-3.

0551.56 - VTC Do you have any marine operator channels?

323 Stand by. What channel do you want?

VTC Ah do you have two eight [2-8]?

323 Stand by.

VTC Traffic 3-2-3. Roger. We have 2-8.

323 Roger that, ah, going to eight one.

VTC 3-2-3 traffic.

323 Traffic. 3-2-3. Over.

	VTC	Roger. Ah tell ah Trooper Fox that ah to stand by to ah for a call ah from Glenallen office. Over.
	323	Traffic 3-2-3 ah which channel is that going to be coming over on?
	VTC	They'll be calling on 16, shifting to 2-8.
0722.51 -	VTC	EXXON BATON ROUGE. Valdez Traffic.
	EBR	Valdez Traffic. EXXON BATON ROUGE.
0723.47 -	VTC	Ah yes sir. We would like you to proceed ah to Naked Island, ah at which time ah you'll be taking orders from the from the on-scene commander ah ah at the site of ah Bligh Reef. Over.
	EBR	Okay, roger that. If you could pass information along to them, ah I don't know how much water alongside the ship, but if there is a lot of water ah, let's say within the hose reach of the vessel, I have stern anchor and bow anchors, and I can use my anchor as and moor myself to the VALDEZ and stand off the vessel pretty far.
	VTC	Roger that. Ah so far we've lined up approximately 200-or 400 feet of hose. Ah I don't know how many lines they want to run. Ah but ah I think you can work that out shortly. Ah you should be in radio range ah as soon as you get around the corner. Over.
	EBR	Okay, roger. At this time I'll report that I'm, of course, inbound at Cape Hinchinbrook. Our ETA at Naked Island will be eight minutes after nine. ETA at Bligh Reef 26 minutes after 10.
	VTC	EXXON BATON ROUGE. Valdez Traffic. Roger. Thank you very much. Traffic out.
	EBR	EXXON BATON ROUGE. Standing by 13 and 22.
0725.27 -	VTC	EXXON VALDEZ. Ah Valdez Traffic. Did you copy?
	VTC	EXXON VALDEZ. Valdez Traffic.
	EV	EXXON VALDEZ. Go ahead.

VTC Ah yes sir. BATON ROUGE estimating Naked Island Naked Island at 0908 and Bligh Reef at 1026. Ah he'll be waiting further instructions. Ah you should be able to contact him by radio probably in about a half hour. Traffic out.

EV EXXON VALDEZ. Thank you. Out.

0735.21 - SW Pilots W-A-B-9-8-2 Southwest Pilots. BEARING. W-Y-Z-4-9-1-4.

0744.29 - SW Pilots W-A-B-9-8-2 Southwest Pilots. BERING. W-Y-Z-4-9-4. Calling WAB982.

VTC EXXON VALDEZ. Valdez Traffic.

EV Valdez Traffic. EXXON VALDEZ. Go ahead.

0746.02 - VTC Yes sir. I have your agent on the phone again. Ah they have ah an EXXON-chartered helicopter en route VALDEZ ah to ferry supplies back and forth. Ah is there anything you need at this time? Or do you need any additional hose?

EV Ah what we need is some additional reducer. Over.

VTC What size?

EV Hello. Ah yeah. This is the EXXON VALDEZ. We need to have the ability to go from 16 inches down to 6 inches once, and the ability to go from 16 inches down to 8 inches once. This is in addition to everything else that was ordered. Over.

EBR EXXON VALDEZ. This is the EXXON BATON ROUGE.

VTC Stand by please.

EV (interrupted) ROUGE. EXXON VALDEZ.

0747.11 - EBR Yes, ah we may have some reducers if you need them. We got a stack on board here.

EV Yeah, okay. What we need to do is ah we got 16-inch headers. We've ordered enough right now to maybe take care of 2 hoses. If possible, we wanna to try to give you 4. If that is the case, we need to have the ability to go from 16 to 6 once and from 16 to 8 once.

EBR Okay, I understand that. Listen, is there anyway we can ah set up a little bit of ah time where you can sit down and talk about this so we know draft alongside and stuff like that?

EV Ah okay, roger that. Ah you know we'll work that out when you get closer.

EBR Okay. Yeah. All considering, if if you guys don't have any water alongside I have a stern anchor and we could drop both anchor with the tug pushing us in, to where we'll have more than enough water to take a full load. And maybe I'll put lines over to you, so, I mean that's a consideration. Right now, we can't take that much.

EV Okay, I copy that. Ah what do you think you could take right now?

EBR I would say ah we could probably take 400,000.

EV Okay, I copy that. About 400,000 and ah what kind of draft would that bring you to?

EBR That would be our summer load line at that point, 40...let's say 41, foot.

EV Okay, thank you.

EBR Ah one other consideration, we do have dirty ballast of 148,000, and it would take us ah --we could drop ah--you know decant that out and come in with ah less dirty ballast, and that way we could take more. That's also a consideration.

EV Okay. Well, someone, someone else will have to make that decision. Ah okay. We're--I seriously doubt if we're going to be able to load you to 41. Ah, ah we'll take another look at it here when you get closer.

EBR Roger. Like I say, I can get with that hose string, depending on how you want to do it, um I can be off your ship up to the length of that hose and still have stability where it won't worry about parting it.

EV Okay. All right, I understand. I see what you're saying. Ah we'll we'll ah have to take a look at here when you get closer cause ah ah I think we have fenders on the way right now also.

EBR Yeah, okay. Roger. Um Yeah, if you have the draft alongside we can do it, but I understood you only have 35 feet so, ah like I say, when you guys can get us down there on the side of the ship we're going along, then we can talk about this.

EV Roger that.

EBR This is EXXON BATON ROUGE standing by 13/16.

BE EXXON BATON ROUGE. Pilot boat BERING.

EBR Ah pilot boat BERING. The EXXON BATON ROUGE.

0749.52 - BE Ah channel 10 please, Captain.

EBR Channel 10.

VTC EXXON BATON ROUGE. Valdez Traffic.

EBR EXXON BATON ROUGE back.

0750.35 - VTC Yes sir. Ah if you could please check to see if you have those 2 reducers. Ah if not, get back to us and we'll try to line them up elsewhere. Over.

EBR Okay, roger that. Ah we'll get back to you as soon as possible. EXXON BATON ROUGE standing by 13/16.

VTC Traffic out.

VTC EXXON VALDEZ. Valdez Traffic.

EV Ah EXXON VALDEZ go ahead.

0751.29 - VTC Ah yes sir. Ah was there anything else you required from ah shoreside ah on that helicopter. Over.

EV Stand by.

VTC Standing by.

EBR EXXON VALDEZ. EXXON BATON ROUGE.

EV Ah go ahead EXXON BATON ROUGE.

0751.56 - EBR I have another length of hose if you want that helicopter to pick it up and bring it over there.

EV Ah it will probably be easier just to transfer it when you get here. Over.

EBR Okay, ah we have a problem. It's on our poop deck, and it weighs a lot. So we'll have to manhandle it into position. Maybe that helicopter could assist us with that.

EV Okay, well ah I'm sure she'll be flying around out here and we'll see how things work. Ah what is it--a six inch? Ah over.

EBR I believe ah that one person says 8 and the other says 6. I have a feeling it might be the ah 8-inch.

EV Okay. Very good. All right I'll check when you get here.

VTC EXXON VALDEZ, Valdez Traffic.

EV Traffic. VALDEZ back.

0803.41 - VTC Yes, is ah Commander Falkenstein aboard?

EV Stand by one please.

EV Valdez Traffic. EXXON VALDEZ. Go ahead. Over.

0804.28 - VTC EXXON VALDEZ. Valdez Traffic. Ah roger. Be advised when the EXXON BATON ROUGE ah clears Naked Island, ah he'll be instructed to take ah further instructions from the on-scene commander. And the Captain of the Port would like you to call him on MARSAT. Over.

EV Roger. EXXON VALDEZ standing by on 13.

VTC Traffic out.

0804.56 -	SW Pilots	W-A-B-9-8-2 Southwest Pilots. The BERING. W-Y-Z-4-9-1-4. Calling W-A-B-9-8-2.
	?	This is W-A-B-9-8-2.
	SW Pilots	Nine, Bob.
	?	Nine.
	VTC	EXXON VALDEZ. Valdez Traffic.
	EV	The EXXON VALDEZ. Over.
0811.06 -	VTC	Yes sir. Ah could we get the current weather again? We have some aircraft ah en route to we would pass along to them. Over.
	EV	Would you stand by one, please.
	EV	Valdez Traffic, EXXON VALDEZ.
	VTC	Go ahead.
0812.20 -	EV	It's ah --we have north winds at ah 10 knots. Ah sea waves at ah 1 to 2 feet. Ah temperature is 38 degrees. Over.
	VTC	Roger. Your visibility, skycover, and ah ceiling? ....
	EV	Overcast. Ah ten to 12 miles visibility. Estimate the ah ceiling at ah 2,000 feet. Over.
	VTC	EXXON VALDEZ. VALDEZ Traffic. Ah roger. Thank you very much. Traffic out.
	EV	VALDEZ clear.
	EBR	VALDEZ Traffic. EXXON BATON ROUGE.
	VTC	EXXON BATON ROUGE. VALDEZ Traffic.
0815.31 -	EBR	Could we have a position for the VALDEZ? Latitude and longitude and/or bearing off of the something?
	VTC	Roger. I have him ah 203 degrees true. 13 decimal 2 miles from Potato Point radar. Lat. Long 60 - 51 decimal 4, 1-4-6-5-2 decimal 3. Over.
	EBR	Roger. Copy that. Thank you very much.

VTC Traffic out.

CC VALDEZ Traffic. CHEVRON CALIFORNIA, W-C-G-N.

VTC CHEVRON CALIFORNIA Traffic.

0816.42 - CC Yes sir. Um Can you tell me the name of that little ah freighter or whatever it is that's coming after our ship to pick up the hoses for the EXXON VALDEZ?

VTC That is the HELENKA B. H-E-L-E-N-C-A B. Bravo.

(Note: The correct spelling of the vessel's name is HELENKA B)

CC That's HELENKA B. Thank you very much. Ah CHEVRON CALIFORNIA calling the HELENKA B on channel 13.

HB Ah this is HELENKA B to CHEVRON CALIFORNIA. Go ahead.

CC Ah yes sir. Let's go to 10. Okay?

HB Roger. Shifting channel 10.

0819.42 - CH Calling the BERING. The BERING. The CHIRIKOF.

BE BERING. Go ahead.

CH 12.

BE 2.

CC CHEVRON CALIFORNIA. W-C-G-N to the ah HELENKA B on 13.

HB HELENKA B. Go ahead.

0820.24 - CC HELENKA B, how about 10 again?

HB Roger. 10.

AB ADMIRALTY BAY the HELENKA B. Channel 13.

HB ADMIRALTY BAY.

0822.47 - AB Roger. Channel 10, please.

HR Channel 10.

0831.35 - EBR EXXON VALDEZ. This is the EXXON BATON ROUGE.

EV EXXON BATON ROUGE. EXXON VALDEZ.

EBR The EXXON BATON ROUGE.

0835.15 - EV The EXXON VALDEZ. Ah wanna go channel 9?

EBR Channel 9.

0839.12 - HB ADMIRALTY BAY the HELENKA B. I'll be up to your ah port quarter in five minutes.

BA CHIRIKOF. BARANOF.

CH Ah CHIRIKOF back.

0841.55 - BA 12th.

0842.31 - EV CHIRIKOF. EXXON VALDEZ. Over.

EV CHIRIKOF. CHIRIKOF. EXXON VALDEZ calling.

CH The VALDEZ. CHIRIKOF.

0842.52 - EV Please stand by.

CH Roger.

EV CHIRIKOF. EXXON VALDEZ. Ah over.

CH Sure Go ahead.

0844.18 - EV Yeah, captain. Can you ah take a few passes back and forth and try to pin point the exact location of that lump and ah how far out it extends for me? Over.

CH Okay. Right now I'm reading 36 feet and my transducer is on my stern. Ah it looks like it's just just right opposite your ah plimsol marks.

EV How far out does it extend? Over.

CH Well, I'm probably ah 100 feet or so from from ah from your ship.

EV Does it extend beyond you or does it drop off pretty quick?

CH Stand by one here.

0845.23 - CH Can you seen me?

EV Yes we can. Over.

CH Okay. I'm reading 35, 36 and now to 37, 38.

EV Roger. Thank you very much, captain. There aren't any other lumps fore or aft of us are there?

CH Ah aft. I'll have to go back there and double check, but ah there's ah like 50 feet, I think, behind you. Ah maybe in the 40's. I'm down to 43 feet now.

EV Okay. Thank you very much, captain. If you could just take a pass and make sure that there's nothing else if that's the one we've got to worry about I'd appreciate it. Over.

CH Okay. Ah what ah depths do you want to know about?

EV Anything higher than 36 feet or in that range and ah where approximately there at we're looking at when bringing ah the EXXON BATON ROUGE alongside I want to know ah if the 36 foot lump here is the controlling factor. Over.

CH Okay. I've been ah maneuvering back and forth of you all morning, and that's all I've found. Ah, however, I guess you don't want me to go any further than I am out right now, huh?

EV It looks like it'll be plenty fine, captain.

CH Okay. I'll make a couple of passes here and then go around your stern and check that.

EV Thank you. Over.

EBR EXXON VALDEZ. EXXON BATON ROUGE.

EV This is the EXXON VALDEZ back to the EXXON BATON ROUGE.

0848.05 - EBR Yes. You can pass along at a 30 foot draft and considering dirty ballast and clean ballast that would be retained. We'll carry 270,000 barrels of cargo.

EV Okay. Thank you very much.

CC CHEVRON CALIFORNIA. W-C-G-N calling the HELENKA B on channel 13.

HB Yeah. This is HELENKA B.

0851.38 - CC Ah let's go to 10.

HB Roger. 10.

BA CHIRIKOF. BARANOF.

CH Go ahead.

0854.54 - BA How about 9 for working channel?

CH Roger.

0857.14 - CG Radio MEP2. MEP2. VALDEZ radio, 8-1, over.

CG Radio MEP2. VALDEZ radio, 8-1, over.

HB ARCO ALASKA, HELENKA B.

AA ARCO ALASKA K-S-P-K on 1-3.

0900.42 - HB Yeah. Ah roger. See you in about 5 minutes. Okay?

AA ....

HB ... HELENKA B.

AA ARCO ALASKA K-S-P-K. Standing by 13 and 16.

EBR VALDEZ Traffic. EXXON BATON ROUGE.

VTC EXXON BATON ROUGE. VALDEZ Traffic.

EBR Yes. We're ... Naked Island at this time.

0911.12 - VTC Roger. You still holding 1026 at Bligh Reef?

EBR Roger that.

VTC Roger. Also I like to inform you that the on-scene coordinator is LCDR Falkenstein. He is onboard the EXXON VALDEZ, and he is also Captain Of The Port's representative. Ah any further directions you'll be taking from him. Over.

EBR Roger. That copied. Thank you.

VTC Traffic out.

EBR EXXON VALDEZ. This is the EXXON BATON ROUGE.

EV This is the BATON ROUGE. This is the VALDEZ, go ahead.

0912.00 - EBR Yes. Okay. We're at Naked Island. We're coming your way. We'll be up ah there about 10:30. From the way you look, I'm going to be going past you and making a round turn coming in on your stern, and I guess I'll have good water all the way up alongside you.

EV Yeah. You got--we're lying at about a two eighty heading here. Barry. Ah, ... ah, there's that thirty-five, thirty-six foot lump right off our manfold, ah a couple hundred yards out, but everything else to the northern is pretty clear. To the southern we haven't sounded yet. I wouldn't suggest going down there. There's a lot of rocks and junk, but, ah, what kind of draft you coming in with?

EBR I'm lining up now. It'll probably be 29 feet aft. Something like that.

EV Yeah. Okay. Just, ah, go by us there to the northern, make your turn, and, ah, I guess we'll just get the tugs and you can settle her downwind, ah, be the easiest way rather than get in towards the beach too much.

EBR Why don't I come off your quarter and then ah with the tugs I will be able to kind of come in for a nice soft landing I hope.

EV Okay. Thanks a lot. We'll talk to you when you get here. We'll have that pilot boat run around and get some more soundings for you off the starboard quarter area.

EBR Okay. Yes, it'll be just like a runway approach. I'm going to come in and kind of match your course as I'm off your stern. What tug boats are there?

EV The, ah, STALWART's out there. The other two, I guess will be coming from town--the SEA FLYER and the, ah, PATHFINDER.

EBR Okay. Roger.

0913.48 - BE VALDEZ. BERING channel 9. ....

EV Yes, the VALDEZ back.

BE Channel 9.

EV 9.

EV VALDEZ Traffic. EXXON VALDEZ. Over.

VTC EXXON VALDEZ. VALDEZ Traffic.

0914.42 - EV Traffic, what's the status of the ah tug coming out from the Alyeska with the ah transfer boom? Over.

VTC As far as we know, they're still not underway yet. Ah stand by and I'll check. Ah have you ordered another tug or has the pilots ordered another tug for maneuvering?

0915.29 - EV We kind of made the assumption that the tug would be alongside by then ah based on the fact she's supposed to be bringing out the transfer hose. Ah she hasn't got underway yet. I'd appreciate it if she would get underway as soon as possible. Over.

VTC Roger that. We'll see to it. Traffic out.

EV Traffic EXXON VALDEZ also be advised ah that ah if she can't get all the hoses that we were promised earlier, ah not to worry. It's It's not as critical at this time. Over.

VTC Roger. Standing by.

0916.38 - EBR STALWART. EXXON BATON ROUGE.

0917.01 - EBR Tug STALWART. The EXXON BATON ROUGE.

0917.22 - 323 Thick sheen starting to hit the rocks there. Over.

0917.36 - VTC 3-2-3 VALDEZ radio. Roger. Anything further?

323 Ah negative further.

VTC Traffic out.

VTC EXXON VALDEZ. VALDEZ Traffic.

EV Traffic. EXXON VALDEZ. Go ahead. Over.

VTC Ah the ....

0918.14 - VTC EXXON VALDEZ. VALDEZ traffic. Terminal advises that the ah SEA FLYER will be getting underway shortly with the ah barge and equipment. Ah do you have need of the third tug? Over.

EV That's ah correct. We need the third tug to help maneuver the BATON ROUGE in alongside the VALDEZ here. Over.

VTC Traffic. Roger. We'll pass that along. Out.

EBR Traffic. EXXON BATON ROUGE.

VTC BATON ROUGE, Traffic.

0919.01 - EBR We'll pass along about a ah little less than an hour time. Let's say 10:15. I could utilize two tugs to maneuver the vessel. Ah one of them pass the VALDEZ, but like I say I'll only need two tugs at that time.

VTC Roger that. Traffic out.

CC CHEVRON CALIFORNIA W-C-G-N to the HELENKA B on 13.

HB Yes, this is HELENKA B.

0920.22 - CC Ah 10?

HB Roger. Channel 10.

CG Radio Coast Guard 1-4-7 niner. Coast Guard 1-4-7 niner. VALDEZ radio. VALDEZ radio. 16. Over.

CG Helo VALDEZ radio. 1-4-7-9. How do you copy channel 16. Over.

0922.38 - CG Radio 1-4-7-niner VALDEZ radio. Copy loud and clear. Shift to ... channel 2-1. Over.

CG This is ... KODIAK, ah 1-4-7-9. Yes, as soon as I establish this VALDEZ radio if possible on 16.

CG Radio — Coast Guard 1-4-7-niner. VALDEZ RADIO. 2-1 Over.

CG Helo — VALDEZ radio. VALDEZ radio. This is Coast Guard copter 1-4-7-niner, channel 21. How do you copy?

CG Radio — Coast Guard 1-4-7-niner VALDEZ radio. 2-1. Over.

CG Helo — ... VALDEZ. 1-4-7-niner. ... medium strength, but readable how me over.

CG Radio — Coast Guard 1-4-7-niner. VALDEZ radio, you are broken up. I say again you are broken up. Say again your last. Over.

CG Helo — ... radio 1-4-7-niner. We'll attempt to reestablish comms in about 5-10 minutes. We're estimating 20 minutes to the scene of the ah oil tanker. Over.

CG Radio — Coast Guard 1-4-7-niner. Valdez radio understand you're going to attempt to communications with us in about 5-10 minutes, and you are about 20 minutes from the scene. Is that correct?

CG Helo — Valdez radio. Coast Guard 1-4-7-niner. That's a charley. 7-niner out.

CG Radio — VALDEZ radio out.

VTC — EXXON BATON ROUGE. VALDEZ Traffic.

EBR — This is the EXXON BATON ROUGE.

VTC — Yes sir. Could you confirm that ah you do have those two additional reducers. Over.

EBR — Ah which sizes are those? Gave them a list of all our reducers, but they didn't confirm which ones they actually wanted.

0924.34 - VTC — EXXON BATON ROUGE. VALDEZ Traffic. Roger. It's required one 16 to 8 inch and one 16 to 6 inch. Over.

EBR — Well, with our combinations we can make those up. We've got some 16 to 12s that we can match up to get to those sizes. Do I need a 16 to 6 and 16 to 8?

VTC Roger that. That with the other ones we have coming from the Admiralty Bay should do the trick. Over.

EBR Okay. Roger. I pass along we do have that 10-inch hose onboard. I don't know if they need it or not.

VTC Traffic. Ah roger. Thank you. Out.

EBR EXXON VALDEZ. EXXON BATON ROUGE.

EV This is the VALDEZ. Go ahead captain.

0928.41 - EBR Yes. Are you adverse to the idea of our putting out wire springs and we'll have poly, ah that samson braid, headlines and stern lines?

EV I'll check on that and get back to you.

BA EXXON BATON ROUGE. The pilot boat BARANOF.

EBR BARANOF. EXXON BATON ROUGE.

0930.20 - BA Yeah we're running a string of soundings for you which ah we'll we'll chart, and ah when you get up closer, we'll run out to you captain, if you'll send somebody down on a pilot ladder we'll hand them to you, and then you'll have that as you make your approach.

EBR Okay. Appreciate that. Thank you very much. We'll probably rig a ladder once we get situated here on our starboard side.

BA Okay. Ah give us about 15 minutes notice when you want us, and we'll come out ah to you with that ah sketch of the soundings.

EBR Right. If we don't have a ladder, we'll lower-- ah we've got a mail bag here we can lower down for you.

BA That's fine. And ah we'll have the pilot boat standing by as you approach, and ah give you soundings as you require.

EBR Thank you. I'm going to be coming--I'll be rounding out of the traffic system onto the quarter of the VALDEZ and ah slowly coming up on her heading so I can match--... you know come up her stern because they said there was a lump off on her beam there. So I'm going to avoid that lump.

BA Are you coming along her starboard side. Is that correct?

EBR Roger.

EV EXXON BATON ROUGE. EXXON VALDEZ.

0931.39 - EBR Talk to me Joe.

EV Yeah, Lloyd just said, ah, what do you want to put a couple wire springs, and the rest soft lines?

EBR Yeah, I figure we could use those springs ah of wires, and I've got these ah samson braids for fore and aft that I figures would be good.

EV Yeah, okay, ah, ah .... Yeah, that will be all right. We'll just have to run it through the hand rails. It's a little too late to worry about the cosmetics right now.

EBR Yes, if possible, if you want to put ah polys out or nylons out for springs, we'd have a problem ah between now and then getting them all rigged up unless you got some out already.

EV Ah, we're all buttoned up. We'll, we'll go with the wires. We'll just, ah, probably have to land her first before we test any lines. Just, ah, pull her in with the boats and then we can, ah, get the springs out and then position her as necessary.

EBR That's what I was going to do. Ah put the forward springs first and ah then go forward. Put the after springs in back up and ah and do each end.

EV Yeah, okay. I guess it's best if you could, ah, just leave that forward spring down the waterway a bit, ah, and ah, by the shear strake there. So just pick it up, and, ah, if you want to drop it back as far.

EBR Okay. Well, let's get alongside, and we'll see how it is. We have them all laid out ready to go. Ah if you have the messengers to toss us to heave them up with, ah I don't imagine it will be more than at 25-foot span between us.

EV Yeah, okay. Will do.

EBR Okay say I've got two fore and two aft on these ah sampson braids. We can put them on the bights to give us--double up on the strength.

EV Very well.

0937.42 - EV Ah, the EXXON BATON ROUGE. EXXON VALDEZ. Thirteen.

EV EXXON BATON ROUGE. EXXON VALDEZ. Channel 13.

EBR BATON ROUGE.

0938.19 - EV Channel 9 for a second.

EBR Channel 9.

END OF TAPE

EXXON PRIVATE
1987 RANK LIST FOR OCEAN FLEET OFFICERS
MASTER-MAR

NAME	MG1	SEX	87 APPR	87 RANK	---	86 APPR	86 RANK
PIERCE, MARK R			1.0	001/029	—	1.0	003/037
SPEAR, PAUL R			1.0	002/029	—	2.0	005/037
REEDER, CRAIG E			1.0	003/029	—	2.0	008/037
SPEAR, JOHN M			2.0	004/029	—	2.0	010/037
DEPPE, WILLIAM J			2.0	005/029	—	2.0	004/037
SHEEHY, WILLIAM P			2.0	006/029	—	2.0	012/037
MORRIS, MICHAEL A			2.0	007/029	—	2.5	018/037
JOHNSEN, BRUCE C			2.0	008/029	—	2.0	013/037
PRICE, MARSHALL C ✓			2.0	009/029	—	2.0	011/037
KNUTSTAD, NILS P			2.0	010/029	—	1.0	001/037 -[illegible]
BEAHAN, WILLIAM J			2.5	011/029	—	1.0	002/037 -[illegible]
MARTINEAU, ANDRE P			2.5	012/029	—	2.0	014/037
CHELLI, WILLIAM F			2.5	013/029	—	2.5	017/037
MONSON, LARRY C			2.5	014/029	—	2.5	024/037
STALZER, MICHAEL A			2.5	015/029	—	2.0	006/037
MAZZA, JOHN A			2.5	016/029	—	2.0	037/037
GREIG, WILLIAM			2.5	017/029	—	2.5	022/037
SPEAR, ROBERT M			2.5	018/029	—	2.5	020/037
NICHOLAS, RICHARD A ✓			2.5	019/029	—	2.5	023/037
WHITTY, DAVID M			3.0	020/029	—	2.5	021/037
STEGLE III, EDWARD J			3.0	021/029	—	2.5	019/037
WALLACE, WILLIAM B			3.0	022/029	—	3.0	025/037
KNOOP, RICHARD M			3.0	023/029	—	2.5	016/037
HAZELWOOD, JOSEPH J ✓			3.0	024/029	—	3.0	035/037
CHAMBERS, WILLIAM H ✓			3.0	025/029	—	3.0	032/037
SOLYWODA, BARRY F			3.0	026/029	—	3.0	029/037
KELLEY, THOMAS M			3.0	027/029	—	3.0	027/037
THOMAS, BRIAN E ✓			3.5	028/029	—	3.0	034/037
DALTON, CRAIG N			3.5	029/029	—	3.0	028/037

FOCEXEC APP8687

Don - Based on prior performance as 'Masters', all should be treated the same.

[illegible]
+/S

CONFIDENTIAL
Pursuant to Protective Order
in the Exxon Valdez Oil Spill Litigation

9/14/92

STALZER
EXHIBIT
31820

PLEX104-001

SEIZED FROM: Exxon Valdez
SEIZED AT: Bligh Reef
DESC: Papers from Captain Hazelwood's ca
on Exxon Valdez
OFFICER: Grimes 04/02/89

CIVIL NO. A89-095
PLAINTIFFS' EXHIBIT
NUMBER 127

[illegible]

A Compilation of Fairly Useful Information for The Right Sort of People

WATERFRONT DIVES

The Boondocks - Pier 30 - Pierside view of what? The butt end of a ship being repaired? Big deal. The owners are assholes and the drinks are expensive. Bleah.

Olive Oyl's - China Basin Blvd. - Run by friendly, androgynous, athletic lesbians. Patio on the water. Semi-sheltered. Best food, drinks, juke box and hygiene of any of the China Basin establishments. One need not fear for one's health to eat here, consequently many Financial District Y.P.'s come here for safe slumming. It's best to come early before they arrive (a little bit after twelve) - and leave as soon as you hear them come through the door.

The Ramp - China Basin - Slow service; great gin fizzes. A sleazy shack that's Key Largo-esque. Adjacent to boat launch ramp. Bag food. Excellent place for nursing a hangover and feeling like a scuzzball.

The Mission Rock Resort - Popular patio on a sunny day. View of Todd Shipyard, lots of moored sailboats, and beautiful Oakland-across-the-Bay. Even-worse-than-The-Ramp food. Extremely bitchy owner. Good place for drinking a carafe of wine with someone you like. Just avoid the food.

Pier 80 - Nautical, noisy and crowded. Ship lanterns, wheels, and other maritime hardware are suspended from the ceiling. Lots of nautical type prints on the walls. There's a guy, Abalone Don, who comes in here with a parrot on his shoulder, which sounds colorful and waterfront-[illegible], but he always has shit down his back. Don't stand next to him at the bar. If you sit at the tables, order anything from the menu - it will be excellent. The daily specials are always outstanding (the prime rib on Wednesdays and the calamari on Fridays are particularly killer). We are told that the breakfasts here are even better than their lunches, but we never get up that early.

The Bounty - Behind the India Basin P.O. - Disgusting place - even though it has some aquariums. Disgusting crowd. Slut show two or three times a week. Terrible drinks. It is the kind of bar that's acceptable only if you're a very heavy drinker and you're already very drunk. If you should stumble in while the cafe part is serving, the greasy smell will make it all seem even worse. Just because it is the closest bar to the Shipyard is no reason to go there. Dante's seventh level - this place bites it bad.

The Monte Carlo - hole-in-the-wall at Third/Yosemite - Old Italian run lunch bar. Good, cheap food, cheap drinks, and a big crowd of shipyard and industrial workers drinking lunch. Loud, boisterous, fun group who actually appear to accomplish real work for a living. We were so taken by them that we briefly considered getting real jobs ourselves.

SOUTH OF MARKET

The Boiler Room - Spear/Howard - Great name - below ground, down fire escape stairs, brick walls, WPA-type murals, quasi-industrial looking. This would be a pretty decent place if the drinks weren't priced like this was a Downtown bar. (Three dollars for well drinks. C'mon.)

Hotel Utah - 4th/Bryant - Incredible juke box - where else can you watch elevated urban traffic, backdropped by the ever-expanding "skyline" while listening to all yer fav's like the Furs, da Ramones, D K 's, X, The The, Aretha, Flipper, James Brown, and Fishbone? Absolutely the best Gin Mary in town is made here by Ramona, an inspired bartender - in fact, we only like this bar when Ramona is on. (Elle s'habille en cuir et decolletage, et tous les mecs sont fous pour sa couture.) At lunchtime it's really great to sit at the wooden bar on the swiveling leather stools and look out the windows or watch the crowd. With Anchor Steam on tap for a dollar, and skewered Vietnamese chicken for a buck sixty, it's a deal ya just can't beat. Check out the battered upright piano in the downstairs loo.

The Stud - Folsom btwn 11th/12th - dancing - Bud-in-a-bottle bar. Gay, but many straights on Wednesday's (oldies nite with a D.J.). Very crowded, with young collegiate-type straights, and older, semi-tough gays. It can be dangerous to the feet to dance here unless one is wearing boots. Beer drinkers are known to be clumsy.

Hamburger Mary's - 12th/Folsom - Very crowded and loud. Good daiquiris. Very self-conscious/pretentious decor and service people. We always expect something to be happening here, but nothing ever is. Why can't it be more like the Hotel Utah?

The Billboard Cafe - 10th/Folsom - More cafe than bar; we include it for completeness in the new Folsom street social axis. Pretty good food, deliberately arty staff and decor, and nearly impossible service. The owner admits he hires the help mainly for their appearance. One cook, who looks rather like Keith Richard in need of a blood transfusion, makes particularly good meals.

The Oasis - 11th/Folsom - dancing; incredible $7. cover on weekend nights - We do not greatly admire the Oasis. It used to be a homo bar oriented around a small pool. Then some Union St. bartenders leased the place and turned it into a "scene". Yow. On weekend nights the young suburbanites drive in from Redwood City and the line stretches around the block. We think the management chooses who gets to go in - like at clubs tres chic de Nouvelle York - based upon one's degree of projected hipness. Once inside it is loud, obnoxious, and full of people desperately looking at each other. We imagine they are trying to decide if they are anybody, or if anyone there is (since we don't go there much, their chances of seeing someone who is are limited). On weeknights the crowd is smaller, and they have live music occasionally. We even saw Lydia Lunch here once. Use discretion in approaching this place - happy hours are sometimes good.

Nine - 9th/Harrison - dancing - The newest arrival to the Folsom street nouvelle chic axis. The place used to be a hardcore gayboy gladiator bar called the Arena. Then the Billboard owner made enough money to buy a club. The Arena closed down for a few weeks, grew some silver exterior paint and a lot of seriously arty objects, was name-changed to "Nine" and reopened looking a lot like the Billboard. Why use imagination when you've stumbled upon a modern alchemical formula for making money? The interior has a couple things the Billboard lacks - a long bar and a large dance floor. It is, of course, strewn haphazardly with a lot of stuff just screaming "Art." Generic New Wave bric-a-brac. Repetitive yet meaningless: new wave primary colors, mannequin parts, old bones ... the usual. The drinks are expensive for the location and ambience: Glenlivet at $3.25? The owners are obviously trying to emulate the Oasis' success. To their credit, Nine does seem populated by a far more interesting bunch, but they already seem to be getting bored with the place. Do them a favor; drop by and try to liven it up during a Friday happy hour.

The Cafe Soma - 12th/Howard - A cappuccino center populated by art assholes and the worst photographs in the world. It does have a pretty good jukebox, beer and wine, and squeezed-on-request orange juice. The croissants are fresh each morning -- but they do not have brioche. They also have VOV which they will put in a cappuccino (and they will put it in a container to go), which is really great to take back to the office, that is, if you are like us and find that un coup d'alcool makes the afternoon seem much shorter.

MISSION

The Deer Inn - Small unmarked hole-in-the-wall at Folsom/14th. They serve incredibly inexpensive, copious, and good Italian family-style lunch. More food than you can eat for about $4.50: thick minestrone; salad; antipasto; pasta; vegetables, and an entree. This place is as yet undiscovered by the upwardly mobile. Sit at the bar or at a table, order some red wine and a full lunch. One place you must go. (For lunch, that is. This is no place to hang out if you're not eating.)

The Rite Spot - 17th/~~Harrison~~ Folsom - Surreal objets d'art on the wall. Live piano player in the evening, but you can hardly hear him because it is very crowded and noisy at night. Empty just after work. Often full of New Performance Gallery goers; Potrero Hill professional types.

The Uptown - Near the Rite Spot on Seventeenth St - Watney's and Heineken on tap; cheap, generous drinks. This is a comfortable, friendly place to drink. We like it so much that we considered having our mail delivered here. It was opened by two bartenders from the Rite Spot after they grew disenchanted with the Spot's increasingly upwardly mobile (read "yawn") crowd. The last time we dropped by we talked to man who claimed to be a space commander - his spaceships did warp 27 as opposed to the martians who can only go warp 17 (we congratulated him). Interesting people, rather sleazy locale; it recieves our recommendation as one of the most consistantly alive places to be: "totally awesome on the right night, dude."

55 I think

La Rondalla - 20th/Valencia - Christmas decorations all year round. Velvet paintings of Indian warriors and maidens. Deer hunting photographs. Marriachi band. Twinkle lights. Terrible food - but they serve a great plate of hot peppers. Don't drink so much that you begin to make up new lyrics to "La Bamba", like "La Burrito", and then start singing them. Some of the barmaids probably have knives.

Harlow's - Valencia/20th - Don't be fooled by the Art Deco exterior and decor; this bar just doesn't make it. It's run by a boring middle-aged fag who's into Rogers and Hammerstein and Steven Soudheim musical soundtracks.

Amelia's - Valencia/Sycamore - dancing -Lesbian bar. Two floors; two bars. Good pounding jukebox on first floor; D.J. dancing on second floor. Rockin' place. We mean these wimmin really boogie nights.

The J and B Club - 20th/York (one blk from Potrero) - This bar is so American working class it feels like a beer commercial. The tables are provided with plates of hot peppers, and fresh Italian bread and cheese (which used to be good, but now they serve Velveeta). House wine is served in pop bottles. (If they do it to be different they have succeeded. We prefer demi-carafes, or better yet, full carafes.) The hard-boiled barmaids look almost as time-weathered as the joint does. "Hey, when it's time to relax. . ." Yes. Life can be just like T.V.

Dover Club - 18th/Lapidge - An Irish bar that doesn't have Guinness on tap. Sleazy interior. Terrible juke box. What is the reason for this place? How can it be an Irish bar and be so bad?

UPPER MARKET

Cafe San Marcos - Market/Castro - Lots of clear glass, lucite and chrome, white carpeting. Very big, airy split levels providing many vantage points for voyeurs/poseurs to delight in. Brightly lit; lots of pretty men. (And don't they know it.)

Dick's - 16th/Sanchez - Amazing that this is a straight bar in this neighborhood with this name. Young, blue collar clientele. A beer, bourbon and pooltable bar. Serious pick-up pool action. R & B jukebox. S. Clay Wilson hangs out here.

CIVIC CENTER

Squid's - 92 McAllister - A not-as-happening-as-they-would-like-to-be crowd. New wave, pink-and-black decor. They make a salty-sweet Tom Collins in a tall glass with neon green straws, a slice of lime and a cherry that all looks really great. Also hot chips and salsa. They are actively working on the quality of the juke box. They spy on the Hotel Utah in order to get ideas for theirs. (Seriously, they do. We heard them say so.)

Max's Opera Cafe - Opera Plaza - crowded, tends towards upscale, middle-aged, cultured professionals (art gallery, symphony, ballet, opera-goers) in fashionable business attire. Lots of glass windows looking out on Van Ness Ave. (Ce n'est pas Les Champs Elysees.) The waiters and waitresses sing Broadway show tunes, which is very annoying when you are in need of a drink.

DOWNTOWN

Lefty O'Doul's - Geary, just West of Powell - Welcome to the 1940's. A great long bar, piano player, and a hofbrau. A friendly, jovial bunch of regulars inhabit the place. We actually heard them singing "I Left My Heart In..." They also are inclined to talk sports, particularly baseball. The walls are covered with baseball memorabilia, especially that of the old San Francisco Seal's player Lefty O'Doul - this place and the the bridge on Third St. being monuments to the fellow. We understand the City's new sewage treatment plant will be named for the Giants: to remind us of where they consistently finish the season. Great spot for knocking back an Irish coffee or two on a cold, rainy day.

The Carnellian Room - Bank of America building - Expensive drinks, but the highest damn place to get a drink outside of an airplane. We get vertigo looking down - it is so high up that the whole city looks flat.

The Redwood Room - Clift Hotel - A good bar where men can drink clean and well. They have a lot of liquor here. The drinks are expensive, but the bar has an elegant, large, dark wood interior. The man at the piano plays old jazz and classical sonatas. Men sit at tables, on chairs that are not too soft. They discuss the steak they had for dinner, their last trip to the Gulf Stream to catch the big bill fish, and the woman who has just walked in and looks very handsome from across the bar. Unruly mesquite and BMW sorts are escorted outside. Actually, we must admit that women are also quite welcome at this bar - providing they do not wear running shoes with their suits. We aren't sure if they talk about bill fish, although we are fairly certain they talk about the pretty men at the bar. We must also add that one of us is rather distressed with the gender orientation of this bar description.

Trader Vic's - dinner jackets, tuxedoes, linen table cloths on the mostly reserved tables in the bar - The place is decorated in a subdued polynesian manner. An odd choice of motif, considering its establishment clientle: people making deals over a drink or two that probably affect nearly everyone. If you aren't dressed like an upper class lawyer, investment banker, or Fortune Five Hundred executive, they won't let you in. We tried to dress like that but didn't really fool them. The barman wouldn't serve us. Finally someone who reminded us of Lee Iaccoca, but more Republican, ordered for us.

The Tonga Room - Fairmont Hotel basement - Ersatz tropical village and ship constructed around the old hotel pool. The waitresses are Oriental dressed Polynesian; the drinks have weird names and come in fake coconut shells or volcanoes, and usually have a little village floating around in them. In the middle of the pool is an elevator music band adrift on an island (last time we dropped by they played a Bowie medly...) At band break time they dim the lights, crank up the wind machine, flash some strobes, and turn on the sprinkler system. If you think this is really dans le vent, then you will love the top-of-the-Fairmont bar - it is done in ornate pink, somewhat like a midwestern brothel.

[illegible]

The Edinburgh Castle - Geary near Hyde - Scottish pub, Guinness and Bass on tap, single malt scotch, model airplanes and RAF memorabilia suspended above the bar, and Toby mugs lining the wall. Large, woody, and dark - a caber hangs on the wall for dispatching those who eat avocados or seriously read the Bay Guardian. The kilted bagpiper's music will evoke the craggy Highland vista, and the smell of sea air blowing inland from the Firth of Forth. Order a MacCallum or Laphroig (straight or with a wee bit o' water), and ask for a single fish and chips. The barman will dispatch someone around the corner to fetch it. (Although these chips are not too authentic, as they are made by Vietnamese - in Scotland the fish and chips are cooked by Italians.) Spare a coin for the jukebox and listen to the pipes; "Amazing Grace" or "Scotland the Brave". Before you buckle on your claymore for the next Burma trip to defend King and Country, drop in and have a spot - "so you roll on your side, put your rifle to your head; and go to your God like a soldier."

VAN NESS

Tommy's Joynt - Van Ness/Geary - The interior is cluttered with rather annoying funk, junk and signs. The food is also terrible - including the buffalo stew. Tommy's seems like it has been here for a while, and should have built up a solid, regular clientele of colorful local folks. But, to quote Gertrude, "there's no there there". No crowd of fun loving regulars; no sense of bar esprit de corps; nothing much going on. They do their level best to contrive a sense of thereness, but il n'arrive pas. The bar has a huge selection of imported beers, and they serve their version of dinner until the wee hours. Hence, the patrons consist mainly of people who have just seen a movie and want a weird beer. They tend to arrive and depart in waves, like the tide. If you wish to sample a Singha or Green Rooster without buying a six-pack (or whatever odd denomination foreign beer comes in) then drop by.

closed

Henry Africa's - Van Ness/near Bdwy - The primo fern bar. There are a couple of old Indian motorcycles in the window. Do not be confused. This is not a biker bar. Older crowd in coats and ties.

Lord Jim's - Polk/Broadway - It is a pity they misused Conrad's troubled, complex hero as their bar's namesake - it invariably houses people that are both shallow and simple. Rather like Henry Africa's, but with a younger, yet more vacuous crowd.

PACIFIC HEIGHTS

The Lion Pub - Sacramento/Divisadero - Gay Pussycat Lounge. The interior is very well thought out (and always changing, the owner just loves to redecorate). It starts with the bar, which is long, but not too long. Then there is a bar annex, where people can take their drinks if the bar is full and still feel like they are sitting at a bar. A cozy fireplace area beyond that, with a couple of small sofas and a coffee table. In a wing off to the side there are some nicely done aquariums and bamboo furniture. Every evening the owner provides amazingly tasty hot hors d'oeuvres. The music is on tape, and is upbeat without being obtrusive. Very handsome men hang out here to drink seriously, to meet each other, and occasionally they bring their straight women friends in because "it's just such a nice, comfortable place to talk." It feels more like a person's home than a bar.

COW HOLLOW

The Balboa Cafe - Fillmore/near Lombard - Yuppie fern bar, excellent hamburgers, crowded, the show place for passing in review and reviewing everyone else; so much so that everytime a trip to the loo is necessary you feel like there's a parade going on and you're it.

The Camelot - Fillmore/Lombard - Pretty hurting place. Not worth going to, even if a college classmate spins records there and you can get free drinks.

The Mauna Loa - Fillmore just off Union - working class biker bar, and something of a merchant marine hangout - kind of fun and a complete relic from whatever Union St. was like when real people lived there.

The Pierce St. Annex; The Dartmouth Social Club - Fillmore near Lombard - Let's see - we're young, upwardly mobile, and have a three piece suit or very smart (but serious) Sak's dress that we just never take anywhere. What's more, our busy lifestyle has not left time for cultivating social relationships, and we are feeling rather hetrosexual. In short, we're the new generation and our glands are getting uppity. Where to go? These two places (maybe Harrigan's downtown as well). They are always packed with people trying to be happy and meet each other for gratuitous sex. You will be required to display your American Express card at the door.

NORTH BEACH

The Savoy Tivoli - Grant/Union - big, rangey open place, great crowd mix: punkers, trendy New Wavers, upscale professionals, old Italian gentlemen. There is a good jukebox, two pool tables, some booths with curtains, cappuccino, passable light food, and a large sidewalk terrace. The place gets packed late on weekend nights. Things seem to happen here - or at least the crowd is entertaining.

The Golden Spike - Columbus/off Union - This place was a speakeasy in the twenties - it still has a great, authentically cluttered Italian bar, and good, copious family-style Italian dinners.

The Bohemian Cigar Store - Columbus/Union - beer and wine only - Probably the best cappuccino in the city, with a friendly, but self-conciously-San-Franciscan clientele: "We pay a lot to live here so we'd better be smug and cultured about it." Its tiny, and very European/old - San Franciscan looking - a place you'd expect to find filled with old Italian men playing cards. They are actually up the street at the Portofino, however.

Vesuvio - Columbus near Broadway - Famous for having been a Beat hang-out. Famous for Irish Coffee. Famous for lots of (depending on your generational jargon pick one) "cool/hip/weird" old postcards, posters and drawings covering the walls - but this is historically significant junk. They also project slides of "cool/hip/weird" images on a screen near the bar. There is an upstairs balcony with tables, so you can look down and observe all the "cool/hip/weird" stuff going on, except that nothing really happens here anymore - it's just sort of a shrine to '50's Beat San Francisco.

good

Spec's Adler Museum - Alley off of Columbus, across from Vesuvio - Possibly the greatest serious drinking bar in the universe - interesting San Francisco crowd; famous as a beat generation and sailor hangout; Laphroig and Rhum St. James at the bar; a great place.

Tosca - Across the street from Vesuvio - Well known among tourists. Irritating lighting. Kinda uncomfortable. Lots of people from L.A. here, and they all think it is great.

The Fab Mab (Mabuhay Gardens) - Broadway and Sansome - dancing; live bands; cheap cover - This was the place. 1979. The Avengers, Dead Kennedys, Flipper, The Mutants, The Nuns, The Black Flag, Fear... even more mainstream acts like Blondie or Lene Lovich. This money-losing Phillipino supper club was converted into the City's first new wave/full punk music venue, and remained the center of the City's scene until '83 or so. Local music took a nosedive; the bands grew up, went to college, and got jobs; the Mab declined. Now they've gone to a mostly heavy metal format - although good bands still occasionally play here. The interior is perfect - dark, cave-like, a tiny stage, and plenty of room for thrashing and slamming. Sigh. The good old days...

PIER 38

The Eagle Cafe - Authentic, original diner decor. Lots of hardhats and telephone linemen in here. Pretty good clam chowder. Reasonable drinks. One can feel very smug and authentic in this place while observing all the dumb geeky tourists wandering around in tour groups and disembarking at the ferry landing down below. They look dumber and geekier the longer you stay. Do not confuse this place with the S.F. Eagle, located off Folsom Street. That bar attracts hardcore leather homos; and the only seafood available doesn't come on a plate...

HAIGHT STREET

Achilles Heel - Reputation for good Irish Coffee; unfortunately, the place tends to be filled with failed hippies/failed professionals who have never been able to get completely behind whatever or other it is that they do.

closed

Persian Zam Zam - very rude bartender (named Bruno); great martinis. Bruno will like you only if your hair is neatly groomed, you are neatly dressed, and you order a martini, (order it "stirred, not shaken"). Smarmy '40's jukebox (Dinah Shore, Glen Miller), oddly genuine (we assume) '40's decor. A Russian Blue, softly lit shrine to booze and money. Love the name, don't you? This is the only decent bar on the street.

Rock 'n' Bowl - Rock videos, bowling lanes, pool tables - great to get smashed, bowl like a Thalidamide cripple and bop about. There is a bar, where people drink and watch Exene and stuff while waiting for a lane; then barmaids will keep you refreshed while you do your best at a very stupid game.

Maud's - Cole and Parnassus or thereabouts - We stopped in here for a few beers at the start of a wash cycle. The place is full of friendly lesbians, who treat men in a rather condescending manner - "well, I guess it's just not their fault" or "really - some of my best friends are men...". If you ever use the laundromat across from the Other Cafe, Maud's is a good place to spend your rinse and spin-dry time.

CLEMENT - RICHMOND

The Plough and Stars - Clement/2nd - There is something appealing about an Irish bar filled with real Irishmen; not a mall Irish bar, decorated in brass and plants, and run by sparkling young airheads with green clover lapel pins, but a real American Irish bar.. This is such a bar. (It was explained to us that the difference between an American Irish bar and an Irish Irish bar is that in America, Irishmen from all over Ireland hang out together in the same bar, whereas back home a like mixture would start a riot). The Plough is filled with people having a good time drinking pints around old wooden tables, and 5 - 7, Monday through Friday, all pints are $1.25. The bar has a huge jar for making contributions to the "Belfast Children's Fund" (wink, wink, nudge, nudge...help buy a tyke that 9mm he needs to grow up Irish and free). And the bathrooms are filled with authentic Irish graffiti - "death to the queen" or "nuke the English". Each night there is a live Irish folk band, but seldom a cover charge. Between sets you can hear Van Morrison, Motown, or U2 songs on the juke box. The Plough isn't clubby, either - you won't feel like a martian if you aren't a regular.
Zhivago's - Clement - Extensive list of coffee drinks; but, sadly, a ruined, formerly good bar - even though it has a fireplace. It used to be down the street in a place with windows and atmosphere - it just doesn't work anymore. Their new location is long, narrow, and off-white, with tasteful prints and reproductions on the walls. Its like sitting in someone's hall.

The Caspian - Clement - WASP Bimbo hostess - Raghead owners - late '70's disco music (the ragheads really like it). Strange twilight ambience: bizarre chromium fixtures; bone white tables, chairs and walls and dead white trees festooned with hundreds of tiny white Christmas lights. An hors d'ouevres tray is kept stocked with fresh caviar and Ritz crackers. Stumble in while ricocheting around the inner-Richmond Irish bars - you may find Rod Serling, stage left "a not-so-typical evening in a rather unusual bar, In a place we call..."

Pat 'O Shea's (The Mad Hatter) - Geary at about Fourth - Once upon a time this was a solid Irish bar, serving solid Irish customers solid Irish lunch and solid Irish liquor. Then the Irish moved-out of the Richmond, and although they still worked in the City and patronized Pat's at lunch, the evening business dwindled. Then UCSF and UC Med Center students discovered it, and the owners capitalized on the new business - Irish crowd at lunch, collegiate and post-collegiate crowd at night. Simple interior - picnic tables and an ornate, long, solid Irish bar. The jukebox had some of the best tunes in town. The motto? "No ferns - no bullshit" Then the owners made another change - widen the bar, add brass rails and a few plants, hey, let's get some not-as-upscale-as-Union Street-singles in here! The result? We're talking a once great bar turned to utter dogmeat. The bartenders now wear uniform shirts and the serviettes have a space for a name and telephone number. The pink section's little man is so depressed he even took his chair home with him.

Abbey Tavern - Geary at about Seventh - Irish bar. Guinness on tap. A lot of young limey soccer fans hang out here to drink with their mates, listen to Mick on the jukebox (they have hundreds of Mick and the Boys tunes), and cheer on Manchester Union on the bar/telly. A good place, but you will feel a bit of an outsider if you're not a regular.

Trad'r Sam - Geary/26th - sleazy Polynesian type bar (fraying rattan wall coverings, bamboo) - a bargain version of Trader Vic's - with dozens of rum drinks, none of which are made without pineapple juice. They put little paper umbrellas in the drinks, some of which come served in fake coconuts. After downing a few tropical "bamboo blasters" we recommend you place a paper umbrella in each nostril and launch them across the room, while yelling "ONE AWAY!". If the airhead waitress complains just make funny noises at her and she'll go away. Try this in Trader Vic's and you'll be arrested.

My House - Balboa/19th - This bar belongs to some drinking order that dates back to the Gold Rush Days. The Budweiser is not in long neck bottles. Sort of a dusty, working class/biker bar, which strikes us as being unusual in this part of town. Love the name.

The Earth Punk Cafe - Balboa/36th - It's actually called "Simple Pleasures" but we prefer our moniker - veg-head blown brain hippie punks operate the place. We like this place. It is decorated in a psuedo-chinese-taoist style. There are Tibetan bell wind chimes in the doorway co-existing with a punk version made out of driftwood and crucifixes. The walls are covered with a muted Chinese-scroll type river scene with swirls of water and even a dragon in one corner. Freshly-baked chocolate chip cookies are available - when they don't space-out and forget to grease the tray. The head server is a middle-aged mother who shaves her head like a French poodle. Another server looks like Repo Man. The local two-tone hairdo kids hang out here and try to cheat at Scrabble.

Hockey Haven - Balboa/36th - Not much going on here; the "Hockey Ha" (that's what the sign says) is full of people who seem good at drinking but not much else. This bar is across the street from the Earth Punk Cafe, which is the only reason we went in there. Be forewarned and don't make the same mistake.

EAST BAY

The Starry Plough - Shattuck (next to La Pena, across from Flynt's Barbeque) - Irish tavern (beer and wine only), Guinness on tap, serious political graffiti in the loo, (they're genuinely impassioned in the East Bay), serious darts, (you've been warned, so be careful), and live music with much frivolity and dancing in the evening.

Brennan's - Right next to the Bridge in Berkeley - Cheap Irish bar run by Chinese; cheap food, cheap drinks, and full of Berkeley people: drunk rugby teams, drunk poets, drunk high-energy physicists, and drunk drunks. We're actually not sure that everyone is drunk here. We think they just have a beer and then pretend to be drunk so they can yell, throw their food around, dance on the tables, and not have to apologize the next day.

Bertola's - On Telegraph Ave. just inside Oakland - great place when you're in the mood - sleazy atmosphere, endless Italian family style dinners - the mosq expensive being roast beef at six dollars - and - PAY ATTENTION! - triples for $1.25 - YOW!

The Metropole - good ersatz French place in the basement of an excellent French resteraunt on Shattuck in Berkeley - Berkeley intelligentsia types hang out and talk art and politics...

The Med - On Telegraph in Berkeley, and close to the campus. This is not really a bar; it is a place to get benzedrined on large double capuccinos. We're not sure they even serve beer here. One can visualize SDS members sitting in the back and plotting to save People's Park - some of the more lucid patrons probably think it still is the sixties (the less lucid ones don't view time as a valid concept). Famous Berkeley street folk drop by frequently - the Bubble Lady and the Polka Dot Man, to name a few.

Out-of-Area

The Java Jive - in the Nalley Valley of Tacoma, Washington - Tacoma's Nalley Valley is a vast industrial basin. Large grey buildings and smokestacks belching forth industrial by-products. What separates the Nalley Valley from, say, Scranton, PA, is its product. Cheese Puffs, Ruffles, pudding-in-a-can; America's breadbasket. In a large parking lot, between what are probably huge pop-tart plants, there stands a fifty foot high coffe pot, flanked by similarly scaled cream and sugar decanters. The bar and burgers are inside (Washington State's rather quaint alcohol laws prohibit liquor by the drink unless the place also serves food). It is the inside that interests us. Picture, if you will, a high coffe pot ceiling. Walls and ceiling coated with sparkling, black light painted cottage cheese textured stuff. Small weird tables. Dim overall lighting, enhanced by hundreds of blinking Christmas lights, irredescent jack 'o lanterns, Santa heads, Easter Bunnies, and some mythic holiday figures we aren't aquainted with. Now imagine two monkeys, Java and Jive, that make their home in this electric forest. Are you with us? Local college students discoverd the place a while back and it immediately became popular, although the owner can't figure out what is unusual about the place. He did punch up the juke box selection, though. They even have live music. A retarded fellow plays an electric piano. A lounge singer sings. They don't collaborate on their choices. So while the singer might be crooning his rendition of "My Way", the electric piano player could be tickling the ivory's - into "Battle Hymn of the Republic". They frequently stop mid-song and argue loudly abuut it. You just have to be there.

190sa

DATE 03/13/89
TIME: 07:26:56 PM

EXXON SHIPPING COMPANY CL1000
M.V. EXXON VALDEZ PAGE 1
CREW LIST - VOYAGE: 004B

FIRST NAME (MI)	LAST NAME	POSITION	RATE CODE	SSN	DATE SIGNED ON
DECK DEPARTMENT:					
JAMES R.	KUNKEL	CHIEF MATE	102	265-15-8799	03/08/89
LLOYD G.	Le CAIN, JR.	2ND MATE	104	228-70-3206	03/12/89
GREGORY T	COUSINS	3RD MATE	105	005-52-2008	02/20/89
JOEL A	ROBERSON	RADIO OFF.	225	455-84-8547	02/22/89
JOHN P	PEACOCK 4-8	ABLE SEAMN	442	001-60-4021	01/05/89
CARL	JONES 4-8	ABLE SEAMN	442	141-40-1518	01/05/89
MAUREEN, L.	JONES 12-4.	ABLE SEAMN	442	385-88-6116	02/05/89
PAUL R.	RADTKE ~~[illegible]~~ 8-12	ABLE SEAMN	442	391-64-8491	02/05/89
ROBERT M.	KAGAN 12-4	ABLE SEAMN	442	438-64-5051	01/18/89
HARRY L II	CLAAR 8-12	ABLE SEAMN	442	558-64-5785	01/05/89
ENGINE DEPARTMENT:					
JERZY B.	GLOWACKI	CH. ENGR.	101	131-36-5813	01/18/89
RAY M.	JONES	1ST ASST.	103	458-92-8608	03/12/89
GRAEME K.	OLDHAM	2ND ASST.	107	567-33-4329	03/10/89
KATHERINE R.	HAVEN	3RD ASST.	108	536-72-3209	03/10/89
JOHN W.	STEWART	PUMPMAN	453	550-42-5669	03/08/89
FRANCIS X.	BOYLE	OILER	463	207-26-0896	03/12/89
MICHAEL M.	EMEL	OILER	463	538-50-0167	01/20/89
STEWARD DEPARTMENT:					
EFRIN M.	MENESES	FLEET CHEF	476	549-88-5177	02/05/89
MELANIE L.	WRIGHT	SHIP COOK	475	520-66-9049	02/01/89

JOSEPH HAZELWOOD MASTER 071388376

TOTAL PERSONS ON BOARD: 20

CERTIFIED TO BE A ~~TRUE~~ COPY
~~[illegible]~~
LCDR, USCG
Name, Rank or Title-Duty Station

I HAVE SEEN THE ORIGINAL AND COMPARED
THE COPY WITH IT AND FOUND IT TO BE A
TRUE COPY. 26 MAR 89
MARK J. DELOZIER, CW03, USCG
MARINE INVESTIGATOR/INSPECTOR
MARINE SAFETY OFFICE, VALDEZ, AK. USCG

PLEX131-001

[redacted]

REF # CH 79.89
SAMPLE Blood

CHAIN OF CUSTODY

DATE & TIME	RELEASED BY	RECEIVED BY	PURPOSE/REMARKS
MAR 3 0 1989 3:30	TEMPORARY STORAGE REC. AREA /	Karen L. Metcalf KAREN L. METCALF	Aliquot
MAR 3 0 1989 3:00	Karen L. Metcalf KAREN L. METCALF	TEMPORARY STORAGE REC. AREA /	TRANSFER SPECS TO TEMPORARY STORAGE
APR 1 7 1989 1:23	TEMPORARY STORAGE REC. AREA /	Karen L. Metcalf KAREN L. METCALF	TRANSFER TO LONG-TERM STORAGE FREEZER
APR 1 7 1989 1:42	Karen L. Metcalf KAREN L. METCALF	LONG-TERM STORAGE FREEZER	TRANSFER TO LONG-TERM STORAGE FREEZER
APR 2 0 1989 10:12	LONG-TERM STORAGE FREEZER	Karen L. Metcalf KAREN L. METCALF	Copy specimen container for time of collection
APR 2 0 1989 10:41	Karen L. Metcalf KAREN L. METCALF	LONG-TERM STORAGE FREEZER	TRANSFER TO LONG-TERM STORAGE FREEZER
May 1, 1989 0925	Long Term Storage	Judy Post Judy Post	transfer to temp storage
May 1, 1989 0925	Judy Post Judy Post	short term storage	Thawing for subsequent aliquoting ~~for shipment [illegible]~~
MAY - 2 1989 4:00	TEMPORARY STORAGE REC. AREA /	Karen L. Metcalf KAREN L. METCALF	ALIQUOT part of [illegible] to be sent to Center for the [illegible]
MAY - 2 1989 4:15	Karen L. Metcalf KAREN L. METCALF	TEMPORARY STORAGE REC. AREA /	TRANSFER SPECS TO TEMPORARY STORAGE

REF # CW 73-871

SAMPLE Blood

CHAIN OF CUSTODY

DATE & TIME	RELEASED BY	RECEIVED BY	PURPOSE/REMARKS
MAY - 8 1980 1:37	TEMPORARY STORAGE REC. AREA /	KAREN L. METCALF	TRANSFER TO LONG-TERM STORAGE FREEZER
MAY - 9 1980 1:40	KAREN L. METCALF	LONG-TERM STORAGE FREEZER	TRANSFER TO LONG-TERM STORAGE FREEZER

CW FORM 2066-1A-R 10/6/87 S.J.E.

CHEMWEST ANALYTICAL LABORATORIES, INC.

Internal Chain of Custody

Ref. No. CW 78-89

Requesting Agency: U. S. Coast Guard - Marine Safety Office
222 E 7th Rm D-148
Anchorage, AK 99501

Attn: Lt. Gary Stock

Identification: Joseph Hazelwood 071-38-8276

Specimen(s): 8 10 ml red stoppered tubes of blood.
2 10 ml gray stoppered tubes of blood KLM 5-1-89

Test Required: Full Screen for drugs of abuse including Alcohol.

Date Received: MAR 2 8 1989 Received by: Karen S. Metcalf KAREN L METCALF

Shipment Container: Sealed Yes Signed NO Shipper: FEDERAL EXPRESS 429 132 293

Comments: Sample received in a sealed white container within a sealed white box with 5 other samples. White box sent in a large sealed brown box.

Specimen Container: Sealed Yes Labelled Yes

CHAIN OF CUSTODY

DATE & TIME	RELEASED BY	RECEIVED BY	PURPOSE/REMARKS
MAR 2 8 1989 10:14	Karen S. Metcalf KAREN L METCALF	TEMPORARY STORAGE REC. AREA	TRANSFER SPECS TO TEMPORARY STORAGE
MAR 2 8 1989 11:55	TEMPORARY STORAGE REC. AREA	Matt Noedel MATT NOEDEL	EtOH
MAR 2 8 1989 3:00	Matt Noedel MATT NOEDEL	TEMPORARY STORAGE REC. AREA	Store

CIVIL NO.: A89-095
PLAINTIFFS' EXHIBIT
NUMBER 141

ATTACHMENT III-1

Seriatim Rating Summary - Joseph Hazelwood

Year	Rating/Group Size
1988	23/38
1987	24/29
1986	35/37
1984	25/34
1983	29/33
1982	35/39
1981	25/39

CONFIDENTIAL
Pursuant To Protective Order
In the Exxon Valdez Oil Spill Litigation

11 · 16 · 92
PLAINTIFF'S
EXHIBIT
42563
TOMPKINS

[illegible]
PLAINTIFFS' EXHIBIT
NUMBER 154

EXXON SHIPPING COMPANY
POST OFFICE BOX 1512 • HOUSTON, TEXAS 77251-1512 "EXXON" HOUSTON

[illegible]

May 29, 1985

Mr. W. J. Davis, Law Department
Mr. F. J. Iarossi
Mr. S. P. Revere, Jr.

Attached is my interview report

Please advise if you take exception.

B

BCG:mb
Attachment

CONFIDENTIAL
Pursuant To Protective Order
In the Exxon Valdez Oil Spill Litigation

CIVIL NO. A89-095
PLAINTIFFS' EXHIBIT
NUMBER 160

B. C. GRAVES, JR.	MAY 28, 1985	

(I asked Joe if he ever drank aboard the ship. He commented that he occasionally drank aboard the ship but not frequently. He also indicated that he came back to the ship from port drunk on several occasions.)

BCG:mb

SAFETYISFOREVERYONEEVERYYEAR

EXXON PRIVATE

EXXON

EMPLOYEE ALCOHOL AND DRUG USE POLICY

UPDATE

GUIDE FOR SUPERVISORS' USE

DURING MEETINGS WITH EMPLOYEES

1989

PLAINTIFF'S
EXHIBIT
43393
Rousse

CIVIL NO. [illegible]
PLAINTIFFS' EXHIBIT
NUMBER 169

SUPERVISOR DISCUSSION WITH EMPLOYEES

Meeting Guidelines

Objectives: Each supervisor will need to discuss with employees the provisions and implications of the updated Alcohol and Drug Use policy.

These discussions will be essential to help implement the policy revisions which are designed to further ensure a workplace that is safe, healthy and productive, and that protects the public and environment.

The video "Drugs at Work" (24 minutes) should also be shown at the start of employee meetings.

Methods: Scheduling the discussions and video showing as part of a regular meeting is preferable vs. calling a special meeting; however, every employee must have the opportunity to take part in one of these discussions.

The discussion should cover the points shown on the attached outline.

Discussions can be supplemented by using Q&As as appropriate to your work setting. The Q&A's however, are for supervisors' use and not for distribution to employees. This also applies to the Supervisor's Guidelines.

Timing: Employee meetings (with non-represented employees) may be conducted beginning on August 4 and should be completed by August 31.

When planning the employee meetings be sure to allow plenty of time for any questions employees might have. If you don't know the answer to a question, let the employee know you will find the answer and get back to him or her. As resources, consult your supervisor , the local HR advisor or the trainer who conducted your training session.

SUPERVISOR DISCUSSION WITH EMPLOYEES
OUTLINE

Introduction

- Purpose of this meeting/discussion is to review the updated Employee Alcohol and Drug Use policy dated July 5, 1989, and to answer any questions you might have about the policy.

Video - "Drugs at Work"

- We would like to show this video to begin the meeting because it helps set the scene for the discussion which follows.

Background as Basis for Understanding Revisions to the Policy

- 1987 Policy Highlights
    - Prohibits use, possession, distribution or sale of unprescribed controlled drugs on company premises and prohibits the use, possession, distribution, or sale of alcohol without prior approval by senior management.
    - Unannounced searches of company facilities and employees are permitted for reasonable cause, for example:
        + Justified safety-related concerns
        + Discovery of alcohol/drugs/paraphernalia in common areas
        + Information that illegal substances might be present
    - Employees can be required to submit to medical evaluation or alcohol and drug testing where reasonable cause exists to suspect alcohol or drug use.
    - Positive test results or refusal to submit to a drug test are grounds for disciplinary action, including dismissal.
- All of these features in the 1987 policy continue to apply.
- Interim Considerations.
    - During the fall of 1988 Employee Relations and Human Resources initiated a study of the 1987 Policy in response to emerging issues such as the changing competitive situations and evolving Federal laws. In December, 1988, the Exxon USA Management Committee endorsed the following recommendations :

- Formalization of unannounced testing of employees following rehabilitation. Competitive survey data of major oil companies indicated that most were using required testing after an employee returns from rehabilitation. Our 1987 policy was silent on this point, some functions were using testing after rehabilitation and some were not.

- Confirmation of screening test threshold for marijuana at 20 ng.

- Contractors will be required to impose on their employees, working with Exxon, testing requirements like those in the Exxon Alcohol and Drug Use Policy.

• Current Situation

  - Factors affecting alcohol and drug policies including societal/public attitudes and changing laws :

    + Several industrial accidents have occurred including our own Valdez incident:

      -- Conrail train accident in Maryland that killed 16 and injured 170, the engineer tested positive for marijuana use and had a history of substance abuse including an arrest for driving while under the influence of drugs.

      -- The Alliance, Ohio train derailment injured three people and cost Conrail $2.4 million in damages. The engineer tested positive for alcohol impairment.

      -- Two Burlington-Northern trains collided head-on in Wiggins, Colorado killing 5 people and resulted in damages amounting to $3.9 million. The engineer in this instance also tested positive for alcohol impairment.

      -- Truck driver in San Antonio Tx. area drove his truck at high speed through 22 cars on the freeway causing many injuries and property damage. When confronted by Highway Patrol, he said he didn't even know he was driving a truck. Subsequent tests indicated a high level of cocaine in his body.

    + Tougher industry substance abuse practices have been enacted in part due to the success of the military with random test programs. Positive test rates within the military have dropped significantly since testing was enacted. Estimated cost to corporations in terms of medical expenses, absenteeism, accidents and lost productivity tied to substance abuse by employees is in the range of $60 - $100 billion annually.

+ Some examples of industry practices are:

  -- DuPont Company conducts random testing where controlled drugs are manufactured.

  -- Allied-Signal Corp conducts random testing at "safety-sensitive" plants.

  -- Texas Instruments recently implemented random testing for employees.

  -- Union Carbide will implement random testing in September 1989.

  -- Amoco tests employees holding certain positions in conjunction with physical examinations.

  -- Shell, Amoco, and DuPont conduct post-rehabilitation follow-up testing.

+ Another factor which impacted our thinking was the new government regulations which mandate random testing of certain personnel such as shipboard licensed personnel, truck drivers, maintenance, operations engineering people in pipeline positions.

+ Finally there have been recent Supreme Court decisions supporting employers' rights to impose drug tests on employees.

  -- On March 21, 1989 the court upheld the constitutionality of federal rules requiring blood and urine tests for railroad employees in accidents resulting in loss of life, release of hazardous materials or major property damage. The court also upheld mandatory drug testing of U.S. customs service employees seeking promotions to certain "sensitive jobs".

  -- On April 3, 1989 the court left in tact a lower court ruling allowing random and "reasonable suspicion" testing for police officers, and mandatory pre-employment testing for workers in nuclear power plants.

  -- On June 19, 1989 the court ruled that railroads and airlines may add drug screening to periodic physical exams without having to bargain with represented workers.

- 1989 Policy Changes

  [Hand out the 1989 policy update. Employees will likely have already seen the policy in a letter from the region CEO.]

  - "An employee who has had or is found to have a substance abuse problem will not be permitted to work in a designated position identified by management as being critical to the safety and well being of employees, the public, or the Corporation."

    + "Designated positions" are those developed by each department (approved by sr. management) where there exists:

      -- High exposure to catastrophic public, environmental or employee incident.

      -- A key and direct role in the operating process where failure could cause a catastrophic incident.

      -- No direct or very limited supervision readily available to provide operational check.

    + Some examples of designated positions are as follows:

      -- Drilling superintendents
      -- Certain field superintendents
      -- Gas plant operators
      -- Shift superintendents at refineries
      -- Console "supervisors"
      -- Truck drivers
      -- Terminal operators
      -- Certain fleet personnel in Shipping
      -- Pipeline station operators

    + Designated positions account for 8.7 percent of regularly assigned employees and about 13 percent when those in relief/step up capacities are included.

    + "Work in" means assigned to permanently or temporarily relieving or stepping up to a designated position, i.e. employees who temporarily relieve or step up to designated positions are obligated under the same terms of the policy/guidelines as employees permanently assigned to work in designated positions.

    + The reference to an employee who has been to or currently is active in rehabilitation is an employee who "has had" or "has" a substance abuse problem.

      -- Rehabilitation is defined as a structured process of counseling, education, and therapy through which an employee seeks resolution of a personal problem with the abuse of alcohol or drugs.

+ If an employee who is assigned to work in a designated position has been found to have a substance abuse problem he or she will be reassigned immediately to a non-designated position.

+ "Found to have a substance abuse problem" may be the case after a thorough assessment of facts following a suspicion of substance abuse..for example:
  - -- Is or has been arrested or received a ticket for a traffic violations while under the influence of alcohol or drugs.
  - -- Is or has been arrested for public intoxication, possession, sale or distribution of controlled substances.
  - -- Is or has been discovered in possession of unauthorized alcohol, drugs or drug paraphernalia in the workplace.
  - -- Fails an alcohol or drug test administered by Exxon or a government agency.
  - -- Comes to work with observable signs of impairment.

+ Any thorough assessment of the facts involving suspicion of drug or alcohol abuse by an employee would involve discussions with the employee, an examination of all relevant facts, and through drug or alcohol testing administered under provisions of this policy. Such assessment must involve the unit human resources manager as well as the employee's supervisor.

+ If substance abuse problem is found to exist:
  - -- Discipline as appropriate (could include termination).
  - -- Remove permanently from designated position.

+ Employees working in designated positions are obligated to inform their supervisor:
  - -- Of past present or future substance abuse problem including participation in a rehabilitation program for an alcohol or drug related problem.
  - -- Is or has been arrested or received a ticket for a traffic violations while under the influence of alcohol or drugs.
  - -- Is or has been arrested for public intoxication, possession, sale or distribution of a controlled substance.
  - -- Any other incident associated with alcohol or drugs.
  - -- The individual must also inform his or her supervisor of the final legal disposition of any such incident.

    -- There will be instances where the employee may have experienced one of these substance abuse incidents many years ago. They are still required under the policy to come forward so that the situation may be assessed by management. If they do not come forward, and management learns later of the incident, the employee will be subject to discipline up to and including termination.

    -- Any assessment of a past incident regarding substance abuse will be considered in light of timing (how long ago was the incident), frequency (how many occurences were there), and the job the employee was in at the time of the incident(s). As always supervisors and managers are expected to excercise good judgment in such matters.

  + Employees working in designated positions must periodically undergo a physical examination and alcohol and drug testing. This includes taking these exams/tests prior to being assigned in a designated position.

- Any employee returning from rehabilitation will be required to participate in a company sponsored after-care program for two years.

  + Purpose is to assist and support employee in overcoming his or her dependency.

  + Coordinated by the Medical Department .

  + Supervisor will be a key player in supporting the employee and will report his or her progress following rehabilitation. The supervisor will also provide periodic confidential written reports to the unit human resources manager regarding his/her observations on the success of the employee's rehabilitation.

    -- Quarterly reports for the first two years.

    -- Semiannual reports for each of the next three years.

  + Supervisors are expected to maintain strict confidentiality when dealing with an employee participating in after-care.

- An employee who meets any of the following conditions is subject to unannounced periodic or random alcohol and drugs testing .

  + Has had a substance abuse problem.

  + Is working in a designated position identified by management.

  + Is in a position where testing is required by law, e.g..

    -- Dept of Transportation   -- Dept of Defense

  - Is in a specified executive position (including corporate officers and department managers; affiliate/region officers and department managers; as well as refinery/division managers and appropriate other positions in both staff and operating management capacities).

- Random testing will be coordinated by the Medical Department and accomplished through unannounced periodic selection of employees .

- Remember that the Exxon Employee Health Advisory Program (EHAP) is available to all employees who need assistance in resolving problems related to alcohol or drug abuse, marital, financial or emotional problems.

- Confidentiality

  - With respect to Medical Department, EHAP and employee medical plans - an employee's involvement and the employee's medical records will continue to be held strictly confidential.

  - If medical data indicate the employee does not meet requirements of alcohol and drug use policy, the Medical Department will notify the unit manager only that the employee is unfit to work in a designated position.

  - However, drug and alcohol random and for-cause test results will be communicated to appropriate management.

- Employee responsibilities.

  - Exxon feels it is in best interest of everyone to have a safe, healthy and productive work environment. All employees play an important role in accomplishing this.

  - All employees are responsible to company, fellow employees, subordinates and to the public.

  - Under the Drug Free Work Place Act of 1988 employees must report to the company, within five days, any drug convictions for violations occurring in the workplace. This is a condition of employment.

- Contractor, common carriers and vendors are expected to have alcohol and drug use policies including provisions for testing their employees for substance abuse.

Questions and Answers

- Review selected Q&A's you feel would be of value to your work group; however the Q&A's are for supervisor's use only and not to be a handout to employees.

Conclusion

- We recognize that the majority of employees do not have an alcohol or drug abuse problem. Nevertheless, it is important that we effectively administer this policy to protect each other, the public, and the environment, and potentially to protect our jobs. In revising the policy the company has tried to maintain a balance between the rights of employees and their safety, the public's safety and potential for damage to the environment.

July 18, 1989
SUPMTG89.DOC

Exxon Shipping Company

Policy Statement on Employee Alcohol and Drug Use

Exxon Shipping Company is committed to a safe, healthy, and productive workplace for all employees. The Company recognizes that alcohol, drug, or other substance abuse by a few employees will impair their ability to perform properly and will have serious adverse effects on the safety, efficiency, and productivity of other employees and the Company as a whole. The misuse of legitimate drugs or the use, possession, distribution, or sale of illicit or unprescribed controlled drugs on Company business or premises is strictly prohibited and is grounds for termination. Possession, use, distribution, or sale of alcoholic beverages on Company premises is not allowed without prior approval of appropriate senior management. Being unfit for work because of use of drugs or alcohol is strictly prohibited and is grounds for termination of employment. While this policy refers specifically to alcohol and drugs, it is intended to apply to all forms of substance abuse.

The Company recognizes alcohol or drug dependency as a treatable condition. Employees who suspect they have an alcohol or drug dependency are encouraged to seek advice and to follow appropriate treatment before it results in job performance problems. Employee Health Advisory Program or medical professional staff will advise and assist in securing treatment. Those employees who follow approved treatment will receive disability benefits in accordance with the provisions of established benefit plans and medical insurance coverage consistent with existing plans.

No employee with alcohol or drug dependency will be terminated due to a request for help in overcoming that dependency or because of involvement in a rehabilitation effort. However, an employee who has had or is found to have a substance abuse problem will not be permitted to work in designated positions identified by management as being critical to the safety and well-being of employees, the public, or the Company. Any employee returning from rehabilitation will be required to participate in a Company-approved after-care program. If an employee violates provisions of the Employee alcohol and Drug Use Policy, appropriate disciplinary action will be taken. Such action cannot be avoided by a request at that time for treatment or rehabilitation. If an employee suffering from alcohol or drug dependency refuses rehabilitation or fails to respond to treatment or fails to meet satisfactory standards of effective work performance, appropriate disciplinary action, up to and including termination, will be taken. This policy does not require and should not result in any special regulations, privileges, or exemptions from normal job performance requirements.

Exxon Shipping Company may from time to time conduct unannounced searches for drugs and alcohol on owned or controlled property. The Company may also require employees to submit to medical evaluation or alcohol and drug testing where cause exists to suspect alcohol or drug use. Unannounced periodic or random testing will be conducted when an employee meets any one of the following conditions: has had a substance abuse problem or is working in a designated position identified by management, a position where testing is required by law, or a specified executive position. A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including dismissal.

Contractor, common carrier, and vendor personnel are also covered by paragraphs one and four of this policy. Those who violate the policy will be removed from Company premises and may be denied future entry.

September 1, 1989

EXXON PRIVATE

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EXXON
EMPLOYEE
ALCOHOL
AND DRUG
USE

POLICY UPDATE

Training Objectives

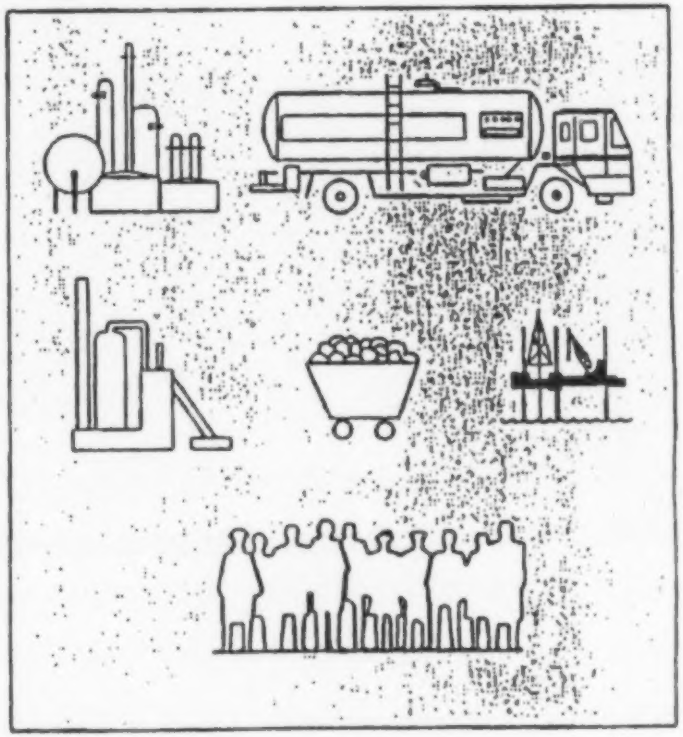
- Understand July, 1989 changes to policy
- Understand role and responsibility of supervisors under the revised policy
- Be prepared to communicate with employees regarding policy changes

Background

Exxon is committed to providing a

- SAFE
- HEALTHY
- PRODUCTIVE

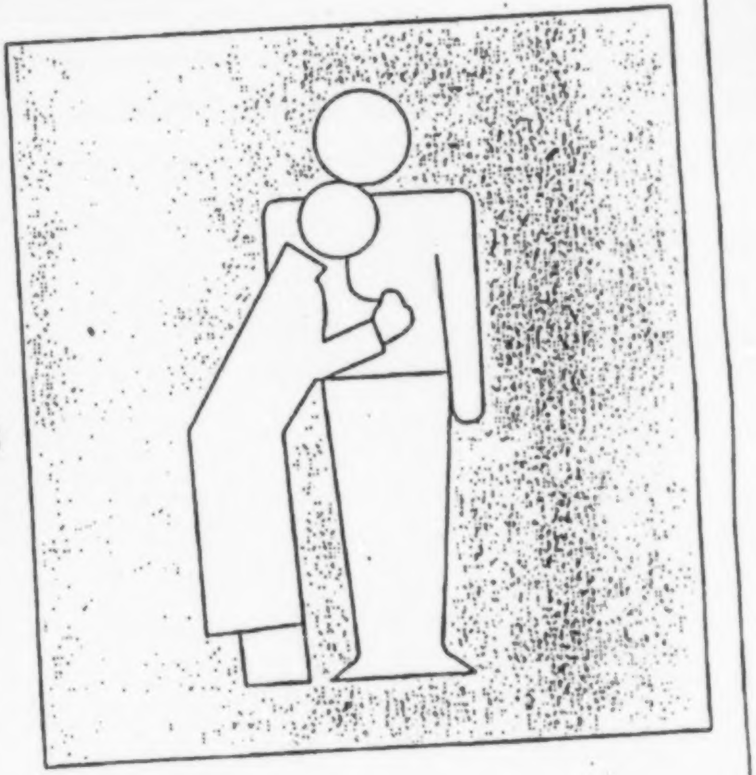
environment for all employees.



Background

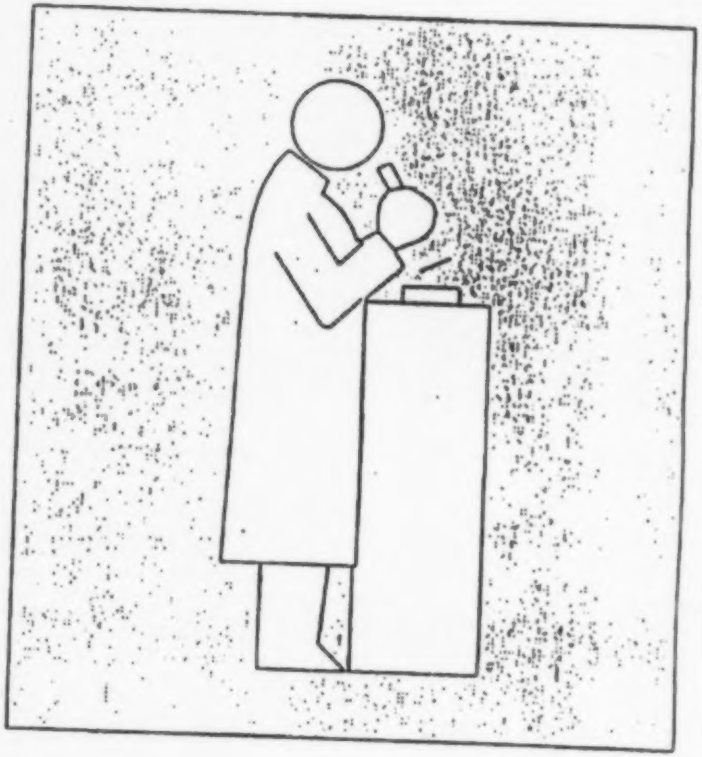
Current policy has roots back to 1977

- Alcoholism Policy implemented
  - Alcoholism seen as treatable illness
  - Focus was on rehabilitation



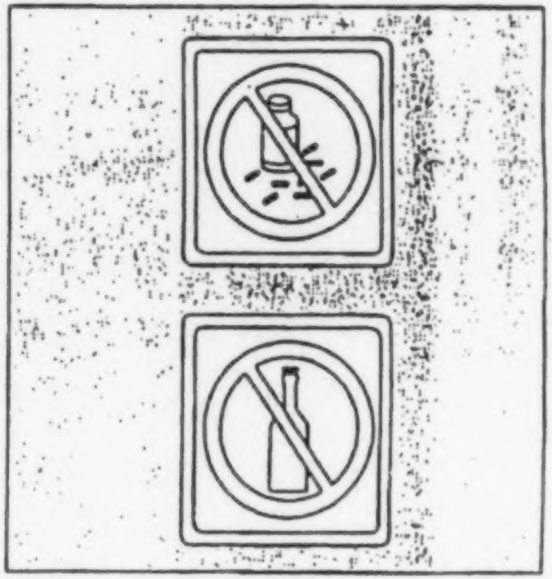
Background

- Drug awareness training (1984-85)
- Employee Health Advisory Program (EHAP) (1985)
- Pre-employment testing (1985)



General Concepts -- 1987 Policy

- Enhance safety and productivity
- Prohibit the use, possession, distribution, or sale of:
  - unprescribed controlled drugs on company premises
  - alcohol without prior senior management approval
- Prohibit being unfit for work



Key Provisions -- 1987 Policy

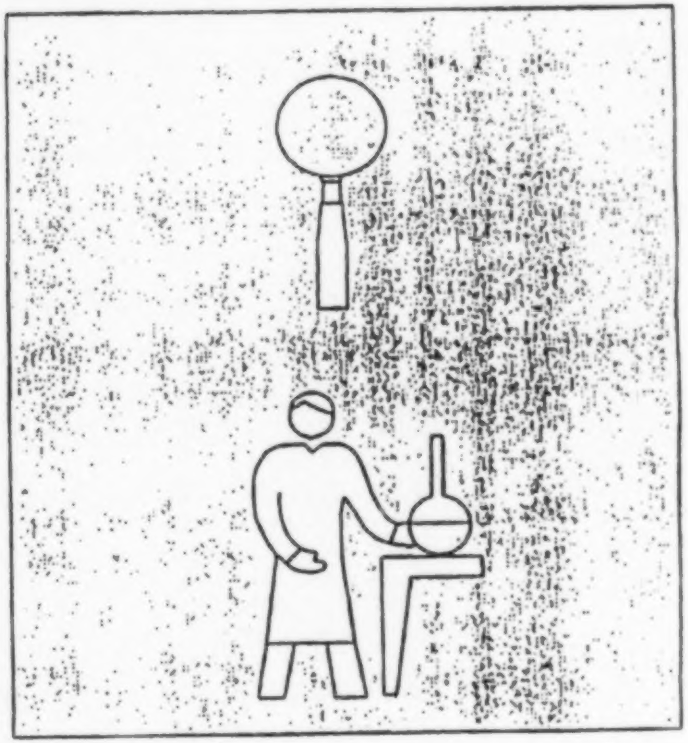
- Emphasis on self identification and rehabilitation
  - No termination if employee comes forward

Key Provisions -- 1987 Policy

Continued

Provided for:

- unannounced searches for reasonable cause
  - Justifiable safety related concerns
  - Discovery of alcohol/ drug paraphernalia
  - Information that prohibited substance present

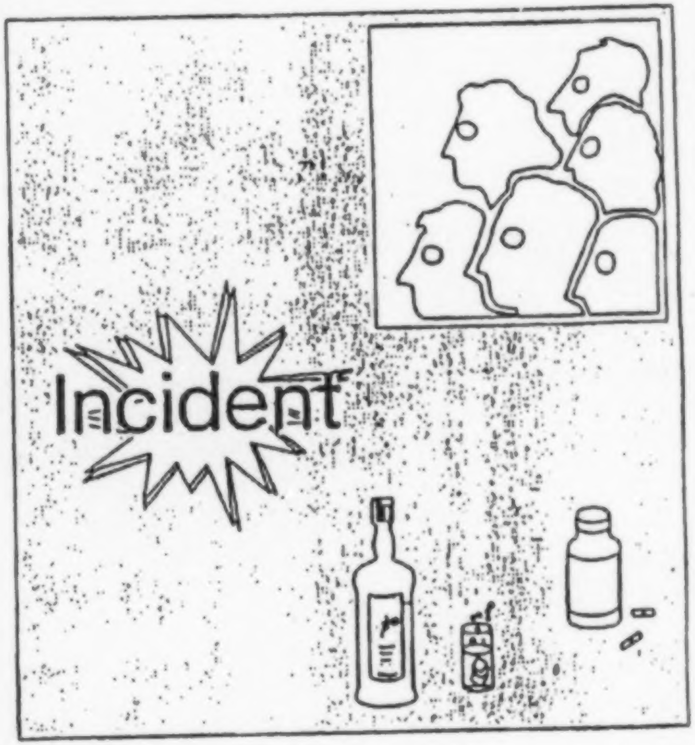


Key Provisions -- 1987 Policy

Continued

Allowed testing for reasonable cause

- Observable physical signs of impairment
- Result of an incident where there is basis to suspect drug or alcohol involvement
- Drugs or alcohol are detected on company premises



Key Provisions -- 1987 Policy

Continued

Discipline as appropriate, up to and including termination, if:

- Impaired on job
- In possession of alcohol or illegal drugs
- Test positive

Key Modifications Proposed to 1987 Policy

December 1988

- Required unannounced periodic (random) post-rehab testing
- Confirmed screening test threshold for marijuana at 20 ng
- Required contractors to incorporate pre-employment and for-cause testing of their employees

Factors Affecting Alcohol and Drug Policies

- Alcohol and drugs a growing societal problem
- Public becoming less tolerant
  - Industry accidents
  - Tougher corporate requirements
- Government action
  - Drug-Free Workplace Act
  - DOT Regulations
  - DOD Regulations
- Recent Supreme Court decisions supporting drug testing

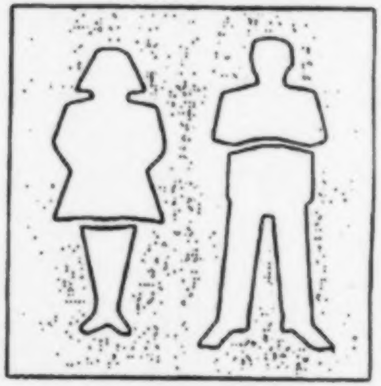
1989 Policy - Broad Concepts

CONCEPT

- Designated some positions for special coverage
  - Safety, environmental risk considerations
  - Reduce potential for accidents or incidents

INCLUDES

- Limited number of employees



1989 Policy - Broad Concepts

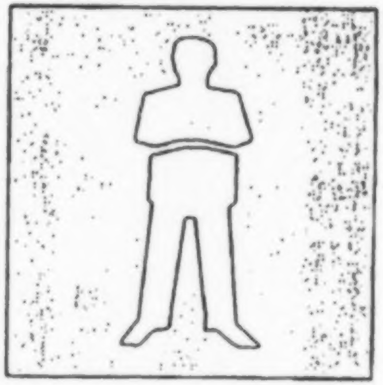
Continued

CONCEPT

- Increased emphasis on elimination of substance abuse
  - Established program of testing/physical exams

INCLUDES

- Certain executives



1989 Policy - Broad Concepts

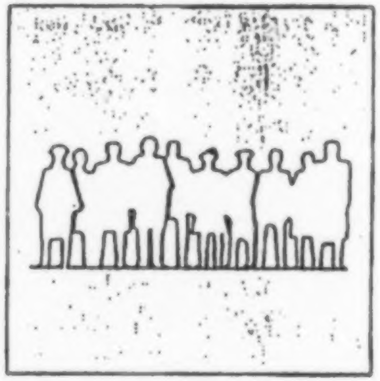
Continued

CONCEPT

- Provide additional support for those with substance abuse problems
  - After-care
  - Supervisor support

INCLUDES

- All employees



Define "Designated Positions"

Designated Positions are identified by management as being critical to the safety and well-being of employees, the public, or the Corporation, and:

- Have high exposure to catastrophic employee, public, or environmental incident
- Have a key and direct role in the operating process where failure could cause catastrophic incident
- There is no direct or very limited supervision available to provide operational check

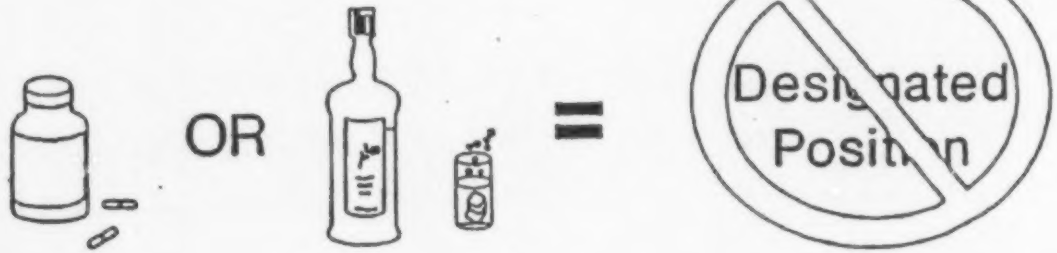
Designated Positions

- Limited number of positions (EUSA) (669)
- Covers 8.7% (1759) of employees permanently assigned
- Includes 13.7% (848) of employees when relief added
- Upstream represented 37% (260)
- Downstream represented 70% (1030)
- Affiliates represented 41% (170)

JULY 1989 - Policy Changes

Designated Positions

- An employee who has had, or is found to have, a substance abuse problem will not be permitted to work in designated positions



Designated Positions

Continued

Define "Work In" and "Has Had"

- "Work in" is defined as assigned to, temporarily relieving, or stepping-up to a designated position
- An employee who has been to, or currently is active in, rehabilitation is an employee who "has had", or "has" a substance abuse problem

Designated Positions

Drug or Alcohol Abuse - PAST

- If an employee assigned to a designated position has been found to have a substance abuse problem, he\she will be:
  - Immediately re-assigned to a non-designated position at a comparable level, if available and qualified
  - If comparable position not available, employee's pay will be maintained up to, but no longer than, five years

Designated Positions

Drug or Alcohol Abuse - FUTURE

- If subsequent to the date of this policy, an employee working in a designated position is found to have a substance abuse problem, he/she will be:
  - Immediately re-assigned to a non-designated position at a comparable or lower level
- Any employee who has in the past, or does in the future, have a substance abuse problem will not be permitted (ever) to work in a designated position

Rehabilitation Defined:

- A structured process of counseling, education, and therapy through which an employee seeks resolution of a personal problem with the abuse of alcohol or drugs
  - Provided by... medical doctor, licensed drug/ alcohol abuse counselor
  - Administered in an inpatient or outpatient setting
  - Rehab process initiated by employee, EHAP, family, supervisor, or others

Rehabilitation Defined:

Continued

- Rehabilitation programs may include:
  - Participation in a structured program
  - Institutional program such as detox center
  - Periodic or part-time counseling
  - Self-help program such as Alcoholics Anonymous, Narcotics Anonymous, or Cocaine Anonymous
- EHAP consultation alone is not considered rehabilitation

Rehabilitation Defined:

Continued

- Rehabilitation programs may include: PARTICIPATION 12
  - Referral to structured program
  - Institutional program such as detox center
  - Periodic or part-time counseling
  - Self-help program such as Alcoholics Anonymous, Narcotics Anonymous, or Cocaine Anonymous
- EHAP consultation alone is not considered rehabilitation

Designated Positions

Continued

"Found to have" a Substance Abuse Problem:

An employee would be suspected of having a substance abuse problem if:

- Has been arrested for substance abuse-related offense
- Has been found with drugs or unauthorized alcohol in the workplace
- Fails an alcohol/drug test
  - random
  - for-cause
  - with physical exam
- Has observable signs of physical impairment

Observable Signs of Physical Impairment

May include, but are not limited to:

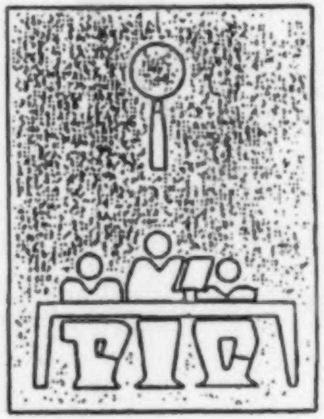
- Poor coordination, slurred speech, illogical or unrelated responses to questions
- Inability to understand and connect thoughts
- Smell of alcohol on breath

These observable signs may occur from sudden impairment, or a more gradual deterioration over time

Designated Positions

Continued.

Assessment of Individuals "Suspected Of"



The assessment will include:

- Discussions with the employee
- Examination of the relevant facts
- Testing administered under this policy

The assessment must involve:

- Unit human resources manager
- At least one other person, supervisor

If a substance abuse problem is found to exist employee will be:

- Immediately removed from the designated position
- Disciplined up to and including termination

PLEX169-038

Designated Positions

Continued

Employee Responsibility

- Employee currently working in (includes employees permanently assigned or qualified to relieve/step up) or in the future transferred to, a designated position must advise supervisor of:
  - Any past, present, or future substance abuse problem, including participation in a rehabilitation program
  - Arrests related to substance abuse
  - Final disposition of such arrests

Employee Responsibility

Continued

Designated Positions

- Failure to comply will result in discipline up to and including termination
- Undergo physical exam and alcohol/drug test prior to working in the designated position, and periodically thereafter

Specified Executive Positions

-- include Corporate and Region/Affiliate officers, Department managers; Refinery/Division managers; appropriate other positions

- Positions to be specified by management
- Incumbents will undergo periodic physical examinations and be subject to random selection for alcohol and drug use testing
- Positive test result is grounds for discipline including removal from position and/or termination

Returning From Rehabilitation

- Any employee returning from rehabilitation will participate in a company-approved after-care program (specifics available at later date)
  - Coordinated by Medical
  - Will last for two years
- Supervisor will support and report progress
  - Quarterly for the first two years
  - Semiannually for each of the next three years

Confidentiality

Continued strict confidentiality will be held concerning:

- Participation in EHAP
- Medical plan use
- Physical examinations
- Company medical records

If medical data indicates employee doesn't meet requirements of Alcohol and Drug Use Policy - employee will be reported as not meeting requirements of the designated position.

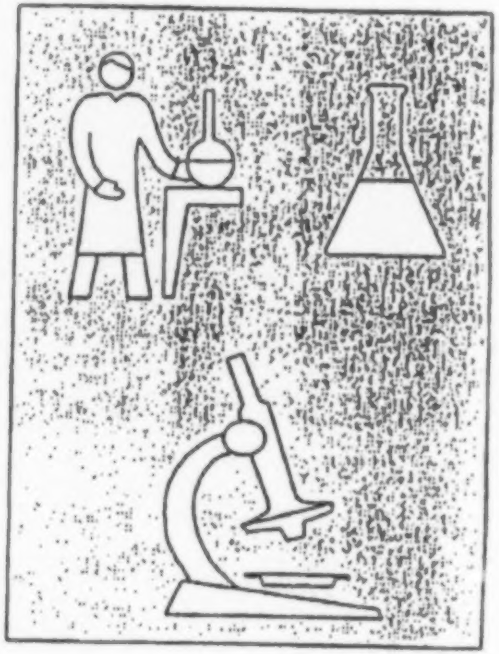
Drug and alcohol random and for-cause test results will be communicated to appropriate management.

Company Expectations of Employees

- Exxon feels it is in the best interest of all employees to have a safe, healthy, productive work environment
- Employees play a key role in the success of the policy
- Employees have responsibility to company, co-workers, their subordinates, and public to ensure adherence to policy

Testing (Five Situations)

- Pre-employment
- Pre-entry
- Unannounced, Periodic or Random
- For Cause
- Periodic Physical Exam



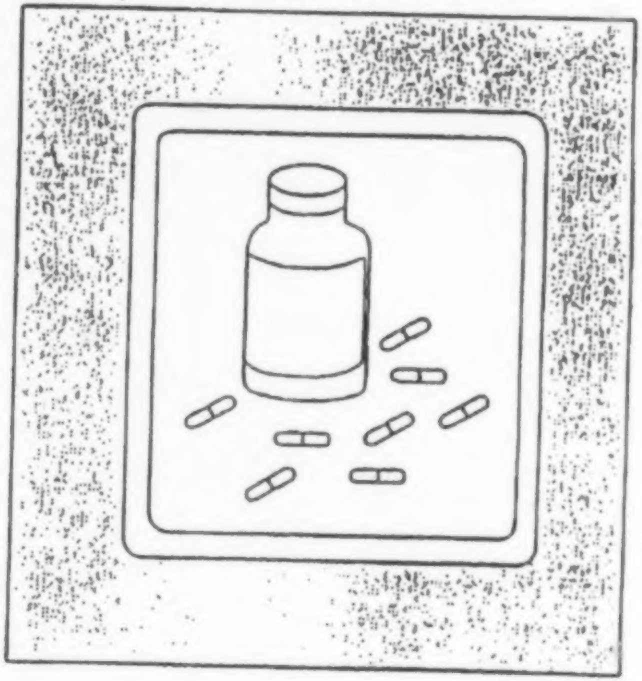
Testing

Testing is defined as:

- For alcohol - an initial screening may be used to determine if blood alcohol test needed
- For drugs - urine samples and other tests as appropriate
- Coordinated by medical department

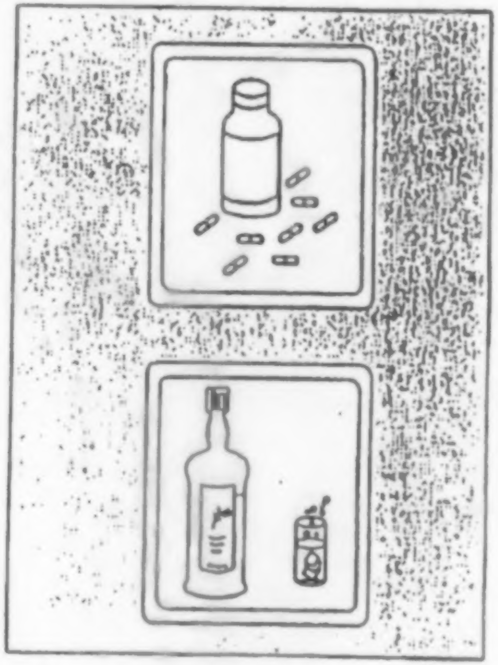
Pre-employment Testing

- Covers All Job Applicants
- Test is for Drugs Only



Pre-entry Testing

- Applies to employees moving from regular positions into designated positions
- Test for drugs and alcohol



Unannounced Periodic or Random Testing

- Employee has had a substance abuse problem
- Is working in a designated position identified by management
- A position where testing is required by law
- A specified executive position

For-Cause Testing

- When supervisor observes signs of impaired performance
- When alcohol, drugs or drug paraphernalia are discovered in the workplace, or when there is strong suspicion that substances are in the workplace
- When supervisor detects smell of alcohol on employee's breath
- Post accident/incident

Periodic Physical Examinations

Include alcohol and drug testing:

- Prior to working in designated position
- Specified executive physical exams
- When relieving/step-up to designated position
- Required at least once every two years

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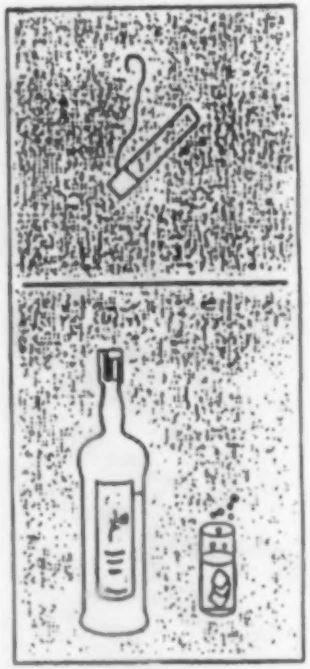
Threshold Levels

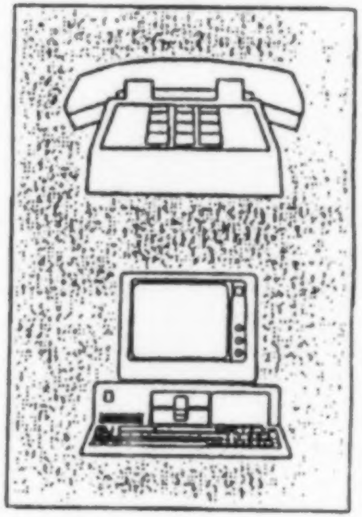
Drug and Alcohol threshold levels are:

- 20 ng/ml for marijuana screening
- 0.04 gm/dl for alcohol screening
- Medical will determine positive test levels for other drugs



Test Results

- Communicated to Medical by federally approved testing lab
- Medical calls authorized site contact if test positive; negative results communicated via electronic mail
- Supervisor notifies employee



Testing Procedures

- No change in pre-employment testing
- No change in for-cause testing -- will follow same procedures developed under 1987 policy

Testing Procedures

Continued

- For cause:
  - Supervisor accompanies employee to test facility
  - Supervisor makes arrangement for employee to get home
  - Employee waits at home to be notified of test result
- Periodic unannounced or random:
  - Employee proceeds on own to test facility
  - Employee may return to work following test

Contractors

Contractors, common carriers, vendors continue to be:

- Subject to unannounced searches
- Expected to have Alcohol and Drug Use policies, including appropriate testing

Failure to comply will result in removal from premises and denial of future entry

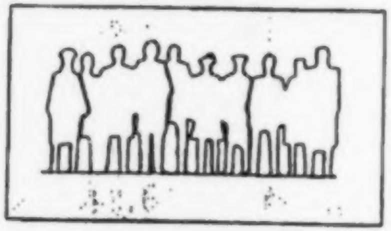
Drug-Free Workplace Act of 1988

- Requires employers in U.S. with Federal procurement contracts at $25k or more to: (for example)
  - Have a drug policy and anti-drug statement
  - Set up an awareness program
  - (For workplace conviction) sanction or send to rehab any employee with controlled substance conviction (employee must report any conviction within 5 days)
  - Make "good-faith" effort to have drug-free workplace
- Use of "Drugs At Work" video, plus discussion of policy will satisfy awareness requirement

Department of Transportation
Drug Testing Regulations

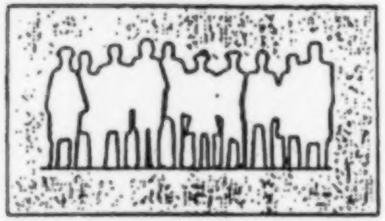
- Implementation not required until December 21, 1989
- Regulations applicable to Exxon
  - Federal Highway Administration . . .
    D.O.T. regulated drivers, including some on contract
  - Coast Guard . . .
    covers crew members, including those on contract
  - Research and Special Programs Administration . . .
    covers operations, maintenance, and emergency response personnel working on D.O.T. regulated pipelines, including contractors
- Pre-entry, post-accident, for-cause, periodic, post-rehabilitation and random sampling

Department of Defense
Drug-Free Work Force Interim Rule



- Covers employees of prime contractors
- Contractor must provide drug abuse education, counseling, and rehabilitation resources and employee drug testing
  - Specifics not yet defined
  - Final regulations may include random testing

Department of Defense
Drug-Free Work Force Interim Rule



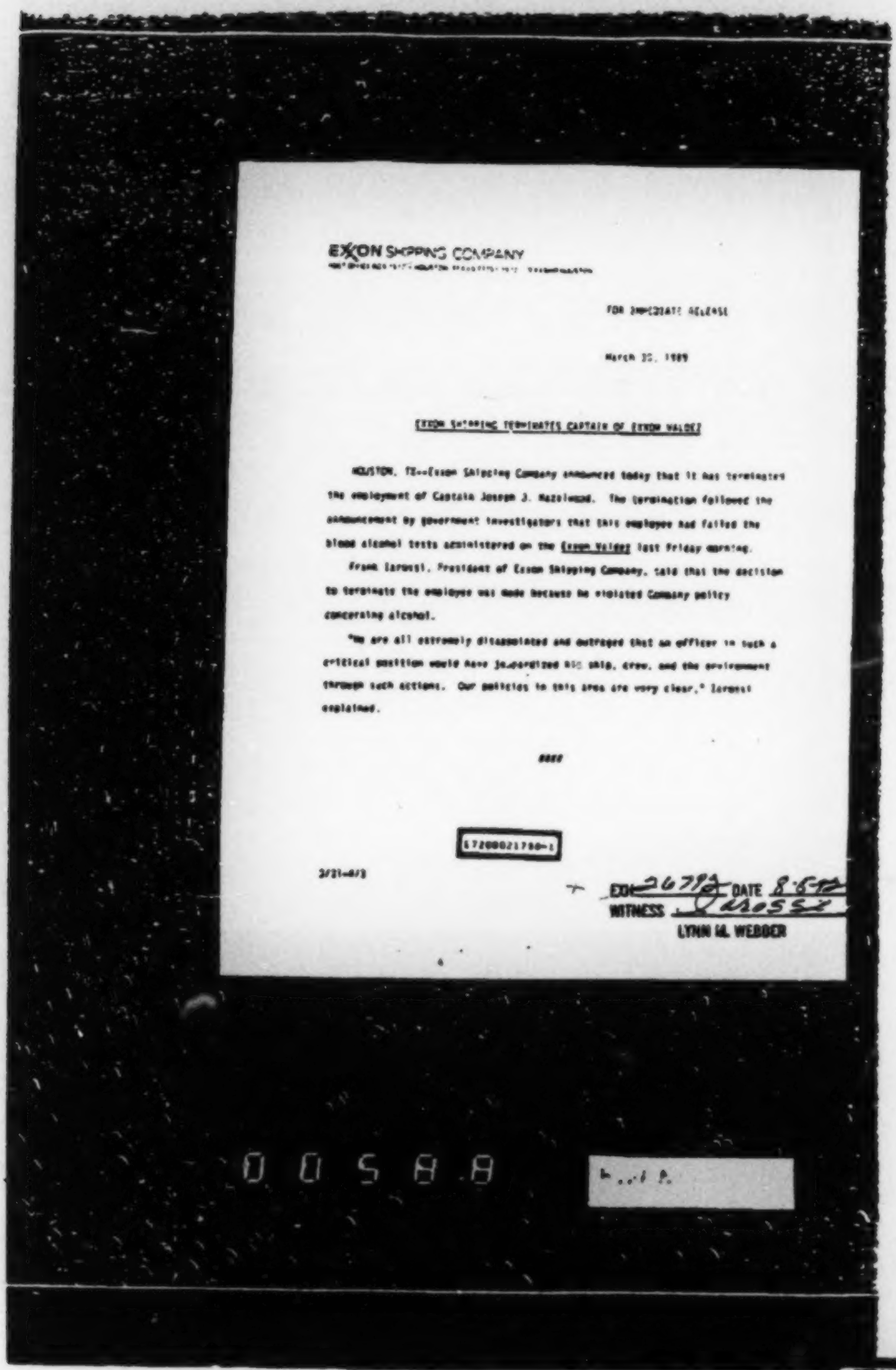
- Covers employees of of prime contractors
- Contractor must provide drug abuse education, counseling, and rehabilitation resources and employee drug testing
  - Specifics not yet defined
  - Final regulations may include random testing

IMPLEMENTATION SCHEDULE

• Train Trainer Sessions (3)	July 19-20
• Negotiator Communications Session	July 21
• Commence Negotiations with Unions/Federations	July 25
• Start Supervisors' Training	July 26
• Release CEO Letter• (Non-Represented Employees)	August 4
• Start Employee Meetings•	August 4
• Test Administrator Training	August 15
• Complete Employee Meetings•	August 31
• Policy Implemented•	September 1
• Letter to Annuitants	September 1

• For represented employees--upon completion of negotiations

10



EXXON SHIPPING COMPANY

FOR IMMEDIATE RELEASE

March 30, 1989

EXXON SHIPPING TERMINATES CAPTAIN OF EXXON VALDEZ

HOUSTON, TX--Exxon Shipping Company announced today that it has terminated the employment of Captain Joseph J. Hazelwood. The termination followed the announcement by government investigators that this employee had failed the blood alcohol tests administered on the Exxon Valdez last Friday morning.

Frank Iarossi, President of Exxon Shipping Company, said that the decision to terminate the employee was made because he violated Company policy concerning alcohol.

"We are all extremely disappointed and outraged that an officer in such a critical position would have jeopardized his ship, crew, and the environment through such actions. Our policies in this area are very clear," Iarossi explained.

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3/31-0/3

EXH 2679A DATE 8-5-92
WITNESS
LYNN M. WEBBER

00588

BEST AVAILABLE COPY

21

Letter to fleet : - Conservatism.
- can't afford any mishap!
- Nav. Manual. - clear statement.
- Operating in PWS.

September 5, 1989

TO: Mr. D. H. Koops

FROM: F. J. Iarossi

(1) DJP

I'd like to discuss your plans and schedule to implement the supplemental deck officer program. Who, when, how, etc. I also mentioned to Dan that we may want to use masters for the Valdez slot. We may also want to use three masters on rotation so that we could expand the role of these three individuals to include a rotation in Houston to provide the "fleet input" we are always searching for when we have special projects. Might consider something like 30 days in Valdez, 15 days in Houston, and 45 days on paid leave and rotate those three back to sea every two years or so.

I'd also like to know your plans and schedule regarding setting maximum work hours. I understand the need to talk this one over. However, we do need to implement such a program soon — let's say not later than October 1.

On another subject, I am growing a little impatient with our slowness in coming to grips with other operational issues highlighted by the grounding of EXXON VALDEZ. Someone in Operations needs to take some initiative fast! Areas which need to be addressed very soon and action steps proposed include:

We are working

(2) JRT OC

1. Very clear instruction to our masters regarding operations in PWS during ice season. (It is incredible that September is here and we still have not addressed this issue.)
2. Very clear instruction regarding vessel speed in PWS and perhaps in other areas also such as SF Bay.
3. Very clear prohibition against leaving the traffic lanes in PWS unless emergency conditions exist and then only with the express permission of the MSO Valdez.
4. (3) JRT Some fail safe method of ensuring that deck watchstanders clearly know when the autopilot is engaged.
5. (4) JRT/DJP A very clear directive on maintaining a lookout at all appropriate times. (The idea of allowing a coffee break is just unbelievable.)
6. (5) JRT A very clear statement that the Navigation and Bridge Organization Manual is not a guide. It establishes how our vessels must be operated and that it is the master's responsibility to ensure it is followed at all times as appropriate.

+15

EXH 26794 DATE 8-25-92
WITNESS Iarossi vol 1
LYNN M. WEBBER

CIVIL NO. 3 A89-095
PLAINTIFFS' EXHIBIT
NUMBER 175

[illegible]

(b) In a similar effort, I would like you to review the 20-mile grounding line policy. Has it been moderated beyond what is prudent! Why are our vessels operating within 20 miles of the Florida coast when outside of the Florida Straits? This seems to me to be in direct violation of the intent of the grounding line policy. Do all of our operations conform to that policy? Please investigate and develop a written report for me. [illegible]

JAT

(c)

JAT/DJP

Last week during a hearing before the Alaska Oil Spill Commission, Jerry Aspland of Arco Marine publicly and for the record stated that in the aftermath of the VALDEZ grounding, Arco Marine has established the following policies:

1. All vessels will remain a minimum of 100 miles offshore except during direct approach to and from port.
2. Restricted speed in PWS and Puget Sound. what is [illegible]?
3. No deviation from the traffic lanes in PWS.
4. Breathalyzer tests for masters before leaving any dock.
5. Autoalarm on all steering gear autopilots.
6. Master's judgment as to whether he leaves Valdez at night during ice season.

These steps clearly establish a new "standard of care" in our industry, and I hope we all have come to understand what that means to us. We could not defend having a lesser standard.

It is more than a little disturbing to me that Arco has come to grips with life after the VALDEZ grounding while we, over five months later, have not. I understand we are responding to many pressures and we are in transition, but safe operation of the fleet is the paramount task of your group. What is needed is some initiative. I'm sure you will provide it!

FJI:tjm

cc Mr. D. J. Paul
   Mr. J. A. Tompkins

-15

EXH [illegible] DATE [illegible]
WITNESS [illegible]

IN TEN YEARS YOU'LL SEE 'NOTHING'

That's what Exxon CEO Lawrence Rawl says will be left of the Valdez oil spill. "A super job" of cleaning up, he hopes, will overcome Congress's new coolness to Arctic exploration.

IF THE OIL SPILL proves anything, says Exxon's boss, it's that you need someone in charge who can "move quickly without a lot of recriminations." Criticized for staying out of public view for nearly a week after the tanker ran aground, Rawl, 60, a genial onetime petroleum engineer, talked to FORTUNE *at length in his vast, hushed office at the oil company's Manhattan headquarters.*

How have you felt, living and operating as Exxon's CEO since the spill?

It is something I wouldn't recommend anybody try to get themselves into. I've felt personally very responsible for doing everything that I can—and I can do a heck of a lot within this company. One is to make sure that we do all that is humanly possible to get this thing cleaned up promptly. It's our problem the ship was on the rock. It's our problem the oil was spilled.

Did you consider immediately visiting the site of the spill yourself? Would that have enhanced Exxon's image?

You're damned if you do and damned if you don't. I concluded that we were going to be up to our butts in alligators right here. I wanted to be able to deal with Congress as well as operate the best we could around the world. I wanted to make sure that when Exxon USA said we need all the booms you have in London, we would get them.

I've fished in Alaska, and I've been to Valdez a number of times, so I know what it physically looks like. From a public relations standpoint, it probably would have been better had I gone up there. But I would have used a lot of people on the gathering information, talking to the governor, and that didn't make a hell of a lot of sense.

Do you think it would have helped if you had been more visible early in the crisis?

In hindsight it would have helped. Some newspapers were comparing the spill to Johnson & Johnson's Tylenol problem in 1982 or Union Carbide's Bhopal plant disaster in 1984. Now, Jim Burke [CEO of Johnson & Johnson] did an excellent job, but he had seven people dead from poisoned Tylenol tablets. I don't think he had a lot of options. Now, whether Warren Anderson [former CEO of Union Carbide] should have gone to Bhopal or not, I don't know. As I recall, he was temporarily taken into police custody.

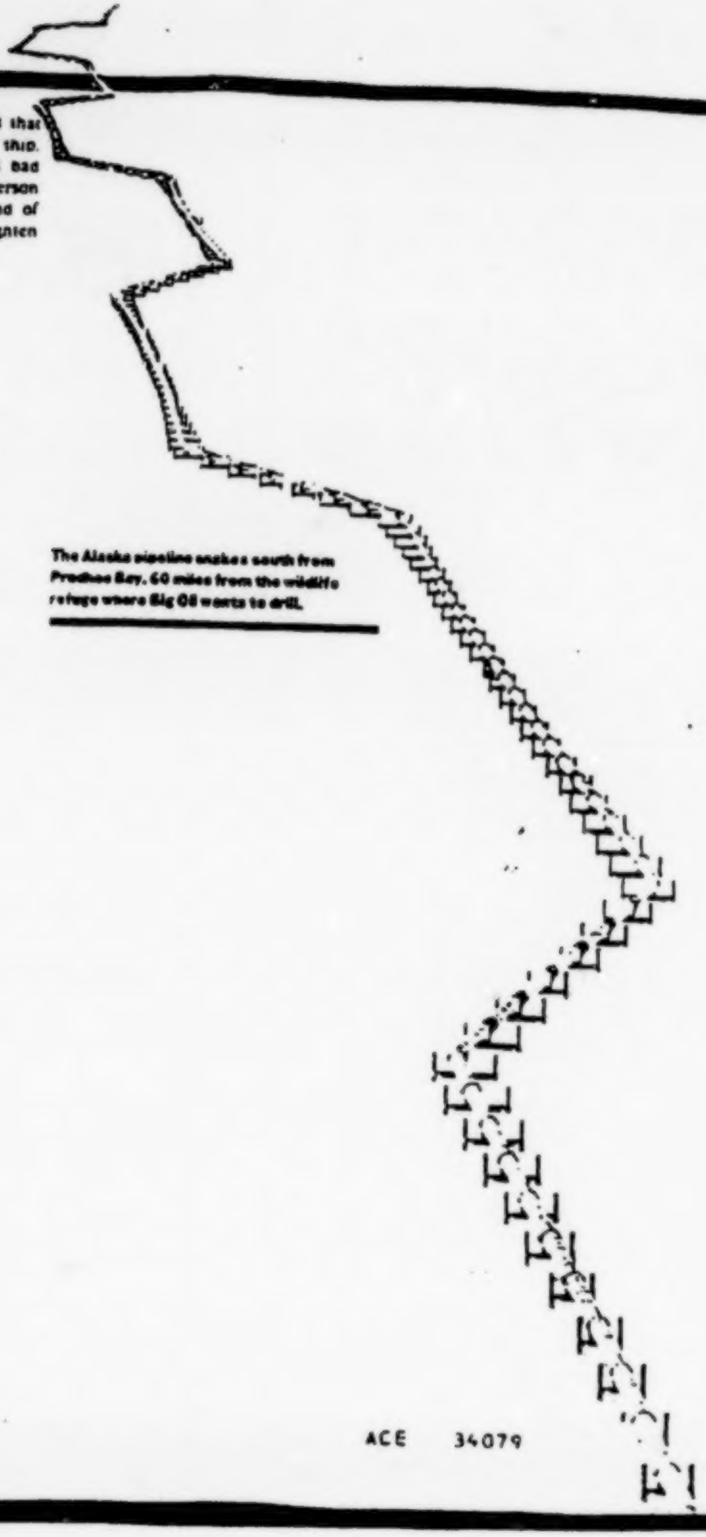
What have you learned from all this?

Well, take the case of the captain of the ship. We can certainly minimize this type of thing from happening again. We've had a policy on alcohol abuse since [illegible] The first drink the captain had after he had been rehabilitated was a basis for dismissal. Someone in management should have been notified and our policy would not have permitted this man back on the ship. [Captain Joseph Hazelwood entered an Exxon drying-out program in 1985. He is currently awaiting trial on three misdemeanor charges and has denied that he was intoxicated at the time of the accident.]

What would you do differently?

CIVIL NO. [illegible]89-095
PLAINTIFFS' EXHIBIT
NUMBER 182

Well, I'd go back to Genesis, and that man wouldn't have been piloting the ship. There's no question that there was bad judgment involved in even putting a person with a critical skill back in that kind of work. It is pretty clear we have to tighten those things up.



The Alaska pipeline snakes south from Prudhoe Bay, 60 miles from the wildlife refuge where Big Oil wants to drill.

ACE 34079

A lot of people are asking whether you can trust Exxon and the oil industry. They kept saying this wouldn't happen.

We're going to demonstrate that Exxon is trustworthy. We're going to do everything possible to mitigate the effects on the environmental situation up there.

What advice would you give other CEOs on handling a crisis like this?

You'd better prethink which way you are going to jump from a public affairs standpoint before you have any kind of a problem. You ought to always have a public affairs plan, even though it's kind of hard to force yourself to think in terms of a chemical plant blowing up or spilling all that oil in Prince William Sound.

I just keep putting one foot in front of the other, and I'm hoping with a little bit of luck to prove to you that we're going to make this thing work out better than the greatest, most optimistic expectations. ☐

PLEASE CREDIT ANY QUOTES OR EXCERPTS FROM THIS CBS NEWS RADIO AND TELEVISION PROGRAM TO "CBS NEWS' FACE THE NATION."

EXH 33101 DATE 9-14-9
WITNESS Lawrence Rawl V 1
GINA M. ZINICOLA

FACE THE NATION

Sunday, April 2, 1989

CBS Television Network, 10:30 AM - 11:00 AM, ET
and the
CBS Radio Network, 12:30 PM - 1:00 PM, ET

MODERATOR:	Charlie Rose - CBS News Correspondent
GUESTS:	WILLIAM REILLY Administrator, Environmental Protection Agency
	LAWRENCE RAWL Chairman, Exxon Corp.
EXECUTIVE PRODUCER:	Karen Sughrue
PRODUCER:	Carin Pratt
DIRECTOR:	Paul L. Taylor

ORIGINATION: Washington, D.C.

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Washington, D.C. 20005
(202) 347-2321

CIVIL NO. A89-095
PLAINTIFF'S EXHIBIT
NUMBER [illegible]

FACE THE NATION - April 2, 1989

WILLIAM STEVENS (president, Exxon Company, U.S.A.): We take responsibility for all of the impacts of this spill, and we're working first to minimize the damage, clean it up so there

FACE THE NATION - April 2, 1989

MR. ROSE: The other question that people are asking about Exxon is how in the world could a captain with the record of this captain be in charge of a tanker in these environmentally sensitive waters, and why was he not on the bridge at the time of this accident?

MR. RAWL: Well, the last part, I guess, is apparent--he was drunk, according to his own--the indications, certainly, of the test.

Now, in terms of how that happened, every tragedy that you and I ever hear about, there's two very unfortunate circumstances that the odds would say wouldn't happen that happened. This man should not have been back on the bridge after this treatment. We do have a policy, however, that says if employees have a problem--and I suppose every industry or most large companies have it--you try to get them into therapy to recover, but certainly do not intend, and this policy doesn't say put them back in critical-skills jobs. And we have not only ship captains; we have airplane pilots, we have people that run refineries and so forth.

MR. ROSE: Let me--

MR. RAWL: This, unfortunately, should not have happened.

EXH 3,31:23 DATE 9-15-92
WITNESS Lawrence Rawl, V.2
GINA M. ZINICOLA

- Thursday, March 30, 1989
  - PBS's "MacNeil/Lehrer": Lawrence B. Rawl, Chrmn, Exxon Corporation
    Briefing ID: 451666 (306 lines)

MACNEIL/LEHRER NEWSHOUR
INTERVIEW WITH:

LAWRENCE B. RAWL, CHAIRMAN, EXXON CORPORATION

THURSDAY, MARCH 30, 1989

ROBERT MACNEIL: First up tonight: a "Newsmaker Interview" with Lawrence Rawl, chairman of the board of Exxon Corporation, the company whose supertanker, the Exxon Valdez, ran aground in Alaska six days ago. Since then, 10 million gallons of oil from the ship have spread over the waters of Prince William Sound in an oil slick of more than 500 square miles. As we reported, the Secretary of Transportation today decided to leave the cleanup in Exxon's hands, saying that it is now proceeding at full speed.

Exxon Chairman Lawrence Rawl is with us now in New York.

Thank you for joining us, Mr. Rawl.

MR. RAWL: Thank you very much.

MR. MACNEIL: President Bush called this a tragedy today. The EPA called it a disaster. How do you characterize it, and how does Exxon feel about it?

MR. RAWL: Well, I'd agree with both characterizations. It is a tragedy, and it is a disaster. And at the start, I'd like to apologize to the people of the US, particularly the people in Alaska. We feel very badly about this, and it's not just in economic terms. We feel badly about the environment up there. Our employees are very distressed, and particularly the people in our shipping company. And it was a very unfortunate happening. And we just appreciate the opportunity to talk about this.

MR. MACNEIL: The people of Valdez, as I'm sure I don't have to tell you, are very angry. They sued to prevent this pipeline outlet being located there. The suit was finally settled after a long legal battle when this contingency plan was imposed. Now disaster strikes, and the plan doesn't work. How do you — what is your reaction to that, to their anger based on that sequence of events?

MR. RAWL: If I lived in Valdez, I would be very angry myself. By the way, I'm very angry anyway, you can imagine, on the kind of situation we find ourselves in. But I think what we can do and we intend to do is clean this up as rapidly as we can, mitigate to the extent possible, no -- you know, pulling out all the stops on the environment, on the birds, on the fish, on the marine mammals, and settle all the claims as rapidly as we can in terms of the people who have been damaged by this. We set up a claims office in Valdez, and we set up another claims office.

MR. MACNEIL: How is it that Exxon, which trains its captains, as you just said, didn't pick up Captain Hazelwood's drinking problem?

As recently as last September, he'd gone through a rehabilitation program. And his mother says Exxon knew about that.

reduced

MR. RAWL: I think — and I, of course — sort of after-the-fact, but Exxon did know about the rehabilitation. And I think we made a gross error, which I'll guarantee you won't be repeated with that kind of rehabilitation. We've got a program which says we'll give people a job; it doesn't say we'd them back to flying airplanes or piloting tankers or whatever other kinds of very risky kinds of activities we have, and there are a lot of them in any large business. But I frankly wish I had known, or I wish some of the senior management in Exxon USA had known.

ABC NEWS
47 West 66th Street, New York, NY 10038
Transcripts: Journal Graphics, Inc., 267 Broadway, New York, NY 10007
Press contact: Julie Vecchione (212) 887-3735

THIS WEEK
with David Brinkley

April 2, 1989

GUESTS:
Gov. STEVE COWPER, (D), Juneau, AK
GAYLORD NELSON, in Washington, DC
LEE RAYMOND, Washington, DC
Sec. SAMUEL SKINNER, in Washington, DC

INTERVIEWERS:
DAVID BRINKLEY
SAM DONALDSON
GEORGE WILL

ROUNDTABLE PARTICIPANT:
TOM WICKER

REPORTS BY ABC CORRESPONDENTS:
JACK SMITH, in Valdez, AK
HILARY BOWKER, in Shannon, Ireland

DORRANCE SMITH, Executive Producer

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CIVIL NO.: A89-095
PLAINTIFFS' EXHIBIT
NUMBER 197

DEPOSITION
EXHIBIT
4340G

Mr. BRINKLEY: Mr. Raymond, thank you for coming in. Glad to have you with us today.

LEE RAYMOND, President, Exxon Corporation: Glad to be here. Thank you very much.

Mr. BRINKLEY: First, let's deal with this. Was it good policy to leave a man with a substantial record of alcohol abuse in command of a tanker loaded with oil?

Mr. RAYMOND: No, it was not a good policy.

Mr. BRINKLEY: How did it happen?

Mr. RAYMOND: Well, I think there are two or three points here, David, I think, that are important to try and to put the whole thing in perspective. The early— as I understand it, in going back and trying to find out exactly what happened, as you can expect, in the last several days there have been a lot of questions like this, the first two traffic violations, as I understand it, were before— and we did not know about them, by we I mean the shipping company, and they were before Captain Hazelwood came forth and said he had a drinking problem, and asked that he be treated for that. Under our company policy, and I'm sure under a lot of company policies these days recognizing the societal impact of alcoholism, we all try and encourage people, if they have a problem, to come forth so they'll be treated. In so doing, he went and was treated, and we were told, or the shipping company was told, that he had had the treatment and was returned to duty.

If there was an error in judgment, in my view, it was at that point. The people in the shipping company, of course, are the people who really make the judgments about the qualifications of people to operate tankers, and that's where that judgment should be. Only they can really judge how good these people are. But I'm afraid, in hindsight, they probably were put in the position of making a broader judgment, a societal judgment which, in hindsight, shouldn't have been made, and that is when someone comes of alcoholic rehabilitation, he obviously is still a risk— that we all know, percentage-wise, that there's a risk that he will not recover. And under pressure, certain things can happen. I would guess that that's what happened here.

Let me just say this, if I can. That won't happen again. And it won't happen again not only for tanker captains, but there are other areas of our company in large company operations like truck drivers that take gasoline to service stations, people who run control houses in refineries, people who run offshore drilling, that we are going to have to deal with.

Mr. WILL: Mr. Raymond, let's stipulate that drunks shouldn't drive tankers, and let's get on—

Mr. RAYMOND: That's correct.

MEMORANDUM State of Alaska - Department of Fish and Game

To: Ken Parker
Director
Commercial Fisheries
Juneau

Date: Nov. 13, 1989

File: 15.1.3.1

Fr: James A. Brady
Area Management Biologist
Commercial Fisheries
Cordova

Re: 1989 PWS salmon season summary

The Prince William Sound Area combined commercial salmon harvest for 1989 amounted to 24.4 million fish (Table 1). This catch exceeds the average harvest over the past 10 years (Table 2), however an exceptionally large portion of this catch (33%), was composed of hatchery sales fish from the PNP hatcheries, leaving a common property portion of the catch below the 10 year average.

A poor return of wild stock pink salmon was again observed in the Sound, which was particularly disappointing in light of the bright forecast. Sockeye returns were above average in the Copper and Bering River Districts but especially weak in the Coghill district. Coho and chum production fell close to the average harvest level for the past ten years.

The March 24, 1989 grounding of the tanker "Exxon Valdez" and resulting oil spill had a great impact on the management, as well as the quantity and quality of the 1989 salmon harvest.

Operating under the guidelines provided by the memorandum of understanding (MOU) signed on June 8, 1989 by the Alaska Department of Fish and Game (ADF&G) and the Alaska Department of Environmental Conservation (ADEC), significant measures were taken to insure that the salmon harvest would not be compromised by contamination from the Exxon Valdez spill. Test fisheries, aerial surveys, beach walks and water quality sampling programs were employed to evaluate the likelihood of the fishery encountering oil that would contaminate fishing gear or adulterate the catch. Due to the extensive beach oiling, the Montague, Southwestern and Eshamy districts as well as portions of the Northern, and Northwestern districts remained closed throughout the 1989 season.

In separate incidents on consecutive days in the Esther Subdistrict and in the Cannery Creek Hatchery terminal area, oil was encountered by the commercial fishing fleet which required an immediate closure of the fishery. The fishery was reopened 10 days later, with a highly regulated on the grounds monitoring program, and field announcement openings and closures similar to herring sac roe fisheries. The ten day closure, which occurred near the peak of hatchery returns to Cannery Creek and Esther, resulted a high percentage

CIVIL NO.: A89-095
PLAINTIFFS' EXHIBIT
NUMBER 276

EXHIBIT
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Brady 9-93

of lower grade fish in the commercial catch.

The value of the combined commercial salmon harvest is estimated at $43 million, excluding hatchery sales (Table 3.). The drift gill net catch is valued at $23.8 million, setting the average earnings for the estimated 480 permit holders that fished in 1989 at $49,470. Seiners harvested $18.9 million worth of fish setting the average earnings for the estimated 235 permit fleet at $80,610. Because the Eshamy district was closed for the season, set net fishermen had no opportunity to fish in The Prince William Sound area in 1989.

Escapements throughout the Sound were mixed but for the most part adequate. The wild stock pink systems of the Southwestern and Montague districts and adjacent areas that remained closed through the season had unexploited returns which resulted in escapements exceeding minimum objectives by a factor of 2 or 3. Chum escapements were high throughout the Sound. The Coghill sockeye escapement fell below minimum desired levels while the Eshamy Lake sockeye escapement was substantially above. Minimum spawning objectives were reached or exceeded for Copper River sockeye, chinook and coho salmon.

A chronology of key events, emergency orders and announcements relating to the oil spill's impact on the management of the fishery is provided in Attachment 1. A more detailed description of the specific management actions by district and species is presently being prepared for the 1989 Annual Management Report, which is scheduled to be completed by mid December.

cc. Florey
Haanpaa
Meacham
Sharr
Biggs
Simpson
Peltz
Cantillon
Savikko

Table 1. Commercial salmon harvest by species, gear type and district in the Prince William Sound Management Area, 1989.

District	Effort	Chinook	Sockeye	Coho	Pink	Chum	Total
Eastern	225	328	3,135	[illegible]	3,131,056	338,187	3,313,892
Northern	231	83	4,115	6,848	6,390,737	182,746	6,584,349
Unakwik	0	0	0	0	0	0	0
Coghill	284	41	2,021	39,211	3,276,666	126,134	3,442,171
Northwestern	28	1	486	1,884	181,505	7,842	191,319
Southwestern	0	0	0	0	0	0	0
Montague	0	0	0	0	0	0	0
Southeastern	28	5	146	322	73,177	763	74,413
Purse Seine		479	9,825	60,953	13,073,187	663,896	13,816,346
Bering River	48	30	9,225	26,932	7	2	36,116
Copper River	476	38,663	1,033,958	194,306	13,877	3,815	1,282,899
Unakwik	98	31	21,432	27	41,830	604	63,494
Coghill	333	364	104,109	79,880	633,185	195,957	1,003,493
Eshamy	0	0	0	0	0	0	0
Drift Gill Net		38,288	1,162,664	301,235	690,880	220,298	2,386,306
Eshamy	0	0	0	0	0	0	0
Set Gill Net	0	0	0	0	0	0	0
Solomon Gulch	2	9	13	52,307	657,599	1,638	711,558
Cannery Creek	2	0	0	0	631,784	0	631,284
Esther	3	0	9	0	2,786,168	16,172	2,802,337
Port San Juan	1	0	2	0	3,690,260	8,869	3,699,138
Main Bay	1	3	13	0	0	182,811	182,824
Hatchery (1)		9	26	52,307	7,965,650	129,310	8,147,304
Ed. Permit (2)	3	10	2,302	1,084	36,097	893	40,368
Confiscated	1	0	140	2	192	142	484
Test Fish	1	19	149	9	1,090	1,931	3,198
Oil Contaminated	0	0	23	0	6,255	201	6,479
Misc. Gear		29	2,614	1,095	43,634	3,189	52,319
Prince William Sound Total		72,085	1,173,125	423,508	21,773,174	998,801	24,442,673

(1) Hatchery sales for hatchery operating costs. Includes hatchery terminal sales.
(2) Cordova High School educational special permit.

ACE 9316753

PLEX276-003

"CONFIDENTIAL - Pursuant to
18.05.815 Protective Order
Exxon Valdez Oil Spill Litigation"

Table 2. Commercial salmon catch by species, Prince William Sound Management Area, 1971 - 1989. a

	Catch by Species					
Year	Chinook	Sockeye	Coho	Pink	Chum	Total
1971	28,142	741,865	327,697	7,312,730	579,552	8,982,066
1972	23,883	976,115	126,678	57,898	46,888	1,226,966
1973	22,638	473,964	199,019	2,085,841	740,887	3,580,562
1974	20,602	741,310	76,041	458,619	89,238	1,385,812
1975	22,325	546,636	86,180	4,453,061	101,886	5,207,395
1976	32,751	1,008,912	260,496	3,022,626	370,457	4,695,240
1977	22,864	943,983	179,417	4,536,459	573,566	6,255,849
1978	38,635	505,550	302,958	2,917,829	489,771	4,256,144
1979	23,678	369,585	385,774	15,615,838	349,865	16,670,860
1980	8,443	208,226	357,125	14,169,025	482,234	15,197,727
1981	29,782	736,489	386,163	20,558,306	1,888,822	23,648,540
1982	47,871	2,362,348	625,877	20,405,425	1,336,898	24,774,377
1983	53,879	908,480	385,469	13,077,936	1,948,737	16,353,678
1984	39,774	1,303,565	689,434	22,119,529	1,229,985	25,381,267
1985	43,735	1,464,563	1,625,046	25,252,926	1,321,538	29,107,806
1986	42,128	1,288,712	426,248	11,410,502	1,700,966	14,868,298
1987	41,909	1,737,989	125,214	29,230,303	1,919,415	33,104,830
1988 b	31,797	767,696	677,816	11,757,328	1,862,959	14,877,554
1989 c	32,865	1,175,125	425,568	21,775,124	996,286	24,442,673
Ten Year Average (1979-88)	35,868	1,119,603	475,221	18,448,586	1,312,625	20,328,351

a Includes catches by all gear types and hatchery sales from the Eastern, Northern, Coghill, Unakwik, Northwestern, Eshamy, Southwestern, Montague, Southeastern, Copper River and Bering River Districts.

b Includes confiscated and educational special use permits.

c Preliminary

PLEX276-004

Table 3 Preliminary Mean price and estimated exvessel value of the Prince William Sound Management Area commercial salmon harvest by gear type, 1989. (1)

Purse Seine

Species	Number	Pounds	Avg. Wt.	Price	Value
Chinook	479	10,547	15.5	1.25	13,183.75
Sockeye	9,823	64,202	6.5	1.43	91,808.86
Coho	68,953	551,882	8.0	0.60	331,129.20
Pink	13,073,197	45,455,967	3.5	0.35	15,909,588.45
Chum	663,894	5,774,186	8.7	0.45	2,598,383.70
	13,816,546	51,856,78[illegible]			$18,944,093.96

Drift Gillnet

Species	Number	Pounds	Avg. Wt.	Price	Value
Chinook	31,288	829,589	26.5	2.25	1,866,575.25
Sockeye	1,162,664	7,882,900	6.8	2.36	18,603,644.00
Coho	301,255	2,462,071	8.2	0.68	1,674,208.28
Pink	690,889	2,498,548	3.6	0.35	874,491.80
Chum	200,208	1,759,149	8.8	0.45	791,617.05
	2,386,304	15,432,257			$23,810,536.38

Set Gillnet

Species	Number	Pounds	Avg. Wt.	Price	Value
Chinook	0	0			0.00
Sockeye	0	0			0.00
Coho	0	0			0.00
Pink	0	0			0.00
Chum	0	0			0.00
	0	0			$0.00

Hatchery Sales

Species	Number	Pounds	Avg. Wt.	Price	Value
Chinook	8	94	11.8		0.00
Sockeye	15	98	6.5		0.00
Coho	1,085	10,131	9.3		0.00
Pink	7,532,927	25,125,975	3.3		0.00
Chum	26,144	235,493	9.0		0.00
	7,560,179	25,371,791			$0.00

Gear Type	Value of Catch	No. of Permits	Average Earnings
Purse Seine	18,944,093.96	235	$80,613.17
Drift Gill Net	23,810,536.38	480	49,605.28
Set Gill Net	0.00	0	0.00

Value of Total Catch $42,754,630.34 (2)

(1) Mean prices are estimated at the end of the season based on the average of cash buyers and the advance prices paid by the canneries on the grounds. They do not reflect the spring adjustments paid by some companies.

(2) Does not include the value of hatchery sales for cost recovery.

Attachment 1. Chronology of key events, emergency orders and announcements relating to the oil spill's impact on management of the Prince William Sound Fisheries.

April 3 - News release issued from the Cordova office stated that the four spring herring fisheries would not open in 1989 (no emergency order needed). Effected fisheries include the purse seine sac roe fishery, gill net sac roe fishery, roe on kelp in pounds fishery, and the wild roe on kelp harvest. The "Exxon Valdez" still has oil on board and remains grounded on Bligh Reef and poses additional uncertainties on the final environmental impacts the oil spill will have. Further introduction of oil may result when the tanker is moved after "lightaning" operations are completed. Compounding this is that a change in wind patterns may cause a redistribution of oil within the Sound, thus threatening undisturbed areas. Taking into account all of the potential effects to the Prince William Sound herring stocks and spawning habitat, it was the concluded that a harvestable surplus of herring can not be justified for any spring fisheries.

May 12 - News release (EO 2-F-E-3-89) issued from the Cordova office opened the Copper River District drift gill net season at 7:00 a.m. for 24 hours on May 15. It was determined that the Copper River District would opened to commercial salmon fishing following a May 8, 9 and 10 test fishery. Sampling of the Copper River District's test fish salmon catches by the Alaska Department of Environmental Conservation (DEC) found the vessels, gear and fish to be free of oil. Through the remainder of the Copper River District's season which ended on September 30, sampling of commercial salmon catches by DEC detected no oil contamination.

June 14 - The "Revised Commercial Salmon Management Outlook - 1989, Prince William Sound Area" was issued from the Cordova office. The revised outlook announced that the Eshamy and Southwestern Districts would not open for the 1989 commercial salmon season (no emergency order required). These districts have suffered some of the most extensive oil impacts to date. Prevailing water currents in Prince William Sound pass along the effected areas in the Sound and exit through the passages of Eshamy and Southwestern Districts where vessels, gear and catch could be fouled if fisheries were to be conducted.

June 16 - News release (EO 2-F-E-15-89) issued from the Cordova office stated that the Coghill and Unakwik District drift gill net fisheries were opened on June 19 at 08:00 for a 60 hour period. Esther Subdistrict and all waters south of a line extending from Esther Rock to Point Bigot in Coghill District was closed to insure that early Esther Hatchery chum salmon brood stock requirements are met. It was determined that the Coghill and Unakwik Districts could open to commercial salmon fishing following a June 12, 13 and 14 test fishery. Sampling by DEC of Coghill and Unakwik Districts test fish salmon catches found the vessels, gear and fish to be free of oil. Through the remainder of the sockeye salmon season which ended on July 03, sampling of commercial salmon catches for both districts by DEC detected no oil contamination.

July 23 - News release (EO 2-F-E-27-89) issued from the Cordova office stated that in order to insure a high quality harvest, the terminal harvest areas of the Cannery Creek and Esther Hatcheries were opened by field announcement at around 8:00 AM on Wednesday, July 26 and to remain open thereafter for seven days a week.

July 24 - New release (EO 2-F-E-28-89) issued from the Cordova office stated that due to favorable trend in wild stock escapement and surplus hatchery production salmon, the Northern District north of the latitude 60° 48.0' N, including the northern section of Perry Passage, the entire Esther Subdistrict of the Coghill District, and the Whittier District and eastern portions of the Northwestern District, were opened for 36 hours as of 8:00 AM July 27.

July 26 - Emergency order (2-F-E-29-89) issued from Cordova stated that the Cannery Creek special harvest area and sanctuary were closed to commercial fishing after July 28 at 8:00 AM. The surplus production had been taken and the area was closed to conserve salmon for Cannery Creek Hatchery broodstock.

July 29 - New release (EO 2-F-K-30-89) issued from the Cordova office stated that due to reports of oil contamination, the Esther Subdistrict of the Coghill District was closed as of 12:00 Noon on this date. The closure resulted from an unconfirmed report from a spotter pilot that an oil sheen has moved into the Subdistrict and may have contaminated some fishing gear in the vicinity of Esther Rocks. The sheen was described as being ½ to ¼ miles in length and 300 yards wide extending from Esther Rocks to shore. Several other second-hand reports came in from tenders and fishing vessels stating that several fishing vessels in the area had contaminated gear and fish.

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July 24 - New release (EO 2-F-E-28-89) issued from the Cordova office stated that due to favorable trend in wild stock escapement and surplus hatchery production salmon, the Northern District north of the latitude 60° 48.0' N. including the northern section of Perry Passage, the entire Esther Subdistrict of the Coghill District, and the Whittier District and eastern portions of the Northwestern District, were opened for 36 hours as of 8:00 AM July 27.

July 26 - Emergency order (2-F-E-29-89) issued from Cordova stated that the Cannery Creek special harvest area and sanctuary were closed to commercial fishing after July 28 at 8:00 AM. The surplus production had been taken and the area was closed to conserve salmon for Cannery Creek Hatchery broodstock.

July 29 - New release (EO 2-F-E-30-89) issued from the Cordova office stated that due to reports of oil contamination, the Esther Subdistrict of the Coghill District was closed as of 12:00 Noon on this date. The closure resulted from an unconfirmed report from a spotter pilot that an oil sheen has moved into the Subdistrict and may have contaminated some fishing gear in the vicinity of Esther Rocks. The sheen was described as being ½ to ¼ miles in length and 300 yards wide extending from Esther Rocks to shore. Several other second-hand reports came in from tenders and fishing vessels stating that several fishing vessels in the area had contaminated gear and fish.

July 30 - New release (EO 2-F-E-31-89) issued from the Cordova office stated that the Cannery Creek Hatchery Area 3 was closed as of 1:00 PM on this date because of several reports from seiners of oil sheen moving into areas of active fishing. One seine boat reported having fouled gear and were returning to town. Water and tar scrapings of the nets, decks, and seaweed were collected from several of the vessels including ones fouled in the Esther Subdistrict by ADEC and ADFG for hydrocarbon analysis.

July 31 - Plans were formulated to assemble test fishing and oil sheen monitoring programs to evaluate the possibilities of appreciable risks of fouled gear or fish in the Coghill, Northern, Northwestern and Unakwik Districts. From Monday, July 31 to Saturday, August 12 an aggressive test fishing program was conducted involving four chartered fishing vessels. These vessels completed transects, net tows, beach surveys, and water sampling of the areas to be considered for future openers. In addition, aerial surveys were conducted on a daily basis by ADFG, ADEC and NOAA with mapping of any sheens or bioscum encountered and video documentation. Finally, the R/V Pandalus was dispatched from Homer to remain on the grounds near the Esther Subdistrict from August 8 until further notice, to provide a platform for conducting aerial and skiff surveys, water sampling, radio contact and announcements with the fleet and town, and to house biologists that remained on the grounds for the duration.

Aug. 10 - Emergency order (2-F-E-32-89) issued from the Cordova office stated that the Esther Hatchery Special Harvest Area was expanded for the capture and sale by the hatchery operator to include all waters north of a line from Esther Light to Hodgkins Point, known as the Hatchery Sanctuary Area. Due to commercial fishing closures in the area resulting from possible oil contamination, the hatchery operators were having a difficult time maintaining a quality harvest in the special harvest area that existed. Expanding the area for hatchery sales provided an opportunity to harvest fish of a higher quality.

Aug. 10 - Field announcement (EO 2-F-E-34-89) issued from the R/V Pandalus in Mueller Cove at 8:00 AM stated that a 12 hour opener was to be conducted from 9:00 AM until 9:00 PM on Thursday, August 10 in Unakwik Inlet and Wells Bay. The waters of the Eastern District south of 60° 57.5' N latitude were opened simultaneously to the waters of Unakwik Inlet. Passive oil monitoring stations as well as test fishing tows and aerial surveys reported no sheen that would pose appreciable likelihood of fouling fish or gear. The opener was scheduled to harvest the two million surplus hatchery fish that had built up in the Unakvik area. It was announced that any fishing vessels or tenders encountering oil sheens that could contaminate fish or gear were to report immediately to the R/V Pandalus on marine VHF channel 70. The ADFG and ADEC personnel on board the Pandalus responded to several reports of sheen, taking water samples and recording video footage, and found no oil that posed appreciable likelihood for the fouling of gear or fish.

Aug. 10 - Field announcement (EO 2-F-E-35-89) issued from the R/V Pandalus in Mueller Cove at 2:00 PM stated that the Cannery Creek Special Harvest Area was opened from 4:00 PM to 9:00 PM in addition to the areas in Unakvik that were opened at 9:00 AM. The opener was scheduled to harvest the surplus production fish that remained inside the Special Harvest Area; these fish were not desirable for broodstock due to unfavorable sex ratio.

Aug. 11 - Emergency order (2-F-E-36-89) issued from Cordova stated that the waters of the Eastern District north of 60° 57.5' N latitude were opened from 1:00 PM until 9:00 PM on this date as oil sheens reported earlier in this area had dissipated and no longer posed an appreciable likelihood for the fouling of gear or fish. This opener was scheduled to allow harvest of surplus wild stocks in the Valdez Arm area.

Aug. 14 - Field announcement (EO 2-F-E-37-89) issued from the R/V Pandalus at Esther Island stated that a 12 hour opener was to be conducted from 9:00 AM until 9:00 PM to include the waters of the Whittier Subdistrict, Culross Passage north of 60° 43.8' N, Culross Bay, the entire Coghill District, the Northern District north of 60° 47.0'N and the Unakvik District. The Cannery Creek Special Harvest Area remained closed. The entire area under consideration for the opener had been surveyed aerially and the heavily fished areas had been surveyed with test fish net tows off of four test fishing vessels; the resulting information revealed that no sheens were present in the area that would pose appreciable likelihood for the fouling of fish or gear. It was announced that any fishing vessel or tender encountering oil must immediately report to the R/V Pandalus via marine VHF or sideband. During the opener ADFG and ADEC responded to numerous reports of oil, taking water samples and asking fishermen to stay away from various small fuel oil sheens to prevent nets and fish from becoming fouled. Several nets and loads of fish were inspected and no fouling of fish or gear was found. Openers were spaced by at least a day to allow full aerial surveys of the proposed areas for commercial fishing to ensure those areas to be free of oil that would have posed appreciable likelihood to fouling of fish and gear.

Aug. 16 - Field announcement (EO 2-F-E-38-89) issued from the R/V Pandalus at Perry Island stated that a 12 hour opener was to be conducted from 9:00 AM to 9:00 PM including the waters of the Northern District north of 60° 47.0' N. latitude, the Unakwik District, the Eastern District and the Southeastern District. The waters of Eaglek Bay remained open to the 500 yard stream markers and the waters of the Cannery Creek Special Harvest Area remained closed. The Coghill District remained closed due to the presence of oil sheen in the area, reported by ADFG, ADEC and NOAA from aerial and skiff surveys, and the possible risk of fouling fish and gear. The sunken tender north of Storey Island was producing a large oil sheen, but was not posing a risk to the areas opened.

Aug. 18 - Field announcement (EO 2-F-E-39-89) issued from the R/V Pandalus at Perry Island stated that a 12 hour opener was to be conducted from 9:00 AM to 9:00 PM including the Whittier Subdistrict, waters of Culross Pass north of 60° 43.8' N., Culross Bay, the Coghill District, the Northern District north of a line extending from Pt. Perry to the southern most tip of Axel Lind Island to Granite Pt. to the western most tip of Glacier Island to the eastern most tip of Glacier Island to Pt. Freemantle, the Unakwik District, the Eastern District, and the Southeastern District. The Cannery Creek Special Harvest Area and Sanctuary remained closed for protection of broodstock. The Northern District boundaries were modified for this day's opener to prevent any risk of fouling of fish or gear from the oil sheen north of Storey Island resulting from the sunken tender. Aerial surveys continued to be conducted on a daily basis and the skiff responded from the R/V Pandalus to any reports of oil and took water samples.

Aug. 21 - Field announcement (EO 2-F-E-40-89) issued from the R/V Pandalus at Perry Island stated that a 12 hour opener was to be conducted from 9:00 AM until 9:00 PM including the waters of the Whittier Subdistrict, the Coghill District, Culross Pass north of 60° 43.8' N., Culross Bay, Perry Passage north of a line extending from a shoremarker located on the eastern shore of Culross Island at approximately 60° 44.0' N. latitude, 148° 01.0' W. longitude and extending across Perry Passage to Tipping Pt. on the west side of Perry Island, the waters of W.

Twin Bay, the Northern District north of 60° 47.0' N. latitude, the Unakwik District, the Eastern District and the Southeastern District. The Cannery Creek Special Harvest Area remained closed, however, the Sanctuary opened due to a surplus of hatchery production fish there. Information from aerial surveys conducted by ADFG, ADEC and NOAA determined the areas opened to be free of oil that posed an appreciable likelihood for contamination of fish or gear.

Aug. 22 - Field announcement (EO 2-F-E-41-89) issued from the R/V Pandalus at Perry Island stated that a 12 hour fishery opener was to be conducted from 9:00 AM until 9:00 PM including the waters of the Whittier Subdistrict, the Esther Subdistrict and the waters of Wells Passage south of a line from Esther Rocks to Pt. Pigot, Culross Pass north of 60° 43.8' N., Perry Passage north of a line described in E.O. 2-F-E-40-89, West Twin Bay, the Northern District north of 60° 47.0' N. latitude, and the Unakwik District. The Cannery Creek Special Harvest Area remained closed, however, the Sanctuary remained open. Aerial and skiff surveys results revealed no oil that would have posed appreciable likelihood of fouling fish or gear.

Aug. 23 - Field announcement (EO 2-F-E-44-89) issued from the R/V Pandalus at Perry Island stated that a 12 hour fishery opener was to be conducted from 9:00 AM to 9:00 PM including the waters of the Whittier Subdistrict, the Esther Subdistrict and Wells Passage (described in E.O. 2-F-E-41-89), Culross Pass north of 60° 43.8' N. latitude, Perry Passage (described in E.O. 2-F-E-41-89), West Twin Bay, the Northern District north of 60° 47.0' N. latitude and the Unakwik District. The waters of Quillion Bay and Esther Bay (Bay of Isles) were closed because of sheens present that posed a threat to contamination of fish and gear. The Cannery Creek Special Harvest Area and Sanctuary remained closed to protect broodstock for the hatchery. Aerial and skiff surveys continued along with water sampling.

Aug. 24 - Field announcement (EO 2-F-E-45-89) issued from the R/V Pandalus at Perry Island stated that a 12 hour opener was to be conducted from 9:00 AM until 9:00 PM including the waters described in E.O. 2-F-E-44-89 (August 23) and the waters of Quillion and Esther Bays. Aerial survey results indicated that no sheens were present that posed an appreciable likelihood for fouling of fish or gear.

Aug. 26 - Field announcement (EO 2-F-E-47-89) issued from the R/V Pandalus at Perry Island stated that an 11 hour opener was to be conducted from 10:00 AM until 9:00 PM including the waters of the Eastern District and Esther Subdistrict. The opener was delayed to allow time for an aerial survey of the Eastern District and results of that survey indicated that no oil sheens were present that would pose an appreciable likelihood for fouling fish or gear and in addition surplus wild stock fish were available for commercial harvest.

Aug. 27 - Field announcement (EO 2-F-E-48-89) issued from the R/V Pandalus at Perry Island stated that an 11 hour opener was proposed from 10:00 AM until 9:00 PM in the Esther Subdistrict. Survey results from 7:00 AM indicated no sheens that posed appreciable likelihood for contamination of fish or gear.

Aug. 27 - Field announcement (EO 2-F-E-49-89) issued from the R/V Pandalus at Perry Island stated that an 11 hour fishery was to be conducted, but that the area described in E.O. 2-F-E-48-89 was modified due to a significant sheen off the eastern shoreline of Perry Island, that appeared to originate in East Twin Bay and extend southeasterly 5 miles to Lone Island, with its movement being northerly and westerly. The modified area closed off a portion of the Esther Subdistrict south of a line extending from the district marker sign on the Culross Light to Egg Rocks to the marker on the west island of the Bald Headed Chris Islands. Water samples were taken of the sheen and its movement was monitored throughout the day from airplane and skiff.

Aug. 28 - Field announcement (EO 2-F-E-50-89) issued from the R/V Pandalus at Perry Island stated that an 11 hour opener was to be conducted including the waters of the Esther Subdistrict and the Fidalgo Subdistrict. Aerial survey results indicated no sheens that posed appreciable likelihood for fouling of fish and gear and surplus wild stock salmon that could be harvested commercially.

Aug. 29 - Field announcement (EO 2-F-E-52-89) issued from the R/V Pandalus at Perry Island stated that a daily 12 hour fishing schedule from 9:00 AM until 9:00 PM in the Esther Subdistrict was established beginning on August 30 and lasting until further notice was given. The daily schedule was imposed because of a steady decline in effort in the area (less than 12 seiners and 60 gillnetters) and daily aerial surveys over the preceding two weeks had not shown an appreciable likelihood for fouling of gear or contamination of fish. Daily aerial surveys were still planned to monitor the commercial fishing area and instructions were left with the hatchery and the hatchery boom tenders in the case that oil sheens were reported that could pose a risk. No sheens were reported or seen from this date forward that posed an appreciable likelihood for contamination of fish and gear.

Sept. 27- New release (EO 2-F-E-55-89) issued from Cordova stated that the Esther Subdistrict was formally closed to commercial fishing on 12:00 Noon on Saturday, September 30. This emergency order officially closed the 1989 commercial salmon season in the Prince William Sound Management Area effective at 12:00 Noon, Saturday, September 30.

COMMERCIAL FISHERY CLOSURES

TABLE B-2

Prince William Sound

Pacific Herring	Gillnet and purse seine sac roe fisheries and pound and wild roe-on-kelp fisheries closed April 3, 1989.
Shrimp	Pot shrimp fishery closed while in progress on April 3, 1989. Trawl shrimp fishery closed on April 9, 1989. A small pot shrimp harvest area near Knight, Eleanor and Smith Islands was closed in 1990.
Sablefish (black cod)	Closed April 1, 1989. Reopened in inside waters only, in conjunction with the halibut opening on June 12, 1989.
Dungeness Crab	Closed April 30, 1989.
King Crab	Closed on October 1, 1989.
Groundfish	Closed April 30, 1989. Reopened with the June 12 halibut opening.
Miscellaneous Shellfish	On April 24, 1989, it was announced that no miscellaneous shellfish permits would be issued.
Pink and Sockeye Salmon	Closures of commercial drift and set net fisheries in Eshamy District, Northern District (surrounding Naked and Perry Island), parts of Culross Island Subdistrict, Southwestern District, and parts of Montague Island District. In 1990, two set net areas near Eshamy Bay were closed for four days and then reopened. In addition, portions of the northern and eastern shorelines of Latouche Island, and waters around Eleanor and Ingot Islands, were closed to fishing.

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NUMBER 285

TABLE B-2 (cont.) **Upper Cook Inlet**	
Sockeye Salmon	With the exception of a very minor opening of a small portion of the Central District, the commercial drift gillnet season was closed because of oil. In addition, setnet fishing in the Upper Subdistrict south of the Kasilof River was closed for the 12 hour regular fishing period on July 7, 1989, due to the presence of oil on beaches.
Lower Cook Inlet	
Shrimp	Closed April 30, 1989. Reopened July 7, 1989.
Miscellaneous Shellfish	On April 24, 1989, it was announced that no miscellaneous shellfish permits would be issued to harvest these species in the Outer and Eastern Districts until the danger of oil contamination had passed.
Groundfish	The Outer and Eastern Districts were closed at noon, April 30, 1989. The fishery reopened to all species except sablefish on June 12 in conjunction with the 24-hour halibut opening.
Smelt	Smelt remained closed along with groundfish in the Outer and Eastern Districts on April 30, 1989. When groundfish reopened, smelt fishing remained closed.
Pacific Herring	The sac roe fishery in the Outer and Eastern Districts closed on April 15, 1989, prior to the anticipated opening date of April 20, 1989.
Pink Salmon	The seine fishery in the Kamishak District opened on June 1, 1989, and was closed by emergency order on June 8, 1989. Portions of Kamishak District north of Contact Point were opened after July 20 based on run strength. The Tutka Bay Subdistrict north of the HEA powerlines was closed to seining on July 10, and reopened later the same day after further assessment showed the commercial fishery would not be impacted.

TABLE B-2 (cont.)

Kodiak	
Pacific Herring	Approximately 34 of 56 management units were closed for the duration of the sac roe fishing season.
Sockeye and Pink Salmon	The commercial season was scheduled to begin June 9, 1989. The fisheries were postponed until June 19, when only the setnet fishery in the Alitak District opened; there were approximately 114 days fished in this setnet fishery by 87 fishermen. The only other commercial opening to occur during the 1989 salmon season was a two day seine opening in Karluk Lagoon, on the west side of Kodiak Island, in mid-September. The entire Kodiak Management Area closed to commercial salmon fishing at the conclusion of the Lagoon fishery.
Chignik	
Sockeye Salmon	The Chignik fishery opened on June 12, 1989. However, portions of the Eastern District were closed due to the presence or close proximity of oil in the Kilokak Rocks area, and in Imuya and Wide Bays. The ADF&G announced a 24-hour fishing period on June 26 for a portion of the Chignik Bay District. The area was limited to a small portion of this district due to the presence of oil in surrounding areas, and was later closed the same day due to the presence of mousse and sheen. Additional closures occurred on July 27 and August 5, 1989.

CERTIFICATION

I, Walter J. Stewart, having custody of the seal of the United States Senate, hereby certify that the attached record is a true and correct copy of an excerpt from a record of the United States Senate Committee on Commerce, Science, and Transportation.

In Witness Whereof, I have set my hand and caused to be affixed the Seal of the United States Senate at Washington, D.C., this 14th day of January, 1994.

Walter J Stewart

Walter J. Stewart
Secretary of the Senate

CIVIL NO. [illegible]
PLAINTIFFS EXHIBIT
NUMBER 710

S. Hrg. 101-[illegible]

EXXON OIL SPILL

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

EXXON VALDEZ OIL SPILL AND ITS ENVIRONMENTAL AND MARITIME IMPLICATIONS

APRIL 6, 1989

PART 1

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The CHAIRMAN. . .

Mr. Rawl, we would appreciate hearing from you now, sir. Mr. Rawl, we have your statement. It will be included in the record in its entirety, and under the circumstances, you can deliver it in its entirety, if you wish, or summarize, either way.

STATEMENT OF L.G. RAWL, CHAIRMAN OF THE BOARD AND CHIEF EXECUTIVE OFFICER, EXXON CORP.

Mr. RAWL. I will summarize my statement.

I am here to provide a frank response to questions regarding the Exxon Valdez oil spill and to describe our continuing efforts to deal with its consequences..

Before I do this, however, I want to express my sincere regret as to what happened on behalf of all the employees of Exxon and certainly on behalf of myself. I really cannot tell you how sorry we are this disaster occurred, and we are particularly sympathetic to the impacts on the residents of Alaska and particularly those in the Prince William Sound area. That is where the spill is creating a great deal of problems.

As has been said many times this morning and by us earlier we take full responsibility. As we have done from the beginning. We will continue doing all we can to clean up and mitigate the spill's effects and all necessary resources are being fully employed.

It has already been mentioned by Secretary Skinner that the environment in this area, its remoteness, the high tides and the associated physical problems make it a particularly difficult problem.

A few comments about the spill, just to put it into perspective. As mentioned before the spill is estimated at 240,000 barrels which occurred early on March 24.

We have other factual information. The weather was clear. The ship had no known mechanical difficulties. A course change was requested and authorized because of ice in the outgoing channel.

The captain subsequently left the bridge and tests made sometime after the grounding showed the captain's alcohol level was above the limits established by the Coast Guard. That is clear.

There are still many unanswered questions as to what occurred during this period. We are conducting, of course, not one but many investigations within the company as are the National Transportation Safety Board and the Coast Guard. There are other federal and state investigations underway, and we are participating in all of those.

The CHAIRMAN. Exactly on that point has Exxon learned, Mr. Rawl, not to risk such a valuable cargo and such an immense vessel the length of three football fields which takes a couple of miles or so to even turn course, to risk that to just one pilot and not have a copilot?

I mean is that—right now if I went out on, let us say, three or four other Exxon supertankers this morning, would I find only one pilot, master pilot, licensed and capable?

Mr. RAWL. No, sir. The Prince William Sound area is unusual. Most of the three mates plus the captain are licensed to pilot the ship in many areas and on the open ocean. In Prince William Sound, as has been said many times this morning, the state pilot takes it to a certain point, and then—the sound system is not working properly can you hear me? I know it goes on and off.

The CHAIRMAN. Please try to talk a little louder.

Mr. RAWL. But in this case the pilot was also the captain. Obviously we had no knowledge that he was impaired.

I think it is possible, however, as I understand the law there, to have two mates on the bridge at the same time in a case like this so you could do what needs to be done to navigate the ship when you have ice in one channel and a great deal of concern about that. I am not trying to make any excuses but the facts are that there are ways to do that. If, in fact, as you suggested in your earlier conversation with Secretary Skinner, that a captain had a heart attack or something similar then there were other options available.

Now, the same impairment, apparently, that created the spill to begin with, created a situation where the master could have brought another officer to the bridge. There were actually four people on the bridge when the skipper was on the bridge. There was a lookout on one of the wings. There was the person in charge which then was the captain. There was a third mate. It was his shift, and there was also the man steering the vessel or the helmsman. So, that was the situation.

If the captain had sent for another mate before he went below, as I understood it, that would have been legally responsive regarding whether or not the ship would have hit the reef. I would expect it would have had a much better chance of getting through there. I have had a lot of difficulty understanding this accident myself, I can assure you.

The CHAIRMAN. Well, I think that is the first lesson we have learned this morning about the copilot. It is thoroughly equipped because the person—the second mate wasn't a qualified master as is required in those waters.

So, obviously, I am not looking for any sympathy, but we did know he came in, as I understand it, and said he had an alcohol problem a number of years ago. He was rehabilitated. That was consistent with the alcohol policy.

However, the judgment to put him back on the ship is a judgment made at an operating level. Obviously, it was a bad judgment. It could have been a bad judgment in a lot of people's eyes on a going-in basis, mine being one of them. But in any event, I just want to make that clear in case you had not heard of that. I do not want you feeling that I did not level with you when I was up here.

The CHAIRMAN. I appreciate that. The third mate, now, you find no culpability there, I take it, because while you fired the master, you now have corporate counsel representing the third mate, is that right?

Mr. RAWL. Well, you find yourself in this kind of a situation, and I am not too expert in these matters, but I have asked these same questions. In the case of the captain initially, we told him to get his own counsel for his protection. This was before we knew that the alcohol situation would show up. And, by the way, the results of those tests did not show up as you may recall until several days later.

But we knew that when the ship ran aground and he was not on the bridge, we obviously had a conflict between the corporate interest and the individual's interest, and so we said you get your own counsel. We will pay for that.

When we found out, however, there was alcohol involved and the other circumstances—we found out he violated a number of company policies—he was terminated.

Now, in the case of the third mate, he is in the early stages
the discovery process. There has been to my knowledge, no testin
ny taken under oath in this case yet because the National Trai
portation Safety Board is still developing the hearing date. So
everyone known to be involved has been interviewed by NTSB re
resentatives, by the Coast Guard, by Exxon and so forth. We ha
to let this investigation get into the hearing stage. I think befo
we get adequate answers.

Mr. Rawl. None.

Senator Stevens. Now I have a map here that I made when I was up there. I mean, I did not make the map but we drew these things on there that shows the four hatchery areas. That is the site of the Exxon Valdez on Bligh Reef.

It was my understanding that the obligation to have a pilot on board, basically came down to about this line, and that the third mate was qualified to handle the ship through Hinchinbrook Entrance, but he was not qualified to pilot this vessel above that line.

It is also my understanding that the captain was the only person aboard after the pilot got off. As the ship came through the Valdez Narrows, the captain was the only person on board that was qualified to run the ship.

Is that your understanding?

Mr. Rawl. My understanding is that the captain was the only man on board licensed as a pilot to run his ship. Now that is different from my view as to who was qualified or unqualified——

Senator Stevens. It is my understanding that the third mate was not qualified to run that ship past Bligh Reef.

Mr. Rawl. Senator, frankly I just kind of lost the thread here. You know, frankly, I am having a little trouble even seeing the map, but I know where Bligh Reef is and so forth, and where the channel goes.

Senator GORTON. I take it that the parent Exxon Corporation sometime ago made a decision that it was wise corporate policy for it to own its own shipping line and to ship Alaskan oil in vessels owned by a company or by a subsidiary?

Mr. RAWL. Well, we also use many charted ships. I do not know how many we are using in Alaskan trade, but in international trade Exxon has 71 ships worldwide, roughly. I may be off a ship or two, 19 of them in this country. So we do use charted ships——

Senator GORTON. But, in any event, this ship is owned by a wholly owned subsidiary of the company of which you are CEO, is that correct?

Mr. RAWL. That is correct.

Senator GORTON. Can you give me the chain of command that would go from you, as chairman of the parent corporation, down through that subsidiary corporation, to this captain? Or maybe work it back up, who is the captain's supervisor, and who is his supervisor, and so on, up to you?

Mr. RAWL. Well, when it gets to the lower levels, I lose the track. But the captain has a supervisor. And then that supervisor and there may be another supervisor in between, reports to a manager on the West Coast of the U.S.

There are also other people who tell this captain what to do in terms of scheduling. As you know these captains work a few weeks on and a few weeks off. I am not precise on the time.

But then that individual on the West Coast, who is in Benicia California in the San Francisco area, would report in to Houston where we have someone we might call an operations manager

And then there is a president of the Exxon Shipping Company who reports to a senior vice president of Exxon U.S.A., who reports to the president of that company.

We have management committees at the level of Exxon U.S.A. We have management committees in New York, and then the president of that company would report to me.

Now I do not know how many levels that is.

Senator KERRY. Have you personally spoken to Mr. Cousins to determine what took place?

Mr. RAWL. No, I have not.

Senator KERRY. Are you aware of what he says took place?

Mr. RAWL. Yes, I am.

Senator KERRY. What is——

Mr. RAWL. Now Cousins is the third mate.

Senator KERRY. That is correct.

What is Exxon's policy when the captain is incapacitated and no other licensed or authorized personnel are on board?

Mr. RAWL. I frankly do not know precisely what that policy is.

Senator KERRY. Is there a policy?

Mr. RAWL. I am sure there is.

Senator KERRY. But you are not aware of it?

Mr. RAWL. I have asked a lot of questions. I have not asked that one.

Senator KERRY. Did, to your knowledge, Mr. Cousins act in conformance with the company policy by assuming command of the ship under that situation?

Mr. RAWL. I do not know the policy, but I doubt it, but I really do not know the policy.

Senator KERRY. And notwithstanding that, you are currently representing him, your lawyers are representing him?

Mr. RAWL. We are representing him until—as I thought you said you are a lawyer—obviously everybody has a right to representation, and if he is not really at fault here. Temporarily we are representing him.

Senator KERRY. But you made no determination based upon this conversation with him as to what happened?

Mr. RAWL. I did not have a conversation. One of our lawyers had the conversation.

Senator KERRY. I understand. But, from what has been reported to you, you have made no determination as to whether or not he acted in conformance with company policy?

Mr. RAWL. I do not know.

Senator KERRY. Is the *Valdez* equipped to maintain communication with Exxon headquarters during transit?

Mr. RAWL. We do not. You are talking about Exxon headquarters, we are talking about an office in New York where I work.

Senator KERRY. No, I am talking about up in the area——

Mr. RAWL. They presumably have radio equipment that can communicate with various points where we have people who stay in touch with the ships. But I do not know precisely what radio equipment we have on board. But they have had no trouble communicating to my knowledge.

Senator KERRY. Are there situations in the past that you are aware of where an unlicensed person has taken control of one of your ships?

Mr. RAWL. Not that I am aware of.

Senator KERRY. So what you are saying is that there is a higher expectancy that you are going to get into a large spill.

Mr. RAWL. No, there is not a higher expectancy. This one should not have happened. I have said that. The equipment is state-of-the-art. This is not an old tramp steamer we are talking about, this is an $125 million-ship.

Mr. RAWL. I do not really know that. Senator. I just do not know how that works, frankly. I assume not because I have not heard that, but I really do not know that.

The CHAIRMAN. Do you know whether or not they do have radio contact?

Mr. RAWL. I do not know whether at that particular point in time. I know they had radio contact with the Coast Guard. And I know if he had said to the Coast Guard, I want to take over, or the captain wants me to take over, they would say you are not the licensed pilot. And so I presume he would not have asked. But I am just presuming, I really do not know.

The CHAIRMAN. Well, then that is a good answer, because the requirements for the master licensed, for a master pilot is very precise, very stringent. And the testimony has been crystal clear that there was only one licensed.

Mr. RAWL. Correct.

The CHAIRMAN. And I am certain that Exxon is not contending that you can countermand the license requirements.

Mr. RAWL. No. Absolutely not.

The CHAIRMAN. So when asked about the policy, you do not have to say you do not know, you do know the policy that you do not countermand.

Mr. RAWL. Okay.

The CHAIRMAN. Okay.

Mr. RAWL. But, of course, there could be a circumstance, as you said earlier, where someone has a heart attack or something, and somebody says, can I pilot the ship or whatever.

The CHAIRMAN. They still would not be licensed.

Mr. RAWL. No, but you cannot just tell them to let it run itself. Obviously if the captain just fell dead, I mean.

The CHAIRMAN. Well, that is the policy of Exxon right now, you do not have a policy for a co-pilot.

Mr. RAWL. No, but we have a circumstance that I mentioned earlier, that, it is my understanding the Coast Guard permits two officers to take over in those kind of circumstances. We have a number of officers that could have been on the bridge in that drop-dead circumstance.

But, you know, you are getting me into——

The CHAIRMAN. I am only getting you into what I know, and I am very inexperienced on the whole question. But, right to the point, if that master had had a heart attack, it was a policy of Exxon that the vessel should just run itself. Because you did not have anybody licensed to take over from him. That is your policy.

Mr. RAWL. But we had people that could run the ship. We had people that could take that——

The CHAIRMAN. Well, let us not equate run the ship with a licensed pilot. I mean we know this fellow could not run the ship, he is the one who ran it into the rocks.

Mr. RAWL. Well, as I understand it, and I have a lawyer over here who can tell me again if I am not stating it properly, that you could have two officers on the deck, along with the helmsman in addition, without the captain there, I guess, or without the licensed pilot.

But, you know, if you want to quiz me on the rules of the road o the Coast Guard, you have got the wrong witness. I will get somebody up here who can spend all day talking about such stuff. You will not find out a whole heck of a lot from me.

The CHAIRMAN. Well, we all know the rules of the road of the Coast Guard with respect to the license of someone who is a master, and you had one.

Mr. RAWL. Yes, sir.

The CHAIRMAN. And no more than one.

Mr. RAWL. On that ship at that time. And if it is appropriate, we will have more than one in the future.

The CHAIRMAN. If it is appropriate. When asked by Senator Kerry if you had learned anything——

Mr. RAWL. All right. I misused the word.

The CHAIRMAN (continuing). Have you at least learned that, that it was not adequate and we ought to have a valuable ship of $125 million——

Mr. RAWL. Well, I am not sure, Senator, since this master has had it indicated that he was under the influence of alcohol sometime after this wreck. Had he, as a licensed pilot, been piloting the ship himself, it is very possible we would have the same circumstance. I do not know that. We are speculating what might have happened. But, a license does not necessarily make anybody effective, whether they are piloting an airplane or a ship or something.

You have brought up a good question which I have raised with our people, and we are chasing it.

The CHAIRMAN. It is not your contention that the vessel should have been controlled by Coast Guard radar at the time of the collision, when it collided with the rocks or went aground?

Mr. RAWL. My contention is, all I know about it is the weather was clear, there was ice out there, which they were trying to avoid——

The CHAIRMAN. I am not asking about the weather conditions. I am asking about the Coast Guard radar.

Mr. RAWL. I understand that. I am answering the question. It is pretty obvious that this should not have happened whether the Coast Guard had the radar on or did not, or controlled it or did not.

The CHAIRMAN. Excuse me. I am asking whether you think the Coast Guard should have had radar control under any circumstances?

Mr. RAWL. I think, obviously, we would be pleased if the Coast Guard had called early in the morning on the 24th and said take a right turn, get back in the channel, or something like that. I mean that would have saved us a heck of a lot of money and saved the government money too.

The CHAIRMAN. That is a hypothetical. What is the actual responsibility? Do you think it was the Coast Guard's responsibility to continue with radar coverage of that vessel?

Mr. RAWL. I cannot comment on that, Senator. I have not studied that. I do not know what their obligations are in that regard. In other ports——

- Can you tell us why Captain Hazelwood was enrolled in the Company rehabilitation program? Was it due to a previous incident while in command, or did he voluntarily participate?

  Captain Hazelwood voluntarily enrolled in an alcohol rehabilitation program in 1985. Captain Hazelwood's enrollment in an alcohol rehabilitation program was not initiated by Exxon Shipping Company as a result of a previous incident while in command.

- Was there any followup to Captain Hazelwood by the Company after he completed the rehabilitation program?

  Yes. From the time Captain Hazelwood returned from rehabilitation, he was the most closely scrutinized individual in the company. The Fleet Operations Manager, who reports directly to the President of Exxon Shipping Company, and the Ship Group Coordinator, who was the direct supervisor for Captain Hazelwood, visited Captain Hazelwood on the average of twice a month when on duty during the first two years following rehabilitation. They watched Captain Hazelwood and made themselves available to other members of the crew so that, if there were any signs of regression that we could learn from other people, we would be attuned to it.

  After the first two years, Captain Hazelwood was transferred to the West Coast, and his supervisors there maintained surveillance by visiting his ship every time it was in port, visiting with him, and observing his behavoir. In addition, in each of the three years after rehabilitation there were meetings, the last being in March, 1988, of about five days each when other managers, as well as the President, had an opportunity to observe

Captain Hazelwood, observe how he interacted and to determine whether he was drinking alcoholic beverages. Following the March 1988 meeting the President, the Fleet Operations Manager, and the Human Resources Manager met for the sole purpose of comparing observations on what they had seen, what their impressions were and to confirm that Captain Hazelwood was not observed drinking. Clearly there was careful followup and monitoring of Captain Hazelwood following rehabilitation.

- What is Exxon's policy when the Captain is incapacitated and no other licensed or authorized personnel are on board?

  It is not clear from the evidence presented to date that the Captain of the EXXON VALDEZ was incapacitated at the time of the accident. A number of individuals have made statements that he was not incapacitated. None, to our knowledge, has indicated he was incapacitated.

  The Chief Mate aboard the EXXON VALDEZ did hold a Master's license but did not have the pilotage endorsement required to command the bridge during the passage through Prince William Sound to Hinchinbrook. In the event the Captain was incapacitated or believed to be incapacitated, the Chief Mate would notify the Coast Guard and proceed as directed by the Coast Guard. The Ship Group Coordinator or Fleet Operations Manager would also be notified to provide relief personnel as required.

- Did Mr. Cousins act in compliance with Company policy by assuming command of the ship in this situation? Did he violate federal regulations?

  Captain Hazelwood apparently left the bridge in command of an officer who was legally licensed as Second Mate by the U.S. Coast Guard but who did not possess the pilotage endorsement required to command the bridge during the passage through Prince William Sound to Hinchinbrook.

  Under federal regulations, the ship should not have proceeded without a person with a pilotage endorsement on the bridge. Mr. Cousins should have asked the Captain to remain on the bridge, and, failing that, notified the Chief Mate of the situation.

- Is the EXXON VALDEZ equipped to maintain communications with Exxon Headquarters during its shipping operations?

  Yes, the EXXON VALDEZ is equipped with a number of ship-to-shore communications to enable the vessel to communicate with any shore location. These systems include Marisat voice and telex systems, single sideband radio, VHF Marine radio, HF Radio, cellular telephone, Sitor telex, and facsimile.

- Did Mr. Cousins contact Exxon for advice or orders once Captain H. left the bridge?

  No.

- Why didn't Mr. Cousins awaken either the Chief or Second Mate for advice assistance?

  According to testimony at the National Transportation Safety Board hearin Mr. Cousins chose to communicate with the Master, whom he knew to be awa

- If Mr. Cousins acted in contradiction with Company policy, has he been reprimanded or discharged by Exxon?

  Mr. Cousins has been relieved from duty pending completion of the Company' investigation of his actions.

- Has an officer not properly licensed for the trip taken control of one of your ships in the past?

  Not to the knowledge of Exxon Shipping Company management.

Steven R. Ross
General Counsel

Charles Tiefer
Deputy General Counsel

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H-112, The Capitol
U.S. House of Representatives
Washington, DC 20515

I, Donnald K. Anderson, Clerk, United States House of Representatives, certify that the attached are true copies of the following documents retrieved from the files of the United States House of Representatives:

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IN WITNESS WHEREOF I hereunto affix my hand and seal of the House of Representatives in the City of Washington, District of Columbia, this twenty-seventh day of November, Anno Domini, one thousand nine hundred ninety three.

Donnald K. Anderson
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U.S. House of Representatives

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EXXON VALDEZ OIL SPILL

HEARING

BEFORE THE

SUBCOMMITTEE ON COAST GUARD AND NAVIGATION

OF THE

COMMITTEE ON

MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

TOPICS CONCERNING THE EXXON VALDEZ OIL SPILL
INTO THE PRINCE WILLIAM SOUND OF ALASKA

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We welcome you, and we welcome your testimony, Mr. Rawl.

STATEMENT OF L.G. RAWL, CHAIRMAN OF THE BOARD, EXXON CORPORATION

Mr. Rawl. Mr. Chairman, thank you for inviting me to come. I will just make a short statement. I am principally here to take your questions.

Mr. Tauzin. We do appreciate that. Your full written statement will be a part of the record.

Mr. Rawl. Thank you. I am here today to provide a frank response to questions regarding the *Exxon Valdez* oil spill, and describe our efforts to deal with its consequences.

Before this, however, I want to repeat some feelings I have, and I speak not only for myself but also for the thousands of Exxon employees who share my distress as to how sorry we are about this disaster in Alaska.

We are especially sympathetic to the impacts on the residents of the Prince William Sound area, and the people of the State of Alaska. Exxon takes full responsibility and it has done so from the very beginning, and Exxon will continue to do all we can to clean up and mitigate the spill's effects. All necessary resources are being employed.

GS

The spill of an estimated 240,000 barrels occurred early on March 24. We have certain other factual information. The weather was clear. The ship had no known mechanical problems. A course change had been requested and authorized because of ice in the outbound shipping lane.

The captain subsequently left the bridge, and tests made some time after the grounding showed the captain's alcohol level was above limits established bv the Coast Guard.

Mr. TAUZIN. Thank you, Mr. Rawl.

I suppose the most obvious question that arises is one that is at first complimentary of your corporation, and, at the same time, extraordinarily difficult to understand. And that is that everyone in the industry, that I speak to, tells me that Exxon, among all the corporations that transport major quantities of crude oil, has one of the best programs to ensure against this type of an accident, and yet it happened. Why?

Mr. RAWL. Well, we are talking about the human error, Mr. Chairman, that occurred. I cannot explain why. We have had, for some time, an alcohol policy that permitted rehabilitation of people who would volunteer that they had a problem. It is obviously good to encourage people to do that.

Our medical program, would pay for the rehabilitation, and then subsequently we would keep them on the payroll. Now, unfortunately, it appears that it was not clear enough that when someone had a job, a high-risk job, such as an officer on a ship, or, for example, in your State, a control man in a large refinery, or other very sensitive jobs—airplane pilot or helicopter pilot—judgment had to be made at the operating level, as to whether return to those jobs would be appropriate. If in fact they had indicated an alcohol problem, or in more recent times a drug problem, and they were rehabilitated, someone had to make the judgment that they should not be put back in that kind of job.

So it was a slip-up in this regard.

Mr. TAUZIN. Are you saying that the company was aware that he had an alcohol problem at one time, and that he had been rehabilitated in your eyes?

Mr. RAWL. Well, we were aware he had an alcohol problem. I personally never heard of the man until Good Friday. But he had an alcohol problem. He had turned himself in, as I understand it, Mr. Chairman, and consistent with that policy had arranged for rehabilitation.

He entered a program. He was followed up, watched, and so forth. As we all know, the statistics prove, if you have a problem like that you have to be helped for humane and human reasons, and you need close follow-up.

But even with close follow-up there are certain things you cannot have people do, in my view.

Mr. TAUZIN. Would it have helped, had you had a policy on board the ship for some sort of a reporting of alcohol abuse by other members of the crew?

Mr. RAWL. Well, we operate a fleet worldwide. We also charter a lot of ships. But we have 71 tankers hauling a variety of cargoes, and from time to time someone will say that—not necessarily the master—but someone has a drinking problem.

Mr. **Tauzin**. Yes.

Mr. **Rawl**. And y[illegible] follow up on it, and sometimes there is some fire under that smoke. In this case we did not have——

Mr. **Tauzin**. You had no reports?

Mr. **Rawl**. We had no reports on this, to my knowledge.

Mr. CARPER. I think you did; yes, sir. Second question. If you could, try to recreate for us the scene on the bridge of the ship on the day of the grounding.

I understand the captain of the ship is not at the bridge; he is in his quarters. I understand——

Mr. **Rawl**. I am sorry. I am having a little trouble hearing you here.

Mr. **Carper**. I understand the captain of the ship is not on the deck; he is in his quarters. Who is at the bridge? Who is—and I am not asking for names—but just recreate, if you will, the scene on the bridge, and the responsibilities of the players who were there.

Mr. **Rawl**. Well, the captain was on the bridge when the vessel left port, with a pilot, I guess a State pilot. The captain had communicated regarding the level of the tanks, and the stores, and so forth.

And then the pilot was dropped off, and the captain was still on the bridge. The third mate was on the bridge. There was a helmsman, and there was a lookout on one of the wings of the bridge.

The captain called the Coast Guard and indicated there was some ice coming off of the Columbia Glacier into the outbound channel. So he called and he wanted to move over into the northbound channel although he was going southbound.

He got authority to do that. He used the radio. The Coast Guard reported that approval was based on the fact they saw the ice on the radar, plus a prior ship, two or three hours before that had seen ice also. He then apparently set the course and asked—and this is——

Mr. **Carper**. The captain set the course?

Mr. **Rawl**. Yes. The captain—whatever the course was. They were heading basically south. And he asked the third mate if he understood the instructions and said he was going below. For a part of that time the ship was on automatic pilot.

It is my understanding, however, in reported interviews with the mate, that after the captain left the deck he took it off automatic pilot.

Now the story becomes very unclear to me, and unclear to the interviewers. There have been interviews by both the Transportation Safety Board and some of our people who have talked to these individuals. Why they then proceeded across the channel to the reef is unclear. The captain said he asked if the mate understood the instructions—you get in this other lane, and you take a right into the channel and head south.

I know I am not using the right nautical language here, of course. But they kept moving in a southerly direction, too far, and they realized too late to maneuver to miss the reef. That is where—as I understand it, the collision occurred. But who was on the bridge? It was the helmsman, the third mate, and a lookout. They had the radar on close range looking for ice, and presumably the course change started for evasive maneuver reasons.

Mr. **Carper**. I spent a little time in the Navy, as a naval flight officer, but also as a midshipman, and I recall, when we would leave port, our quartermaster would be using our radar, or whatever other fixing devices we would have to fix our position, not every minute but every several minutes, as we departed from a hazardous area.

To a guy who is not exactly a layman on this subject, it is hard to understand, with the radar up and operating, looking for the ice flows, how it would be possible to miss the land mass.

Mr. RAWL. Well, we did not hit a land mass. We hit a reef which was 36 feet deep.

Mr. CARPER. I understand.

Mr. RAWL. A lot of tankers would go over that. This tanker happened to draw 50-plus feet, so that is the problem. So the radar would not have showed that. The sonar, or whatever——

Mr. CARPER. But the radar would show the position of the ship relative to that known reef?

Mr. RAWL. Oh, there is no question. Not only the radar. This thing has the latest in celestial navigation equipment. I do not understand. You might—I thought someone who knows something about ships would understand it better than I do. I do not understand at all, frankly, why this happened.

Mr. COBLE. Mr. Rawl, I was a little late getting here and you may have already covered this. If so, I apologize for repeating it. But I want to shift gears to the captain. We were told this morning—and I do not recall from whom—but that the captain had completed a rehabilitation course for people who are severely troubled by or addicted to alcohol.

Now, hypothetically, if I have someone in my employ who is severely addicted and who enrolls in a rehabilitation course, and who successfully completes it, and comes back to my employ—if he occupies a position of trust and responsibility, I would have some sort of time frame whereby he is observed, so that I know he in fact has overcome his problem.

Do you all have such a time frame, and, if so, walk me through some of the details on that.

Mr. RAWL. Congressman, I will be glad to do this again. I have responded to this question a little earlier in the meeting. But I will be glad to just tell you that we have a policy—as you heard this morning, I am sure—that helps people get back in shape. It is a policy that probably was too general in terms of what you are talking about.

The facts are, though, that in terms of an alcoholic, it is a disease that you never do get over, as I understand it. They have to be watched closely on follow-up. A better plan—and it can be done within the same policy—is to not give the person that job back, but give them a less stressful job back. Give them a way to recover, and continue to work, but certainly not as a captain of a ship, or an airplane pilot, or someone in the control room of a refinery, or a chemical plant, or jobs of that nature.

I agree, wholeheartedly, this should not have happened, but unfortunately it did. We never used to be explicit on these sensitive jobs—local management would look at the situation and make a decision, and would do the follow-up.

But what I really want to focus on—this is a major responsibility, to drive this 60-million gallon tanker—who makes that decision, and is it so caught up in the bureaucracy that it really does not get all the way up there? How is that decision made as to who has that responsibility?

Mr. RAWL. First, to the bureaucracy. We do not have very much bureaucracy, Congresswoman, but I do not want to leave the impression we have none. We have 100,000 employees worldwide. We operate in 80 countries. I have mentioned we have 71 ships. We produce 1.8 million barrels of oil and 5 billion cubic feet of gas a day, and we sell 4 million barrels of products, and we refine 3 million barrels of products.

So, obviously, I do not make every decision. But policies such as this, particularly since we are a U.S. corporation in this country, are the same in New York as they are elsewhere.

Now we have 300 people in your State, whereas in Alaska we have a small number. In other States, we have quite a bit more. With this diverse operation the policy is clear, but who decides whether a ship captain is qualified are the people who run the marine company, which is a shipping company in Houston. Now, we have a number of other marine companies around the world, and that is where the operating decisions have to be made. Because those are the people that run the show. We give them a policy, and it is pretty clear as to how, in a good social-conscience way, we try to rehabilitate people. The other point in that argument is, if as an employee you do not tell your supervisor that you have a drinking or a drug problem and do not come in for rehabilitation, then when we find it out we are going to fire you. This is a pretty serious thing.

So you try to use that bait to find out who has a problem. Now, what said earlier today—and I am not sure you were here at the time—is that we did not say that after you give this man rehabilitation he should not go back to a sensitive job.

We put him into this program, and paid for it through our insurance, hospitalization, and then gave him his job back. What we should have done in this case, in this kind of a job, is have given him a job back but not the same one. This then would get people like this back to work—but not back in the same job, or not the job of running the Baton Rouge refinery, or driving a gasoline tanker truck in the State of Maryland.

I mean, you cannot make those kind of judgments remote from the operation. You talk about bureaucracy. If we had to make those kinds of judgments in New York you could never get a decision. We are talking about, worldwide, probably 300 masters on ships, or 250. If management, at that level, cannot make those decisions, then you have to get some different people at that level who can make those decisions.

Mr. STUDDS. I just want to be sure—and I do not know that one can get that assurance in a reasonable fashion in this setting at this time—that we are not going to find, a week, or a month, or six months, or a year down the road, when the immediate glare of headlights and cameras, and the inevitable short attention span of the American people and their media, has relegated this somewhere to the background. That somewhere, in some court, a lawyer representing Exxon is going to suggest that the Coast Guard did not do all that it should or could have done; that therefore, at least some of the legal liability should fall on the Government and the taxpayers of the United States, rather than on the corporation.

Mr. RAWL. Now let me just put it this way, in operational terms. There were something like 8800 voyages with tankers in and out of that harbor. We had a large percentage of them. Twenty percent, or less I guess, because we probably had bigger ships.

A large number of those times we did not expect any radar help, and we did not get any radar help, if that is what you are getting to right now. And therefore, when we put that ship in there the last time, and unfortunately, did not get it out of there, as far as the people that were running that company, Exxon Shipping Company—they did not expect to have to rely on the Coast Guard to get them out of that harbor.

I said earlier, I think before you came in, that the weather was good, and so forth. So if you are talking about that particular part of it. But you know, I feel a little uncomfortable, just generalizing on this kind of thinking. But I am trying to get across my intention, our corporate intention, and the intention of the company in Houston that is dealing with these ships.

Mr. STUDDS. I am partly reassured. I understand that you really could not go further than that without being attacked from behind there by whichever your attorneys are, but——

Mr. RAWL. No, I do not even worry about that. I just do not want to walk off into a ditch and find out that I misunderstood your question, or something.

Statement of
L. G. Rawl
Chairman of the Board
and Chief Executive Officer
Exxon Corporation

before the

Subcommittee on Coast Guard and Navigation
of the
United States House of Representatives
Merchant Marine and Fisheries Committee

Washington, D.C.

April 6, 1989

I am L. G. Rawl, Chairman of Exxon Corporation. I am here today to provide a frank response to questions regarding the Exxon Valdez oil spill and describe our comprehensive efforts to deal with its consequences.

But before I do this I want to repeat what I've said in print and on television a number of times; how sincerely and profoundly sorry I am that this accident happened. I speak not only for myself, but also for the thousands of Exxon employees who, because of their loyalty and commitment to Exxon, share my distress. We are especially sympathetic to the impacts on the residents of the Prince William Sound area and the people of the State of Alaska. Exxon takes full responsibility, and has done so from the beginning. And Exxon will continue doing all we can to clean up and mitigate the spill's effects; all necessary resources are being employed.

Before proceeding further, I would like to point out that the statement I am submitting today reflects the situation as it existed as of noon, Eastern Daylight Time, April 5, 1989. The spill of an estimated 240,000 barrels occurred early on March 24. We have certain other factual information: the weather was clear; the ship had no known mechanical problems; a course change was requested and authorized; the captain subsequently left the bridge; and tests made some time after the grounding showed the captain's alcohol level was above limits established by the Coast Guard. Obviously, this leaves many unanswered questions. Exxon is conducting an investigation of the accident, as are the National Transportation Safety Board and the Coast Guard. Other Federal and State investigations are also underway.

Certified copy
of August 4, 1989
correspondence from Dan
Paul to Dr. Berky, NTSB

CIVIL NO.: A89-095
PLAINTIFFS' EXHIBIT
NUMBER 745

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached is a true copy of the original on file in the Analysis and Data Division, National Transportation Safety Board, which original comprises the material available from the NTSB public reference file concerning the marine accident in Valdez, Alaska on March 24, 1989 involving the Exxon Valdez, letter dated August 4, 1989 with attachments and that I have legal custody of the record involved.

Signed and dated at Washington, DC
this 14th day of April 1994
by Susan Stevenson
(Signature)

Archives Technician
(Title)

****

I HEREBY CERTIFY that Susan Stevenson who signed the foregoing certificate is now, and was, at the time of signing the Archives Technician, Public Inquiries Branch, Analysis and Data Division, National Transportation Safety Board, that she has legal custody of the record involved, and that full faith and credit should be given her certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the National Transportation Safety Board to be affixed this 14th day of April 1994

(Signature)

Records Management Officer/Analysis and Data Division
(Title)

National Transportation Safety Board

SB Form 1320.17 (Rev. 6/80)

CIVIL NO. A89-095
PLAINTIFFS' EXHIBIT
NUMBER 745

EXXON SHIPPING COMPANY
ST OFFICE BOX 1512 • HOUSTON, TEXAS 77251-1512 "EXXSHIP HOUSTON"

D.J. PAUL
HUMAN RESOURCES MANAGER

August 4, 1989

Dr. Birky
National Transportation Safety Bureau
Bureau of Technology and Rehabilitation Records Research
TE-3
800 Independence Ave. S.W.
Washington, DC 20594

Dear Dr. Birky

As discussed in our telephone conversation of July 26, 1989, I am forwarding a Benefit Record - Sickness report on Joseph Hazelwood which I am told was submitted to the NTSB as part of Exxon's June 23, 1989 submission responding to the June 9, 1989 subpoena. I trust this report will provide insight regarding the purpose of the leave of absence and the compliance with Captain azelwood's doctor's recommendations for after care.

I have also enclosed a copy of Exxon Shipping Company's Alcoholism Policy in effect at the time Hazelwood entered the treatment program. You will note that the State of Alaska's Proposed Findings of Fact, Conclusions and Recommendations refer to the 1987 policy.

Sincerely,

DJP: jm
63001

Attachments

C: Mr. D.M. Bates
Mr. L.A. Coluccielo
Mr. W.J. Deppe
Mr. T.W. Gillette
Mr. R.H. Wood

SOCIAL SECURITY NO. 071-38-8376

EMPLOYEE HAzelwood, Joseph	RATING & CODE M 100	BIRTH DATE	VESSEL OR STATUS P L	85

SICKNESS CASE:

Diagnosis Alc treatment

B.P. service — Years ______ Months ______ Days ______

Did empl. work 20 wks. cumulatively since last full benefits? ☐ Yes ☐ No

If "No", last S/L period from ______ ; Weeks ______

Date benefits began 4/1 ______ Ended 5/13/85 Total Days ______

TEMPORARY TOTAL DISABILITY UNDER PLAN:

Full benefits ______ Days from ______ Thru ______

Half benefits ______ Days from ______ Thru ______

Unearned wages payable to ______ DATE ______ At daily rate ______

Hospitalized

From ______ Thru ______ At ______

From ______ Thru 4/9 At [illegible]

FCN issued 5/7/85 By [illegible]

Paid leave credits ______

M.I.B. notified ______ Packet sent ______

D.T.R. issued 5/20/85

4/16/85 — [illegible] thru 4/29 — [illegible] LOA for [illegible] therapy; [illegible]

Phone Number (516) 427-6486

Address

Remarks Apr - March Period - Left for 3/15 - [illegible] Check on S/A or LOA - Check w/ Blank re SL. Come [illegible] around 8/15/85 — come back then — [illegible] to Dr Cahn

(7/31) [illegible] Hazelwood [illegible] 8/1/85

BEN[illegible] — SICKNESS

E7200001205-3

DATE OF PAYMENT

AMOUNT

MEDICAL AND MISCELLANEOUS

DESCRIPTION

BENEFIT PAYMENTS

DATE OF PAYMENT

REV

PERIOD FROM TO

AMOUNT

REMARKS

PLEX745-003

XXON SHIPPING COMPANY
POST OFFICE BOX 1512 • HOUSTON, TEXAS 77001 "EXSHIP HOUSTON"

W M SNOW, JR
SECRETARY

September 28, 1984

Exxon Shipping Company
Policy Manual

Mr. F. J. Iarossi
Mr. S. P. Revere, Jr.
Mr. R. M. Weatherford

Attached is a resolution adopting an Exxon Shipping Company policy manual which requires approval by the Board of Directors.

The policy manual has been reviewed by our primary shareholder contact, who took no exception to the proposed action.

Please indicate your respective approval of the resolution by signature, then return the completed document to the Company secretary's office in Room 3409-A.

WMSnow

WMS:dh
Attachment

PLEX745-004

TO: Mr. U. J. LeGrange

FROM: F. J. Iarossi

SUBJECT: Exxon Shipping Company Policy Manual

Exxon Shipping Company has satisfied EUSA Audit staff that activities and situations not specifically addressed in its proposed policy will be governed according to EUSA and/or Exxon Corporation policies.

The Law Department has reaffirmed concurrence with the proposed manual, a draft of which was sent to you earlier.

If you take no exception, the manual will be circulated to the Exxon Shipping Company board members for adoption.

FJI:jk

Reviewed and no exception taken

U. J. LeGrange 9/24/84

SEP 25 1984
RECEIVED
F. J. IAROSSI

EXXON SHIPPING COMPANY

CONSENT TO ACTION IN LIEU OF MEETING

We, the undersigned, being all of the Directors of Exxon Shipping Company, do hereby consent to the Board's acting without a meeting and do hereby adopt the following resolution; it being understood that the Secretary of the Company will record this Consent and the actions taken in the record of Director Proceedings:

WHEREAS, The predecessor marine transportation entity to Exxon Shipping Company was the Marine Department of Exxon Company, U.S.A.;

AND WHEREAS, Said Marine Department was subject to the policies manual promulgated by Exxon Company, U.S.A.;

AND WHEREAS, Exxon Shipping Company became successor to the Marine Department on July 1, 1982, as a separate affiliate and has developed a manual for reference of established policy guidelines which will be made a part of and preserved with the Company records;

BE IT RESOLVED, That the Exxon Shipping Company policy manual in its entirety be, and it hereby is, approved.

RM Weatherford

EMPLOYEES SECTION II

ALCOHOLISM (Page 1 of 2) SUBJECT 8

Source: Board of Directors Meeting of 9/28/84.

COMPLETE POLICY

I. Policy

The Company recognizes alcoholism is a treatable illness, characterized by an inability to control the repeated consumption of alcohol causing impairment of job performance. This policy is to assure that any regular employee with this illness receives consideration appropriate to this medical problem.

The principal provisions of the policy are as follows:

A. The Company believes that a realistic approach to alcoholism will encourage employees to take advantage of available rehabilitative treatment whenever needed. The Company's medical advisor is available to advise and assist employees to secure medical treatment. Employees with alcoholism who follow prescribed medical treatment will receive sickness benefits under established employee benefit plans and insurance coverage consistent with local insurance plans.

B. Recognition and acknowledgement on the part of alcoholic employees that they suffer from this illness, desire rehabilitation, and are willing to cooperate in an appropriate program of treatment are essential to a successful rehabilitative effort. Employees who suspect they may have an alcoholism problem are encouraged to seek diagnosis and follow through with prescribed treatment. No employees with alcoholism will have their job security or future opportunities jeopardized due to a request for help or involvement in a rehabilitation effort.

C. If, after reasonable efforts on the part of the Company to encourage rehabilitation, an employee suffering from alcoholism refuses rehabilitation, or is uncooperative, and as a consequence is consistently unable to meet normal standards of effective work performance, the Company will take disciplinary action, including termination, if necessary. This policy does not require and should not result in any special regulations, privileges, or exemptions from the normal job performance requirements.

D. Alcoholism, per se, does not represent grounds for dismissal; nevertheless, failure to maintain satisfactory attendance and job performance as a result of alcoholism, or for any other reason, is sufficient cause for termination.

ISSUED 9/28/84

BEST AVAILABLE COPY

LOYEES SECTION II

COHOLISM (Page 2 of 2) SUBJECT 8

Source: Board of Directors Meeting of 9/28/84.

II. Administration

A. All supervisors will be responsible for referring employees to the medical advisor. Referral should be based on unsatisfactory job performance where the use of alcohol appears to be a contributing factor. Supervisors will be furnished with guidelines and instructions to assist in proper administration of this policy.

B. The confidential nature of medical records of employees with alcoholism will be preserved as any other confidential medical records.

C. Policy is to be administered to fleet personnel in accordance with the list of rules posted on the bulletin boards of each ship.

ISSUED 9/28/84

OILSPILL IMPACTS

This report lists commercial and subsistence fisheries impacted through August 22, 1990.

While thought to be comprehensive, it is not intended to represent a complete or final listing of all adjustments to commercial fisheries to date.

There have been several closures, cancellations, and postponements to commercial and subsistence fisheries in Alaska as a result of oil spilled from the "Exxon Valdez" on March 24, 1989. These include:

COMMERCIAL

Price William Sound

Herring. The gillnet and purse seine sac roe and pound and wild roe-on-kelp fisheries were canceled April 3, 1989 prior to opening. The food and bait fishery began November 1, 1989 in the General Herring District. The harvest quota for this fishery was revised to conform with the 1990 spawning biomass estimate and was set at 1,760 short tons. However, because of existing market conditions, only 646.1 tons were harvested and the fishery was closed on November 12, 1989.

Pot Shrimp. This fishery was closed while in progress because of the high potential for direct contact of gear and catch with oil on noon, April 3, 1989. This closure was anticipated to run until the fishery was scheduled to reopen by regulation, August 15, 1989. However, aerial surveys from August 3 through 8 indicated the presence of oil in waters of the Traditional Harvest Area. The fishery remained closed until March 15, 1990 when the season opened by regulation. However, a small portion of the Traditional Harvest Area was closed on March 15 because of the presence of oil. The area included waters near Knight, Eleanor, and Smith Islands.

Trawl Shrimp. Closed 12:00 noon, April 9, 1989. This fishery was scheduled to reopen August 15, but aerial surveys indicated the presence of oil in the areas where the fishery was scheduled to occur. The Port Wells area reopened March 1, 1990 and the remainder of the Sound will probably remain closed until weather improves in the spring and aerial surveys are possible.

Sablefish (black cod). Did not open as scheduled April 1, 1989 because of the oil spill. This fishery reopened in inside waters only, in conjunction with the halibut opening at noon on June 12. This fishery closed on December 31, 1989. Sablefish was not reopened during the remainder of 1989 in outside waters because the Gulf of Alaska sablefish quota had been filled. The 1990 season did open as scheduled April 1.

CIVIL NO.: A89-095
PLAINTIFFS' EXHIBIT
NUMBER 794

Northern Area Dungeness crab. Was closed April 30, 12:00 noon. It reopened on January 1, 1990.

King crab

The entire Prince William Sound Registration Area was closed to the commercial harvest of all species of king crab during the 1989-1990 fishing season on October 1, 1989. Aerial surveys located oil in Knight Island Passage and adjacent bays. Knight Island Passage is the primary harvest area for brown king crab in the Sound. The brown king crab fishery, like other crab fisheries, depends upon the capture by pots and subsequent live holding of legal size males before they are sold to processors. The live holding of male crabs requires a fresh supply of sea water to be supplied to the crabs until the fishing vessel reaches port. Due to the fact that winter storms can move oil into the fishing areas, monitoring the area on a timely basis is impractical. Due to oil, which persists in the area of known fishing for brown king crab, there is an appreciable likelihood that the adulteration of crab or fouling of gear and vessels will occur. The red and blue king crab fisheries will not occur due to low abundance.

Groundfish. This fishery was closed at noon on April 30, 1989. It reopened with the June 12 halibut opener. Incidental catches indicated no contamination, and this fishery remains open (except for bottom trawl gear) at this time.

Miscellaneous shellfish. On April 24, 1989, it was announced that no miscellaneous shellfish permits would be issued to harvest these species in Prince William Sound until the danger of oil contamination had passed. To date no requests have been received for permits to harvest miscellaneous shellfish in the Sound, and none are expected to be issued prior to mid-April 1990.

Salmon

Eshamy District commercial drift and set net salmon fishery (100,000 chum surplus to hatchery needs, plus harvests of other species) did not open for the 1989 season, as was announced May 19, 1989. This District did not open for the 1989 season.

Most waters of the Northern District surrounding Naked and Perry Islands remained closed due to beach oiling.

Most waters of the Culross Island Subdistrict (224-30 & 40) remained closed to salmon fishing during the 1989 season because of exposure to frequent oil sheen.

The Southwestern District did not open for the 1989 season due to oil.

The Montague District (227) remained closed for the 1989 season. This area includes the inside shoreline of the Montague District, 227-10 and 227-20.

All of the commercial salmon fisheries in the Prince William Sound Management Area closed at noon, September 30, 1989.

In 1990, it was announced that two small beaches in the Eshamy District would remain closed because of the presence of oil. After re-evaluation on July 5, the two areas were determined not to pose an appreciable likelihood of fouling commercial fishing gear or adulterating product. They were therefore re-opened July 9, and remained open during regular fishing periods in the Crafton Island Subdistrict. These areas were:

1) Eshamy Bay: approximately 700 yards at the southern entrance into the bay between shore makers located at approximately 60'27.85' N. lat., 147'57.80' W. long. and 60'27.90' N. lat., 147'57.40 W. long. and extending 300 yards seaward.

2) Foul Bay: the shoreline surrounding the rock island in the middle portion of the Bay located at approximately 60'34.95' N. lat., 148'03.60' W. long. and extending 300 yards seaward.

On July 27 it was announced that several areas would be closed to commercial fishing because of the appreciable likelihood of fouling fishing gear or adulterating product. Those areas closed effective at 8:00 a.m. Monday, July 30 until further notice were:

1) Latouche Island: approximately 3.5 miles of the northern shoreline between markers located at approx. 60'03.83' N. Lat., 147'53.08' W. long. on the west shore and 60'03.05' N. lat., 147'48.93' W. long. on the east shore and extending 300 yards seaward;

2) Eleanor, Ingot, and Knight Island: all waters extending 300 yards seaward of the Eleanor, Ingot and Knight Island coastlines north of 60'25.0' N. lat.

Upper Cook Inlet

Salmon

With the exception of a very minor opening of a small portion of the Central District, the commercial drift gillnet season was canceled because of oil. In addition, the Department closed setnets in that portion of the Upper Subdistrict south of the Kasilof River for the 12-hour regular fishing period on Friday, July 7, 1989, because of presence of oil on the beaches. All other setnet fisheries and fishing periods were managed according to run strength.

The commercial salmon fisheries in Upper Cook Inlet closed in early September 1989.

Lower Cook Inlet

Pot shrimp. (Outer District). This fishery was closed at noon April 30 because of the presence of oil. It reopened at noon on July 7, 1989.

Miscellaneous shellfish. On April 24, 1989, it was announced that no miscellaneous shellfish permits would be issued to harvest these species in the Outer and Eastern Districts until the danger of oil contamination had passed. To date no requests have been received for permits to harvest miscellaneous shellfish from these two districts. All shellfish fisheries in the remaining districts of Cook Inlet are managed according to abundance, effort, and existing regulations.

Groundfish. (Outer and Eastern Districts). This fishery was closed at noon on April 30, 1989 because of oil. It reopened to all species except sablefish, June 12 in conjunction with the 24-hour halibut period. Sablefish was not reopened in 1989 because the Gulf of Alaska sablefish quota had been filled.

Smelt. Smelt was closed along with groundfish in the Outer and Eastern Districts at noon on April 30, 1989. When groundfish reopened, smelt fishing remained closed.

Herring Sac Roe. (Outer and Eastern Districts). These fisheries did not open for the 1989 season because of the presence of oil. This was announced April 15, 1989, prior to the anticipated opening date of April 20.

Salmon. Kamishak District commercial salmon fishery. This seine fishery opened by regulation June 1, 1989 and was closed by emergency order on June 9 because of oil. Portions of the Kamishak District north of Contact Point were opened after July 20 based on run strength. The Tutka Bay Subdistrict north of the HEA powerlines was closed to seining at 6 a.m., July 10. It was reopened at noon the same day after further assessment showed the commercial fishery would not be impacted. The commercial salmon season in Lower Cook Inlet closed August 26, 1989.

Kodiak

Herring Sac Roe. Approximately 34 of 56 management units closed during the duration of the fishing season, because of oil impacts. The 1989 Kodiak sac roe GHL was approximately 2,415 short tons.

Salmon. The commercial season was scheduled to get underway June 9, 1989. The fisheries were postponed until June 19, when only the setnet fishery in the Alitak District opened; there were approximately 114 days fished in this setnet fishery by 87 fishermen. The only other commercial opening to occur during the 1989 salmon season was a two day seine opening in Karluk Lagoon, or the westside of Kodiak Island, in mid-September. About five seiners took part in that fishery, netting fewer than 5,000 salmon. The entire Kodiak Management Area closed to commercial salmon fishing at the conclusion of the Lagoon fishery.

Chignik

Salmon. The Chignik fishery opened on Monday June 12, 1989 at 11:00 a.m. However, portions of the Eastern District were closed due to the presence or close proximity of oil in the Kilokak Rocks area, and in Imuya and Wide Bays. The Department announced a 24-hour fishing period beginning at 9:00 a.m. June 26 for a portion of the Chignik Bay District. The area was limited to a small portion of this district due to the presence of oil in surrounding areas. The documented presence of mousse and sheen in Chignik Bay near Anguvik Island, coupled with a minimal monitoring effort, justified the closure of the commercial salmon fishery effective 10:00 p.m., Monday, June 26 for the remainder of the announced period. Because of the presence of oil contaminants within Chignik Lagoon in sufficient quantities to pose a risk of contaminating gear and/or product, the commercial salmon fishing periods scheduled for Thursday, July 27 and Sunday, August 5 were canceled. Commercial fishing opportunities remained restricted to Chignik Lagoon of the Chignik Bay District. Fisheries were held when sockeye escapements into the system justified them.

SUBSISTENCE/PERSONAL USE

Prince William Sound

Much of the Southwestern District and the western shoreline of Green Island was closed to subsistence fishing June 6, 1989. The only areas remaining open to subsistence fishing for those residents domiciled in the Southwest District are Eshamay Lagoon, Jackpot Bay, and inside Sawmill and Crab Bays.

Cook, Inlet, Kodiak, and Chignik

There have been no closures to subsistence fisheries because of oil. Subsistence fishermen have been cautioned to select fishing areas that show no signs of oil impact.

5c

SURRENDERING THE MEMORIES

Frank J. Iarossi
Exxon Shipping Company

EXH 26800 DATE 8-6-92
WITNESS Iarossi
LYNN N. WEBBER

CIVIL NO. A89095
PLAINTIFFS'
EXHIBIT NUMBER
795A

SIX YEARS AGO, EXXON SHIPPING COMPANY (ESC) SET ABOUT TO ENLARGE THE RESPONSIBILITIES AND AUTHORITY OF ITS SENIOR FLEET OFFICERS BY MOVING AWAY FROM THE "SHIP DRIVER" CONCEPT TOWARD A "BUSINESS UNIT MANAGEMENT" CONCEPT. THE ENSUING YEARS HAVE BEEN MARKED BY MEASURED BUT CONTINUOUS CHANGE IMPACTING NOT ONLY THE ROLE OF THE FLEET OFFICER BUT ALSO THAT OF THE UNLICENSED SEAFARER AND THE SUPPORTING SHORESIDE ORGANIZATION. THE PURPOSE OF THIS PAPER IS TO HIGHLIGHT THESE CHANGES AND TO PROVIDE SOME OBSERVATIONS REGARDING THE PROCESS AND THE RESULTS.

THE NEW FLEET OFFICER

IN RETROSPECT, THE CHANGING ROLE OF ESC'S FLEET OFFICERS CAN BE TRACED BACK TO 1973 WHEN ESC CEASED RECOGNITION OF A BARGAINING UNIT FOR ITS CAPTAINS. PERFORMANCE AND COMPETENCE RATHER THAN SENIORITY BECAME THE KEY FACTORS DETERMINING PROMOTION TO THE RANK OF CAPTAIN. IN 1976, ALL CAPTAINS WERE PLACED ON A MERIT BASED SALARY SYSTEM. THE OBJECTIVE OF BOTH CHANGES WAS TO STRENGTHEN THE SUPERVISOR ROLE AND MANAGEMENT

PERSPECTIVE OF THESE SENIOR FLEET OFFICERS. AT THE TIME, THOSE CHANGES WERE VIEWED AS ISOLATED STEPS. HOWEVER, IN RETROSPECT, THEY WERE THE HARBINGER OF A SEASON OF CHANGE.

IN 1981 EXXON SHIPPING CEASED RECOGNITION OF ITS FLEET OFFICER BARGAINING UNIT, THUS ENHANCING THE SUPERVISOR ROLE OF ALL ITS FLEET OFFICERS. BY 1983 ALL OFFICERS WERE ON A MERIT BASED SALARY SYSTEM SIMILAR TO EXXON'S MANAGEMENT AND PROFESSIONAL SALARY SYSTEM. A MORE EXTENSIVE PERFORMANCE APPRAISAL AND COUNSELING PROGRAM WAS INITIATED WITH THE FLEET OFFICERS IN THE KEY ROLE OF THE APPRAISERS. THIS PROGRAM SET THE BASIS FOR PROMOTIONS AS WELL AS SALARY TREATMENT.

SINCE 1981 A NUMBER OF PROGRAMS HAVE BEEN INITIATED TO ENHANCE THE MANAGEMENT SKILLS OF THE FLEET OFFICER. THE OBJECTIVE WAS TO MOVE THE OFFICER BEYOND THE TRADITIONAL PROFESSIONAL ROLE INTO A MUCH BROADER ONE THAT INCLUDED RESPONSIBILITY FOR THE OVERALL PERFORMANCE OF HIS BUSINESS UNIT; I.E., HIS VESSEL. THESE PROGRAMS INCLUDED SUCH TOPICS AS EFFECTIVE SUPERVISION, PERFORMANCE STANDARDS, APPRAISALS AND COUNSELING, INDUSTRIAL HYGIENE, EEO AWARENESS, EXPENSE FORECASTING AND MONITORING, BUSINESS PRACTICES, AND SAFETY SUPERVISION.

PARTICIPATION, LEADERSHIP, AND TEAMBUILDING

THE MOST AMBITIOUS OF THESE PROGRAMS WAS CREATED IN 1985 TO ENHANCE THE LEADERSHIP CAPABILITIES OF THE FLEET OFFICERS. DURING THE DEVELOPMENT OF THIS PROGRAM, IT WAS RECOGNIZED THAT MOTIVATING THE COMPANY TO HIGHER LEVELS OF PERFORMANCE REQUIRED MORE THAN ENHANCED LEADERSHIP OF ITS FLEET OFFICERS. IT REQUIRED THE WILLINGNESS OF ALL EMPLOYEES TO PARTICIPATE IN THE SEARCH FOR IMPROVED PERFORMANCE. IT REQUIRED THE LEADERSHIP SKILLS TO MOTIVATE THIS PARTICIPATION, TO DEVELOP CONSENSUS, AND TO IMPLEMENT CHANGE. IT REQUIRED THE ABILITY TO CREATE TEAMWORK WITHIN A HIGHLY SEGMENTED ORGANIZATION. THIS MEANT BRIDGING THE DIVISIONS BETWEEN DECK AND ENGINE DEPARTMENTS, SENIOR AND JUNIOR OFFICERS, LICENSED AND UNLICENSED SEAFARERS, AND, OF COURSE, BETWEEN SEAGOING PERSONNEL AND THE SHORESIDE STAFF. THIS WAS NO MODEST UNDERTAKING!

THE PROGRAM WAS APPROPRIATELY LABELED "EXCELLENCE THROUGH TEAMWORK" OR "EXCEL" FOR SHORT. BY THE TIME THE FIRST CLASS WAS UNDERWAY IN EARLY 1986, THE PROGRAM HAD BEEN EXPANDED TO INCLUDE ALL 900 EMPLOYEES IN THE OCEAN FLEET PLUS MOST OF THE SHORESIDE ORGANIZATION. PARTICIPATION WAS MANDATORY FOR CAPTAINS, CHIEF ENGINEERS, AND SHORESIDE SUPERVISORS, AND VOLUNTARY FOR ALL OTHER FLEET OFFICERS AND UNLICENSED SEAFARERS. A TOTAL OF 800 EMPLOYEES ATTENDED THE 26 ONE-WEEK TRAINING SESSIONS COMPLETED BETWEEN FEBRUARY 1986 AND DECEMBER 1987. ATTENDEES INCLUDED 84% OF FLEET OFFICERS, 65% OF UNLICENSED EMPLOYEES, AND 95% OF SHORESIDE EMPLOYEES. EACH SESSION COMBINED A NUMBER OF FLEET OFFICERS, UNLICENSED SEAFARERS, SHORESIDE MANAGERS, SUPERVISORS, AND STAFF PARTICIPATING TOGETHER AS EQUALS IN A PROGRAM THAT STRESSED INTERPERSONAL SKILLS AND TEAMBUILDING.

ONE OF THE NOTEWORTHY CHANGES COMING OUT OF THIS EFFORT WAS THE INITIATION OF "WORKTEAMS" ON BOARD MANY OF THE COMPANY'S VESSELS. LICENSED SUPERVISORS AND UNLICENSED SEAFARERS JOIN IN IDENTIFYING WORK TASKS, SETTING PRIORITIES, AND IN PLANNING AND ASSIGNING PERSONNEL TO SPECIFIC TASKS. IN MOST CASES, THE WORKTEAM CONCEPT HAS LED TO A MORE PARTICIPATIVE, MORE PRODUCTIVE ENVIRONMENT FOR BOTH LICENSED AND UNLICENSED TEAM MEMBERS. ANOTHER CHANGE INVOLVED THE FORMATION OF PERMANENT COMMITTEES IN EACH SHORESIDE OFFICE DEDICATED TO ENCOURAGING PRODUCTIVE CHANGE WITHIN THE ORGANIZATION. THIS INFORMAL ORGANIZATION HAS BEEN LARGELY RESPONSIBLE FOR ENCOURAGING INNOVATION AND KEEPING THE EXCEL SPIRIT ALIVE WITHIN ESC.

THE EXCEL PROGRAM HIGHLIGHTED THE IMPORTANCE OF EFFECTIVE COMMUNICATION AS A PREREQUISITE TO EFFECTIVE TEAMWORK. THIS CAN BE A PARTICULARLY DIFFICULT CHALLENGE IN A HIGHLY SEGMENTED ORGANIZATION SUCH AS A SHIPPING COMPANY WHICH MUST DEAL WITH A NUMBER OF MOBILE UNITS CONTINUALLY CHANGING GEOGRAPHIC POSITION, WITH CLEAR DISTINCTIONS AMONG GROUPS OF EMPLOYEES, AND WITH THE TRADITIONAL SHIP/SHORE INTERFACE PROBLEMS. UNDOUBTEDLY, THE MOST IMPORTANT CHANGE RECOGNIZED WITHIN ESC SINCE THE EXCEL INITIATIVE HAS BEEN IMPROVED PARTICIPATION AND COMMUNICATION AT ALL LEVELS OF THE ORGANIZATION. MUCH OF ESC'S PLANNING AND DEVELOPMENT ACTIVITIES ARE NOW BEING ACCOMPLISHED THROUGH TASK FORCES OR PROJECT TEAMS COMPRISED OF A MIX OF SHORESIDE STAFF AND FLEET OFFICERS REPORTING THEIR PROGRESS PERIODICALLY THROUGHOUT THE ORGANIZATION.

THE SHIPBOARD MANAGEMENT TEAM

THE LATEST AND PERHAPS MOST SIGNIFICANT STEP IN THE EVOLUTION TO THE NEW FLEET OFFICER INVOLVED THE DEVELOPMENT OF THE SHIPBOARD MANAGEMENT TEAM AND THE CONCEPT OF BUSINESS UNIT STEWARDSHIP. BY LATE 1986, THREE INITIATIVES UNDERTAKEN BY ESC HAD CONVERGED LEADING TO THE FORMATION OF A SHIPBOARD MANAGEMENT TEAM FOR EACH OF THE COMPANY'S 20 OCEAN TANKERS. THESE FACTORS WERE THE INCREASING DEMONSTRATION OF MANAGEMENT AND LEADERSHIP SKILLS BY THE FLEET OFFICERS, THE SHIFT TO CONTINUITY OF VESSEL ASSIGNMENT FOR ALL OFFICERS ABOVE THE ENTRY LEVEL, AND THE SIGNIFICANT REDUCTION IN SHORESIDE STAFFING RESULTING FROM CORPORATE-WIDE RESTRUCTURING. DEVELOPMENTS DURING THE PREVIOUS FOUR YEARS MADE IT POSSIBLE TO INITIATE A MAJOR SHIFT OF RESPONSIBILITY AND AUTHORITY FROM THE SHORESIDE STAFF TO THE SHIPBOARD TEAMS.

THE SHIPBOARD MANAGEMENT TEAM INCLUDES THE 12 OFFICERS ASSIGNED TO THE SIX MOST SENIOR POSITIONS ABOARD THE VESSEL; I.E., MASTER, CHIEF ENGINEER, CHIEF MATE, FIRST ENGINEER, SECOND MATE, AND SECOND ENGINEER. ONE OF THE CHALLENGES UNIQUE TO THIS TEAM CONCEPT RELATES TO THE PERIODIC CHANGE IN TEAM MEMBERSHIP AS EACH OFFICER ROTATES BETWEEN SEA TOUR AND PAID LEAVE. WHILE WE HAD SOME CONCERN WHEN THE PROGRAM WAS INITIATED, THE SHIPBOARD TEAMS HAVE MANAGED TO MAINTAIN CONTINUITY IN BOTH OBJECTIVES AND IMPLEMENTATION EVEN THOUGH EACH TEAM MEMBER IS ON BOARD ONLY HALF THE TIME.

(AS BACKGROUND, IT SHOULD BE NOTED THAT ESC'S 20 OCEAN TANKERS ARE UNDER THE OPERATIONAL CONTROL OF TWO FIELD OFFICES — ONE LOCATED AT EXXON'S REFINERY AT BAYTOWN, TEXAS, AND THE OTHER LOCATED AT EXXON'S REFINERY AT BENICIA, CALIFORNIA. THE PRINCIPAL STAFF OF EACH OFFICE INCLUDE A FLEET MANAGER WITH OVERALL OPERATING AND STEWARDSHIP RESPONSIBILITIES AND THREE SHIP GROUP COORDINATORS, EACH WITH DIRECT RESPONSIBILITY FOR THREE OR FOUR SPECIFIC VESSELS. THE TERM STEWARDSHIP MAY ALSO NEED SOME EXPLANATION. AS USED WITHIN EXXON, IT REFERS TO A MANAGER'S RESPONSIBILITY TO FORMALLY AND PERIODICALLY ACCOUNT FOR THE OVERALL PERFORMANCE OF THE UNITS UNDER HIS CONTROL. THIS STEWARDSHIP RESPONSIBILITY COVERS ALL ASPECTS; EXPENSE CONTROL, OPERATING PERFORMANCE, SAFETY, EMPLOYEE RELATIONS, ENVIRONMENTAL IMPACT, ETC.)

THE CORE OF THE SHIPBOARD MANAGEMENT TEAM CONCEPT IS A FORMALIZED FORECASTING AND STEWARDSHIP PROGRAM WHICH PROVIDES THE FRAMEWORK FOR THE TEAM'S PERFORMANCE. EACH YEAR THE TEAM IS PROVIDED WITH HISTORICAL DATA FOR THEIR VESSEL AS WELL AS FOR SIMILAR VESSELS. ALSO PROVIDED IS A PROJECTION OF THEIR VESSEL'S UTILIZATION IN THE COMING YEAR. FROM THIS, THE TEAM DEVELOPS A FORECAST OF PERFORMANCE PARAMETERS AND OPERATING EXPENSES. ONCE THIS FORECAST HAS BEEN PRESENTED AND REVIEWED BY THE RESPECTIVE FLEET MANAGER, IT BECOMES THE STEWARDSHIP BASE FOR THE COMING YEAR. IT IS THEN UP TO THE SHIPBOARD TEAM TO MEET THE GOALS, OPERATING PARAMETERS, AND EXPENSE PROJECTIONS SET OUT IN THEIR FORECAST. TWICE EACH YEAR THE SHIPBOARD TEAM MEETS WITH THEIR FLEET MANAGER AND SHIP GROUP COORDINATOR TO REVIEW PROGRESS AND TO MAKE ADJUSTMENTS WHERE NECESSARY.

ESC IS NOW IN THE SECOND YEAR OF THIS PROGRAM. THE COMMITMENT AND PROFESSIONALISM DEMONSTRATED BY ITS FLEET OFFICERS IN THE FIRST YEAR OF THE SHIPBOARD TEAM CONCEPT EXCEEDED ALL EXPECTATIONS AND PROMPTED THE STUDY OF FURTHER ENHANCEMENTS TO THE STEWARDSHIP PROGRAM.

ASSIGNMENT CONTINUITY

PRIOR TO 1986, ESC HAD ENDEAVORED TO MAINTAIN ASSIGNMENT CONTINUITY FOR MASTERS AND CHIEF ENGINEERS AND TO EXTEND THIS FOR OTHER SENIOR OFFICERS WHENEVER POSSIBLE. IN PRACTICE, IT WAS DIFFICULT TO MAINTAIN MORE THAN A 60% TO 70% CONTINUITY RATE DUE PRIMARILY TO PERSONNEL RETIREMENTS PLUS THE STARTUP OF NEW VESSELS AND THE RETIREMENT OF OLDER VESSELS. HOWEVER, EVEN WITH THIS MODEST LEVEL OF CONTINUITY, THE BENEFITS OF RETURNING SENIOR OFFICERS TO THE SAME VESSEL WERE READILY APPARENT.

THE SHIPBOARD MANAGEMENT TEAM CONCEPT REQUIRED THAT OFFICER CONTINUITY BE EXPANDED; AND BY LATE 1986, ESC HAD SHIFTED TO PERMANENT VESSEL ASSIGNMENTS FOR ALL ITS FLEET OFFICERS THROUGH SECOND MATES AND SECOND ENGINEERS. IN 1987 ESC WAS ABLE TO MAINTAIN A CONTINUITY RATIO OF NEARLY 90%. IN ESSENCE, TWO FLEET OFFICERS ARE ASSIGNED TO EACH BILLET. FLEET OFFICERS HAVE BEEN GIVEN THE FLEXIBILITY WITHIN BROAD GUIDELINES TO WORK OUT ROTATIONS WITH THEIR COUNTERPARTS TO SUIT BOTH VESSEL AND PERSONAL

PREFERENCES. THE RESPONSE BOTH FROM THE FLEET OFFICERS AND FROM THE SHORESIDE SUPERVISORS HAS BEEN VERY POSITIVE. IN 1984 ESC WILL ENDEAVOR TO INCREASE THE CONTINUITY RATIO AND TO EXPAND ASSIGNMENT CONTINUITY TO INCLUDE SELECTED THIRD MATES AND THIRD ENGINEERS WITH AT LEAST TWO YEARS EXPERIENCE. ESC HAS ALSO RECOGNIZED THE VALUE OF ASSIGNMENT CONTINUITY FOR UNLICENSED PERSONNEL AND PLANS TO EXPAND THE USE OF PERMANENT ASSIGNMENTS FOR SELECTED UNLICENSED CREW MEMBERS.

STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-20572

ADDRESS

I CAPTAIN JOSEPH J. HAZELWOOD

of Valdez make the following voluntary [illegible]

time 13:05 approx. date 3/24/89

I was born on [illegible] I have completed [illegible] year

MD= Chief Mark Delozier, U.S.C.G.

MF= Trooper Mike Fox

JH= Joseph J. Hazelwood

UM= Unidentified Male

Um m

MD: Well, why don't you Ah describe to me in your own words ah what, ah what took place from the time we, ah we untied the, the vessel at the pier and ah if you can remember...

JH: Yeah.

MD: The times, to the best of your ability, that would be helpful?

JH: Well, I...at approximately 2100, we started to single up.

MD: Okay.

JH: INAUDIBLE pretty routine, let...let go.

MD: As...as...as you, as you're doing it, ah you've got to place me in ah a location where you are and try to Ah designate which persons are also ah with you at that time. In other words, you're up in the wheel house getting ready to...

JH: Oh.

MD: Get under way, the Chief Mate is there, etc.

JH: Yeah.

MD: Okay.

JH: It was myself, the Pilot, Ah the Helmsman, and the Chief Officer, Bridge

I have read the above and foregoing statement consisting of [illegible] page(s). I have been given an opportunity to make any changes that I might want to make. The changes which I have made are initialed by me in my own handwriting.

I have sign this statement in the presence of [illegible] and [illegible] this day of [illegible]

CIVIL NO. A89-095
PLAINTIFF'S EXHIBIT
NUMBER 826

DEPOSITION EXHIBIT
766 41
Allison Aah-Hoyman
Date

DATE 3-25-92 Do [illegible]
WITNESS Delozier

Watch Team.

MO: Alright.
JH: We let go normally, let go Valdez, just let the ends go, work down to the spring lines and let them go. The tug was inside, pushed us off the dock, we proceded towards the Narrows.

MO: Did you say the First Officer was there too?
JH: Yeah, he's...that's his station.

MO: That's his station?
JH: INAUDIBLE...dock.

MO: Chief Mate?
JH: Chief Mate, First Officer, are the same...

MO: First, Pilot, and the Pilot was Mr. MURRAY?
JH: MURPHY.

MO: MURPHY. Okay, okay, go ahead...INAUDIBLE...
JH: And we disembarked him at Rocky Point, approximately 2330, 2325 exact time. He got on the pilot boat, I assumed the con of the vessel at that time.

MO: At Rocky Point?
JH: At Rocky Point, the pilot station.

MO: Okay, now when you say you assumed the con...you're ah referring to, from the Pilot?
JH: Yeah, he got off and I...

MO: Okay.
JH: I piloted through the waters.

MO: Okay.
JH: And then we came down here, I had to alter course somewhat to port, some ice was here.

MO: Um, huh.
JH: And then I noticed on the radar, you could kind of see it in the darkness, you could see some big chunks, there was a big, almost a flight of ice bergie bits and brash ice hanging across the entire separation zone into the northbound lane.

MO: Um, huh.
JH: At that point, I altered course to 200, which is about 17° to the left of the track line, because 217 inaudible is the median of the traffic lane.

MO: Okay.
JH: And I saw that wasn't going to be enough to avoid all the ice on the radar, so I altered course to 120 and...

STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-20572

MD: At any point Ah ah. during this determination of the ice and altering the course, did you communicate with the, the traffic?
JH: Yes, I notified traffic on Channel 13 and let them know my intentions, what I was doing, and that I would probably cross the inbound lane and they said there was, I think, two Arco ships that were outside of Hinchenbrook, so there would be no conflicting traffic.

MD: Okay, inbound, we're talking...
JH: Northbound.

MD: This one here, right? So, you're...
JH: Coming out here.

MD: You're supposed to be on this one here...
JH: Yeah.

MD: Normally, right?
JH: Yeah.

MD: So, you took...
JH: Well, this dotted line is the median or the...the solid line is the middle.

MD: This, this one here?
JH: Yeah.

MD: This is the one that you're supposed to be on?
JH: Yeah.

MD: For prime lane, okay, so you altered and you're about 17 off of that?
JH: Yeah.

MD: Which would put you...?
JH: INAUDIBLE position.

MD: Okay, right here.
JH: INAUDIBLE...that's 15 minutes after the pilot's got off.

MD: Okay, and then...
JH: And the I had to haul some more just about to due south, which would be this...

MD: Okay.
JH: That's a longitude line.

MD: Um, huh. (and About HERE)
JH: (It's...and it was about here) I had some paperwork to attend to down here for a few minutes and I asked the Third Mate...he had, was comfortable with the situation...the course we were steering...we got down to Busby Island, we clear the ice on the radar, haul it back to the right, and rejoin the traffic system.

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STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-20572

MD: Okay, so the intention was to come on down to this vicinity?
JH: Yeah, Busby Island, get a new fix, and the light was visible.

MD: And then swing her back up?
JH: And swing her to westward again.

MD: Okay, and that was about..:that was 180?
JH: That's a 180. Well, this isn't a course line, it's the meridians.

MD: Yeah.
JH: Due north and south, so basically that's a...

MD: Alright. So, you asked the Third, if he felt comfortable?
JH: Yeah.

MD: And.. Ah
JH: And he was aware of, apprised of the situation, what...how I had conned the ship, that it was steering 180.

MD: Um, huh. Did you leave any explicit instructions as far as when you get through such and such a point, you will turn to...
JH: No, I didn't...

MD: Any particular course?
JH: Ah, say at Busby Island, turn back, but I showed him on the radar where the ice was...

MD: Um, huh.
JH: And we'd be abeam of it and we'd be approximately here.

MD: Okay.
JH: And once we're abeam of the, the apex of the Ah? ice...

MD: Um, huh.
JH: Come back to the right and rejoin the traffic lane.

MD: Alright.
JH: And I went down to here, I was at my desk, starting to do some papers and I felt a shudder. The vessel shuddered and I was just about to go up to the bridge when the phone rang and he said, "I believe we're aground."

MD: Okay. Ah;..you, you felt a shudder? SR
JH: Yeah.

MD: And Ah you were preparing to, to get up and go?
JH: Get up to the bridge and find out what was...

MD: And, at that time then, you received a phone call?
JH: Yean, the phone rang.

MD: Okay. Alright, and...alright, then what? I mean, once you got there?

STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-20572

JH: Well, I...I went over to the side and the...you could tell she was aground. I looked at the...INAUDIBLE...the depth sounder.
MO: Were you, were you dead in the water then? I mean...
JH: Yeah, she stopped.

MO: You were stopped?
JH: The engines were still running, but the, there...was making no way.

MO: Okay.
JH: Put some deck lights on and we saw the oil around the vessel And I called traffic.

MO:
JH:

MO: As far as Ah when you, when you actually hit aground, Ah you say, it shuddered?
JH: Yeah.

MO: Was...was that, was there a ah jolt...?
JH: No, it was just a...

MO: Rocked the boat, I mean?
JH: Well, there's a normal vibration of the engines. It's...but this was a, you know, significant shudder that's not, you know, didn't feel right.
MO: Okay. Alright...ah alright, when you arrived on the bridge, did you, did you do anything at that time?
JH: Em, I was...I tried the rudder and the engines for a few minutes, to see if we could extract it from the situation, but then, I got my faculties about me...I was a little upset, of course, but then I thought about it and driving her off might not be the best way to go, [because it just... Inaudible exacerbate the damage, so I just stopped the engines.
MO: Did...Ah did the Third Ah say anything to you then or...?
JH: No, he Ah he didn't communicate anything. He...the only mention he made, he said, "he started the turn too late." He said, "she was sitting down on this area," and then he said, "he put more wheel on it." That's when she shuddered and stopped. He was in the process of making the turn when she...

MO: Alright, did...Ah did you have any conversation with him once you got up there Ah I mean, as far as...? Ah Ah
JH: No. I haven't really spoken to him concerning this situation...INAUDIBLE...

MO: Okay.
JH: He's probably as upset as I am, so...

MO: INAUDIBLE...okay.

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JH: Constructive at this point.

MO: Alright, so there you sat, high...high aground and ah was there any other Ah any other attempts to, to do anything or... Ah, I mean, Ah notification.

JH: Ah Notification I had the Mate to sound the tanks and the engineers sound the engine room...

MO: Um, huh.

JH: Void spaces, double bottoms, pump room, to ascertain any damage that we could ascertain.

MO: Okay. Ah Alright, Ah again on, Ah on the... Ah who was where, when. You departed with the Chief Mate, yourself, First, and the Pilot, and the Helmsman in the wheel house. Alright, the Helmsman at departure was RED...REDDICX? Ah Is that his name?

JH: RADTKE.

MO: RADTKE?

JH: PAUL RADTKE.

MO: PAUL RADTKE?

JH: Yeah.

MO: Okay, and ah...do you know how far he took the Ah vessel?

JH: He had the wheel, so he would have taken it through the Narrows, almost to Ah (where the pilots disembarking and shortly thereafter, he was relieved by KAGAN. Inaudible

MO: Do you remember that for a fact? I mean... Ah

JH: Yeah....

MO: As far as the pilot.. Ah

JH: I remember the pilot...

MO: Departing and RADTKE's still Ah at the helm?

JH: I couldn't say for sure if he was on the wheel.

MO: Alright, and ah, alright, how about the Chief Mate, how far did he take it?

JH: He took it until we were clear of the dock and the deck was reasonably secured, and the Third Mate came up from his docking station to relieve him on the bridge. The Third Mate INAUDIBLE...

MO: Do you know what your, what the ship's location was about that time? Inaudible Just a...

JH: It's usually about halfway between the, the berths and Middle Rock by the time all the lines are stowed...kind of a rule of thumb, to have everything buttoned up pretty well on deck.

MO: Alright, then the Third took over, right?

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JH: Yes, he, that's his regular watch.

MO: Okay, and how about the First, he was on, on the bridge when you departed. When did he...when you left the dock...
JH: Yeah.

MO: When did he leave or do whatever he did, did he stay there the whole time or...?
JH: No, he turned in as soon as he was relieved, went down below decks, well...

MO: In about what location did he INAUDIBLE...
JH: At about the halfway point...

MO: INAUDIBLE I believe.
JH: INAUDIBLE...Third Mate relieved him.

MO: ah Okay, so the Third relieved the First?
JH: Yeah.

MO: The Chief's position is to take the ship out?
JH: No, the Chief Mate is the same as the First Mate.

MO: Oh, I'm sorry.
JH: INAUDIBLE...

MO: Maybe I should just INAUDIBLE...gotcha...sorry about that...First, Chief Mate...Okay, did you notice anything unusual about this, about any of the, the operators or the persons in the wheel house?
JH: No.

MO: During this ah...INAUDIBLE...did you ah, ah observe them to be in a ah fairly routine manner or?
JH: Yeah, it was...pretty routine ~~INAUDIBLE~~. EVOLUTION

MO: How about the Helmsman or did you get an opportunity ah to take a look INAUDIBLE?
JH: Well, it was dark ~~and~~ he did fine coming out through the Narrows, you know. Tight spot, so he responded per the pilot's orders.

MO: Have you sailed with him before?
JH: No, I haven't.

MO: How about the, ah the Third, have you sailed with him before?
JH: Yeah, he's a regular on this vessel.

MO: And you feel pretty comfortable with him?
JH: Yeah, competent man.

MO: ah There have been some ah suggestions and ah statements concerning the fact that ah ah, that you had some alcohol or an odor of alcohol on you, do you? ah

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JH: Well, I had one of these phony beers, "Moussy," and I'd been ashore, I had lunch with Ah Captain MURPHY, drank iced tea.

MD: That's the pilot?
JH: Yeah, he's an old friend of mine. [I went to see him,] had lunch over in the town. ↳ Inaudible

MD: Where was that at?
JH: Ah, the pizza ↳ Ah joint there.

MD: Pizza Palace?
JH: Yeah.

MD: What time was that, do you remember?
JH: Right around noon time. I conducted some business in the agency office and he picked me up. We saw the Chief Engineer, Radio Operator...lunch.

MD: What time were you done there?
JH: Oh, I'd say Ah roughly 2:00. I did a little shopping, got some post cards, and sent some flowers to my wife for Easter and picked up some pizza to bring back to the ship with us. The Chief got a cab and we came back to the ship...

MD: Alright, what time did you grab the cab?
JH: Oh, I'd say about 7:00 o'clock. We were just walking around the town, hadn't been ashore in awhile, stretch my legs. We were diddling around for a while with the cab, because he had to pick up another fare that was coming back to the docks, Arco ship, crew member...he was trying to track him down in town.

MD: Alright, Ah did you have anything to drink at the Pizza Palace?
JH: Ah, I had a beer with a piece of pizza, picked up before we came back.

MD: One beer?
JH: Yeah.

MD: A real beer?
JH: A real beer, nothing with lunch, just iced tea.

MD: Anything af...any other alcohol consumption after Ah the pizza?
JH: Well, these "Moussy's," I had one of them prior to sailing. It's...I guess it's not alcohol ~~and it's~~ an alcohol free beer.

MD: It's Ah ...what's it called, a Moose?
JH: "Moussy."

MD: Non-alcoholic...and you had one of these when you came back?
JH: One or two. I was just sorting out some papers before we sailed.

MD: Prior to sailing?
JH: Yeah.

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MD: One or two "Moussy's,"...alright, ah any indication that anyone else on watch was, had been drinking or had been ashore or had the indication to you that maybe they had been drinking?
JH: No, nothing was evident.

MD: Okay.
JH: No erratic behavior INAUDIBLE...

MD: Do you know if any of those people were ashore?
JH: That I, I really couldn't tell you. I, I don't believe so anyway.

MD: Alright.
JH: The Mates didn't go ashore.

MD: Alright, let's start with the Chief Mate. Do you know if he was or wasn't ashore?
JH: No, he wasn't.

MD: That's a definite no?
JH: Yeah.

MD: Ah, how about the Third?
JH: I...couldn't swear to it, but I, I, I don't think he was ashore. I don't believe he went, the Second Mate as well...INAUDIBLE...

MD: Alright, and how about either of the helmsmen, either?
JH: That I...CLAAR or RADTKE.

MD: CLAAR or RADTKE? No, ah KAGAN?
JH: Oh, KAGAN relieved the wheel. I couldn't say.

MD: INAUDIBLE...
JH: INAUDIBLE...You'd have to ask him that...

MD: Okay, and, ah and RADTKE?
JH: No, I, I don't know.

MD: Yeah, okay.
JH: I didn't see him in town.

MD: Did you, ah did you stop at any other... ah, ah establishments in town, liquor places or bars?
JH: Well, we went by the Pipeline to see if anybody off the ship was in there, if we knew anybody.

MD: Okay. THERE
JH: That was...nobody there, so we left and picked up the pizza over at the, ah the Harbour Club.

MD: Um, huh. Did you go by cab to the Pipeline or were you just walking...
JH: Walking... YEAH.

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STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-20572

MO: Around?
JH: ~~We were just~~ walking around.

Did
MO: Okay. Do you have any idea what time you stopped in at the Pipeline?
JH: Oh, I'd say 3:30 or so, ~~it was~~ after lunch, and I did some shopping.

ah Ah ah
MO: ~~Okay~~. Alright...okay, well, do you have any suggestions or thoughts on Ah
the cause or reason why this, this happened? Why we are where we are?
JH: The only...I've, I've got to accept the responsibility for not, possibly
overestimated the Third Mate's abilities as a ship handler, perfectly
reliable before...that's a pretty simple maneuver...wasn't you know, I
wouldn't have left the bridge if I didn't feel comfortable with his
abilities to bring her back on course. ah

Ah Ah
MO: Ah, when I talked to the Third, he said that...okay, between Busby, the
fix at Busby...
JH: Um, huh.

Ah
MO: And the grounding, ah, he gave her ten degrees rudder at ten degrees
right...
JH: Um, huh.

MO: About in this position...
JH: Yeah.

MO: And then he felt the ship sliding, in his words, and then he gave her
twenty degrees right.
JH: Okay.

MO: And then, just prior to the grounding, it was hard right. Um, what does
he mean by sliding down? Do you have any idea?
JH: The only thing I can think of is he must have felt some motion that would
indicate she's sliding over the bottom, touched the bottom around,
actually touched.

ah
MO: With the bottom...okay, how about the...let's get back to the traffic
service here. What's your thoughts on that? I mean, any, if any?
JH: No, I've done the same maneuver before with ice...

MO: Okay.
JH: In the lanes. Check with them and let them know what I was doing.

MO: Um, huh.
JH: I had to do the same thing inbound...avoid some ice...came over...

Ah
MO: Were you aware of this, this section here?
JH: Yeah, I, like I said, I felt comfortable leaving him there, because
it...the way the ice was situated, the turn.

UN: INAUDIBLE...The fenders are on.

WITNESS

SIGNATURE

STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-20572

JH: Okay, 'cause BARRY's going to hang them on himself, I think.

UM: Yeah, they're sending one to us.
JH: One?

UM: Yeah, and they're rolling up another one.
JH: Oh, okay. Yeah, just ah...

MO: Okay, do you feel like, uh, like the Third was aware of this, you know, the...?
JH: Yeah, he's competent and it's on...it's well charted and...

MO: Um, huh.
JH: You know, he's looking right at it.

MO: Alright, um, how about drugs? Do you use any drugs, any medication?
JH: No, uh, uh.

MO: Neither?
JH: Neither.

MO: How about your health?
JH: Ah, fine.

MO: I'm not talking about at the moment. I'm talking about yesterday.
JH: Well, yesterday morning, I worked out and I felt fine, so...

MO: Good health?
JH: Good health...INAUDIBLE.

MO: Okay, alright, how about...ah...a home address?
JH: My home?

MO: Do you have a permanent home?
JH: Yeah, 48 Crescent Beach Drive, Huntington, New York, 11743.

MO: Four what?
JH: 11743.-

MO: 11743, and an area code and phone number?
JH: 516 area code, 427-6425.

MO: Do you have family there?
JH: Yes, my wife.

MO: And... Ah
JH: ~~My~~ daughter.

MO: Okay, let's see, how long have you been on board here?
JH: Six...five weeks.
ah

WITNESS

SIGNATURE

STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-20572

MO: And how much longer would you...?
JH: I was looking at approximately four to five more weeks INAUDIBLE.
an

MO: And then you're scheduled off after that four to five weeks?
JH: Yeah.

MO:, Four to five more weeks and then you're off for?
JH: Well it's two month, two month. Approximately two months off, two months on.

MO: Okay, so, if you ~~do~~ did go as scheduled, then you should be off for two months?
JH: Yes.

MO: And if you go on that two months off, you go to ah your home?
JH: Yes.
Inaudible

MO: (Okay)..got anything?
MF: I'm not quite clear on the sequence in town. I, I lost a...you were from town from what, noon till 9:00, is that?
JH: Oh, no, to about 7:00, 1900.

MF: Oh. ah
JH: When we came back. We were...had been conducting some business at the agency office, ship's business, we made some phone calls and then went to lunch. We just walked around...

MF: With, with Mr. MURPHY?
JH: With...no, had lunch with ah Captain MURPHY. Then he went back to take a nap. The pilot's have their own apartment. He was going to lay down before he...

MF: Right.
JH: Drove us out and ah...went and picked up a pizza, got a cab, did a little shopping.

MF: And you walked by the Pipeline at about 3:00, you said?
JH: Yeah, looked in there to see if anybody was off the ship INAUDIBLE...

MO: You didn't have anything in there?
JH: No.

MF: And then when did you have the beer, you said that was?
JH: ah About an hour later at the Harbour Club.

MF: When you picked the pizza up?
JH: Picked the pizza up, yeah, just waiting for the pizza, cab was coming.

MO: Sir, you did stop at the Harbour. ah
JH: Club or the...

MO: Or the Club?

WITNESS SIGNATURE

005

STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 29-20572

JH: Yeah, that's where I picked up the pizza.

MF: The Pizza Palace?
MD: Yeah, what's the one next door, Club Valdez?

MF: No, it's called the Harbour Club INAUDIBLE....
JH: Harbour Club, I believe.,

MF: I think...INAUDIBLE...
MD: You stopped there? You went to the pizza...
JH: Had lunch and then we were going to pick up two pizzas...

MD: INAUDIBLE...
JH: To bring back to the ship.

MD: From the Pipeline, you went to get your pizza that you'd ordered?
JH: Yeah.

MD: While you were waiting for the pizza, you went in the club?
JH: Yeah, we were in there waiting. I'd called a cab and INAUDIBLE...

MD: And you got picked up...
JH: INAUDIBLE...

MD: By the cab at the Club?
JH: Yeah, and then we had to go find somebody else, I believe he was off an Arco ship.

MD: Okay, well...
JH: The cab had another fare.

MD: This, this time limit, this time frame right here, okay, you said that somewhere around 1900, is when you caught the cab to come back to the ship.
JH: Um, huh.

MD: Okay, was that pretty accurate?
JH: Pretty_close to it.

MD: Pretty close?
JH: Yeah.

MD: Alright, so somewhere around 1500 to 1530, you were at the Pipeline?
JH: Yeah.

MD: Right, for a few minutes?
JH: Yeah.

MD: Alright, then to...
JH: INAUDIBLE...

WITNESS SIGNATURE

MD: Then to Pizza Palace to pick up a pizza?
JH: Yeah.

MO: Waiting for it to get ready?
JH: And the cab.

MO: Stopped in the Club?
JH: Yeah.

MO: Then the cab and then to go look for someone else?
JH: Yeah, that's...we got in the cab and then we went, he had another fare. I've forgotten where he picked him up, fellow off another ship.

MO: That wasn't your fare?
JH: No.

MO: That was another fare that was going to where?
JH: To the Terminal.

MO: Okay, so you weren't looking for someone else for you?
JH: No, no, it was...

MO: It was, the cabbie was looking for?
JH: Yeah, the cabbie was looking for him.

MO: Do you recall who the cabbie was?
JH: No.

MO: Do you recall what he looks like?
JH: Big fellow, black hair.

MO: Ugly?
JH: Well, I really didn't...it was dark.

MO: A beard?
JH: Yeah, I'm pretty sure he had a beard. I was in the back seat. The Chief was in the front seat.

MO: Alright. Okay, so from the club, you got the cab, the cabbie went and picked up another fare and then to...
JH: The Terminal.

MO: To the Terminal, okay, and to the best of your recollection, you arrived back at the ship at approximately what time?
JH: About 2000, eightish.

MO: Okay.
JH: And Captain MURPHY was already on board, ready to go.

WITNESS

SIGNATURE

STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-20572

MO: Okay. Ah, not to complicate anything, but Ah while you're at the Pizza Palace with Captain MURPHY having lunch with Captain MURPHY and the Chief Engineer and the Radio Officer...
JH: Um, huh.

MO: Ah, he...did Captain MURPHY have anything to drink?
JH: No, iced tea, ~~same as me~~.

MO: Okay, okay, I think that about summed it up for me? Mike?
MF: I just made, for you, a list of the guys will be wanting to talk to you later INAUDIBLE...
JH: Sure.

MF: And Ah I doubt if it will be me, but it will be somebody representing the State Troopers or the Attorney General's Office or whoever...
JH: Shows up.

MF: They decide to send to town, yeah.
JH: Would that be from local, or you don't know?

MF: No, it's not local.
JH: Oh, okay.

MF: I'm the only one, me and one other guy, who's on vacation.
JH: I see.

MF: So, they'd send somebody who would be Ah..have a particular duty...
JH: Okay.

MF: Interest...
JH: INAUDIBLE...

MF: Do you have any idea, I don't suppose there's anyway you could even guess a time frame or anything though, I suppose, what's going to happen here?
JH: Well, I, I just spoke to our office down in California and they Ah..this ship, there's another one coming in at midnight...the same, the Exxon San Francisco, same class as...let's see how this first lightering goes...

MF: Um, huh.
JH: She's available for another lightering, you know, if it comes to that.

MF: Okay, the two together can, can equal what you've...
JH: Well...

MF: Got on board?
JH: Pretty close to it, yeah, but we'll have to see how this goes once she...

MF: Uh, huh.
JH: Starts getting up out of the water...

MF: Yeah.

WITNESS SIGNATURE

STATEMENT OF CAPTAIN JOSEPH J. HAZELWOOD OF THE EXXON VALDEZ 89-2C572

JH: And see which way she's going to flop, you know, stability-wise INAUDIBLE a few days.

MF: Um, huh, is there any speculation as, as of this point from your office as to if we do get you afloat, which we will ah..which direction you'll want to be heading, ah...(SIDE 1 OF THE TAPE ENDS)...

END OF INTERVIEW

WITNESS

SIGNATURE

lan/rn 15

COMPUCHEM
LABORATORIES

March 29, 1989 **REPORT # 1**

Requesting Agency:

U.S. Coast Guard
222 E. 7th Street, Room D-148
Anchorage, Alaska 99501
Attn: Lt. Gary Stock

Reference Information:

HAZELWOOD Joseph
071-38-8376

Our Reference No: CW78-88

Sample: Blood received on March 28, 1989.

Request: Ethanol by gas chromatography. Cocaine and its metabolites, cannabinoids, amphetamine, morphine and codeine, barbiturates, benzodiazepines, phencyclidine and methaqualone by radioimmunoassay.

Results:

Drug	Blood
Ethanol (w/v)	0.061%
Cocaine & metabolites	
Methaqualone	
Amphetamine	
Phencyclidine	
Morphine & Codeine	
Barbiturates	
Benzodiazepines	
Cannabinoids	

Disposition: Further assays are being done.

CIVIL NO.: A89-096
PLAINTIFFS' EXHIBIT
NUMBER 3797

Michael A. Peat, Ph.D.
Director

CompuChem Laboratories, Inc. - Western Division
600W North Market Boulevard - Sacramento, CA 95834 - Phone (916) 923-0840 - Fax (916) 923-1938

COMPUCHEM
LABORATORIES

April 14, 1989

Requesting Agency: National Transportation Safety Board
TE-50 800 Independence Ave., S.W.
Washington, D.C. 20594
Attn: Dr. M. Birky

Reference Information: HAZELWOOD Joseph
071-38-8376

Our Reference No: CW78-88

Sample: Blood :received on March 28, 1989.

Request: Ethanol by gas chromatography. Cocaine and its metabolites, cannabinoids, amphetamine, morphine and codeine, barbiturates, benzodiazepines, phencyclidine and methaqualone by radioimmunoassay.

Sympathomimetics (e.g. pseudoephedrine, phenylpropanolamine, phentermine, MDA, MDMA) by gas chromatography. Basic drugs (e.g. antihistamines, antidepressants, methadone, methaqualone) by gas chromatography.

Results:

Drug	Blood
Ethanol	0.061%
Cocaine & metabolites	
Methaqualone	
Amphetamine	
Phencyclidine	
Morphine & Codeine	
Barbiturates	
Benzodiazepines	
Cannabinoids	

4-14-89

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600W North Market Boulevard - Sacramento, CA 95834 - Phone (916) 923-0840 - Fax (916) 923-1938

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Results:

Drug	Blood
Sympathomimetics	
Basic Drugs	

Disposition: Retained for one year.

Michael A

Michael A. Peat, Ph.D.
Director

COMPUCHEM
LABORATORIES

March 29, 1989 **REPORT # 1**

Requesting Agency:
U.S. Coast Guard
222 E. 7th Street, Room D-148
Anchorage, Alaska 99501
Attn: Lt. Gary Stock

Reference Information:
KAGAN Robert
438-64-5051

Our Reference No: CW79-88

Sample: Blood received on March 28, 1989.

Request: Ethanol by gas chromatography. Cocaine and its metabolites, cannabinoids, amphetamine, morphine and codeine, barbiturates, benzodiazepines, phencyclidine and methaqualone by radioimmunoassay.

Results:

Drug	Blood
Ethanol	None Detected
Cocaine & metabolites	
Methaqualone	
Amphetamine	
Phencyclidine	
Morphine & Codeine	
Barbiturates	
Benzodiazepines	
Cannabinoids	

Disposition: Further assays are being done.

Michael A. Peat, Ph.D.
Director

CompuChem Laboratories, Inc. - Western Division
600W North Market Boulevard - Sacramento, CA 95834 - Phone (916) 923-0840 - Fax (916) 923-1938

311sa

COMPUCHEM
LABORATORIES

April 14, 1989

Requesting Agency:

National Transportation Safety Board
TE-50 800 Independence Ave., S.W.
Washington, D.C. 20594
Attn: Dr. M. Birky

Reference Information:

KAGAN Robert
438-64-5051

Our Reference No: CW79-88

Sample: Blood received on March 28, 1989.

Request: Ethanol by gas chromatography. Cocaine and its metabolites, cannabinoids, amphetamine, morphine and codeine, barbiturates, benzodiazepines, phencyclidine and methaqualone by radioimmunoassay.

Sympathomimetics (e.g. pseudoephedrine, phenylpropanolamine, phentermine, MDA, MDMA) by gas chromatography. Basic drugs (e.g. antihistamines, antidepressants, methadone, methaqualone) by gas chromatography.

Results:

Drug	Blood
Ethanol	None Detected
Cocaine & metabolites	
Methaqualone	
Amphetamine	
Phencyclidine	
Morphine & Codeine	
Barbiturates	
Benzodiazepines	
Cannabinoids	

4.14.89

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600W North Market Boulevard - Sacramento, CA 95834 - Phone (916) 923-0840 - Fax (916) 923-1938

COMPUCHEM
LABORATORIES

Page 2
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Results:

Drug	Blood
Sympathomimetics	
Basic Drugs	

Disposition: Retained for one year.

Michael A. Peat, Ph.D.
Director

COMPUCHEM
LABORATORIES

March 29, 1989 REPORT # 1

Requesting Agency:
U.S. Coast Guard
222 E. 7th Street, Room D-148
Anchorage, Alaska 99501
Attn: Lt. Gary Stock

Reference Information:
COUSINS Gregory
005-52-2008

Our Reference No: CW80-88

Sample: Blood received on March 28, 1989.

Request: Ethanol by gas chromatography. Cocaine and its metabolites, cannabinoids, amphetamine, morphine and codeine, barbiturates, benzodiazepines, phencyclidine and methaqualone by radioimmunoassay.

Results:

Drug	Blood
Ethanol	None Detected
Cocaine & metabolites	
Methaqualone	
Amphetamine	
Phencyclidine	
Morphine & Codeine	
Barbiturates	
Benzodiazepines	
Cannabinoids	

Disposition: Further assays are being done.

Michael A. Peat, Ph.D.
Director

CompuChem Laboratories, Inc. - Western Division
600W North Market Boulevard - Sacramento, CA 95834 - Phone (916) 923-0840 - Fax (916) 923-1938

COMPUCHEM
LABORATORIES

April 14, 1989

Requesting Agency: National Transportation Safety Board
TE-50 800 Independence Ave., S.W.
Washington, D.C. 20594
Attn: Dr. M. Birky

Reference Information: COUSINS Gregory
005-52-2008

Our Reference No: CW80-88

Sample: Blood received on March 28, 1989.

Request: Ethanol by gas chromatography. Cocaine and its metabolites, cannabinoids, amphetamine, morphine and codeine, barbiturates, benzodiazepines, phencyclidine and methaqualone by radioimmunoassay.

Sympathomimetics (e.g. pseudoephedrine, phenylpropanolamine, phentermine, MDA, MDMA) by gas chromatography. Basic drugs (e.g. antihistamines, antidepressants, methadone, methaqualone) by gas chromatography.

Results:

Drug	Blood
Ethanol	None Detected
Cocaine & metabolites	
Methaqualone	
Amphetamine	
Phencyclidine	
Morphine & Codeine	
Barbiturates	
Benzodiazepines	
Cannabinoids	

Michael N
4-14-89

CompuChem Laboratories, Inc. - Western Division
600W North Market Boulevard - Sacramento, CA 95834 - Phone (916) 923-0840 - Fax (916) 923-1938

COMPUCHEM
LABORATORIES

Page 2
CW80-89

Results:

Drug	Blood
Sympathomimetics	
Basic Drugs	

Disposition: Retained for one year.

Michael A. Peat, Ph.D.
Director

COMPUCHEM
LABORATORIES

March 29, 1989 **REPORT # 1**

Requesting Agency:

U.S. Coast Guard
222 E. 7th Street, Room D-148
Anchorage, Alaska 99501
Attn: Lt. Gary Stock

Reference Information:

JONES Maureen
385-88-6116

Our Reference No: CW81-88

Sample: Blood received on March 28, 1989.

Request: Ethanol by gas chromatography. Cocaine and its metabolites, cannabinoids, amphetamine, morphine and codeine, barbiturates, benzodiazepines, phencyclidine and methaqualone by radioimmunoassay.

Results:

Drug	Blood
Ethanol	None Detected
Cocaine & metabolites	
Methaqualone	
Amphetamine	
Phencyclidine	
Morphine & Codeine	
Barbiturates	
Benzodiazepines	
Cannabinoids	

Disposition: Further assays are being done.

Michael N

Michael A. Peat, Ph.D.
Director

CompuChem Laboratories, Inc. - Western Division
600W North Market Boulevard - Sacramento, CA 95834 - Phone (916) 923-0840 - Fax (916) 923-1938

COMPUCHEM
LABORATORIES

April 14, 1989

Requesting Agency: National Transportation Safety Board
TE-50 800 Independence Ave., S.W.
Washington, D.C. 20594
Attn: Dr. M. Birky

Reference Information: JONES Maureen
385-88-6116

Our Reference No: CW81-88

Sample: Blood received on March 28, 1989.

Request: Ethanol by gas chromatography. Cocaine and its metabolites, cannabinoids, amphetamine, morphine and codeine, barbiturates, benzodiazepines, phencyclidine and methaqualone by radioimmunoassay.

Sympathomimetics (e.g. pseudoephedrine, phenylpropanolamine, phentermine, MDA, MDMA) by gas chromatography. Basic drugs (e.g. antihistamines, antidepressants, methadone, methaqualone) by gas chromatography.

Results:

Drug	Blood
Ethanol	None Detected
Cocaine & metabolites	
Methaqualone	
Amphetamine	
Phencyclidine	
Morphine & Codeine	
Barbiturates	
Benzodiazepines	
Cannabinoids	

6-14-89

CompuChem Laboratories, Inc. - Western Division
600W North Market Boulevard - Sacramento, CA 95834 - Phone (916) 923-0840 - Fax (916) 923-1938

Page 2
CW81-89

Results:

Drug	Blood
Basic Drugs	
Pseudoephedrine (ng/mL)	207.0
Phenylpropanolamine (ng/mL)	less than 10

Disposition: Retained for one year.

Michael A.

Michael A. Peat, Ph.D.
Director

EXXON PRODUCTIONS RESEARCH COMPANY

Field Manual For Oil Spill Response

[illegible]

CIVIL NO. A89-095
PLAINTIFFS' EXHIBIT
NUMBER 6468

FIELD MANUAL OBJECTIVES

This manual has been prepared to assist the Exxon on-scene coordinator at the site of an oil spill who has inadequate technical or scientific assistance immediately available to consult. It is not to be used as a substitute for good judgement or in place of qualified assistance if it can be obtained, however it does provide a source of potentially helpful information based on studies and experience gained elsewhere.

This manual has been written for world-wide application to proved data showing the most effective technical means of minimizing oil spill impacts and does not consider various local laws or environmental policies that might exist.

The report has been organized according to the sequence of events that must be considered during a spill. The manual is not intended as a primer or text. The flow charts, charts, and end point analysis are designed to provide potential solutions or approaches for a qualified generalist already familiar with the overall technical approaches, but is currently stressed and requires either a check list or specific information as quickly as possible.

The information and opinions contained in this manual are considered to be accurate as of January, 1984. Neither Exxon Corporation, it affiliates, subsidiaries, employees, officers or directors shall be liable for injury, loss or damage of any kind resulting directly or indirectly from the use of the information contained in this manual whether or not such loss or damage was caused directly or indirectly by their negligence.

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SOCIAL SECURITY NO. 071-38-8376

EMPLOYEE	RATING & BOOK	BIRTH DATE	VESSEL OR STATUS	
HAZELWOOD, JOSEPH	M 100		P L	85

SICKNESS CASE:

Diagnosis Alc treatment

S.P. service – Years ______ Months ______ Days ______

Did empl. work 26 wks. cumulatively since last full benefits? ☐ Yes ☐ No

If "No", last S/L period from ______ To ______ ; Weeks ______

Date benefits began 4/1 Ended 5/13/85 Total Days ______

TEMPORARY TOTAL DISABILITY UNDER PLAN:

Full benefits ______ Days from ______ Thru ______

Half benefits ______ Days from ______ Thru ______

Unearned wages payable to ______ DATE ______ At daily rate ______

Hospitalized

From ______ Thru ______ At ______

From ______ Thru 4/4 At ______

PCN issued 3/25 By [illegible]

Paid leave credits ______

M.I.B. notified ______ Packet sent ______

D.T.R. issued 8/20/85

LAST DOC. REPORT — DATE — DOCTOR

4/16/85 – [illegible] thru 4/29

– – [illegible] LOA [illegible] [illegible] therapy; [illegible]

Address ______ Phone Number (516) 427-6846

Remarks [illegible] – [illegible] 5/15 [illegible] check on SA or [illegible] – check w/ [illegible] ; Conf [illegible] LOA around 8/15/85 – – come back then – [illegible] Dr. C[illegible]

(7/21) [illegible] to call Hazelwood [illegible] 8/1/85

BENEFIT RECORD – SICKNESS

E7200001205-3

DATE OF PAYMENT

AMOUNT

DESCRIPTION

MEDICAL AND MISCELLANEOUS

DATE OF PAYMENT

BENEFIT PAYMENTS

PERIOD

57304368839-0

A2188

DEFENDANT'S EXHIBIT
DX-3471
A89-095-CW

RECEIVED
SEP 29 1988

EXXON SHIPPING COMPANY
POST OFFICE BOX 1512 • HOUSTON, TEXAS 77251-1512 "EXXSHIP HOUSTON"
D. J. PAUL
HUMAN RESOURCES MANAGER

September 27, 1988

TO ALL OCEANGOING EMPLOYEES OF
EXXON SHIPPING COMPANY

Recent developments by Exxon Shipping Company, the United States Coast Guard, the United States Customs Service, and Labor Arbitrators have focused a renewed emphasis on our commitment to providing a safe, healthy and productive work place by ensuring that drug, alcohol or other substance abuse is eliminated. The purpose of this communication is to ensure that all employees are aware of the various rules, regulations and company policies regarding substance abuse in the work place and to give notice that enforcement will be more stringent in the future.

Exxon Shipping Company Employee Alcohol and Drug Use Policy

On March 11, 1987, the Exxon Shipping Company Policy on Alcohol and Drug use became effective for all non-represented employees and was mailed to all employees. The Exxon Radio Officers Association accepted the policy during our 1987 contract negotiations. On April 1, 1988, we implemented the Alcohol and Drug Use Policy for all unlicensed Oceangoing employees. A copy of this policy was again mailed to all unlicensed employees as a part of the total implementation package at the conclusion of bargaining with the Exxon Seamen's Union.

The Company Policy specifically prohibits the misuse of legitimate drugs or the use, possession, distribution, or sale of illicit or unprescribed controlled drugs on Company business or premises. Possession, use, distribution, or sale of alcoholic beverages on Company premises is prohibited. Being unfit for work because of use of drugs, or alcohol is strictly prohibited and is grounds for termination of employment. Exxon Shipping Company may from time-to-time conduct unannounced searches for drugs and alcohol on owned or controlled property. The Company also has the right to require employees to submit to medical evaluation or alcohol and drug testing where cause exists to suspect alcohol or drug misuse. A positive test result or refusal to submit to a drug test is grounds for disciplinary action, including dismissal. The guidelines for Supervisors, which were bargained with the Exxon Seamen's Union, are essential to the administration of this policy and should be familiar to every employee.

1. At the discretion of the President or Fleet Manager, the Company may conduct unannounced alcohol and drug searches on owned or controlled property where there is reasonable cause to suspect that these

DEFENDANT'S EXHIBIT
DX-3618
A89-095-CV

substances may be present. Reasonable cause may include searches in operations where use of these substances could create an unsafe situation.

2. The decision to require an employee to submit to testing for drugs and alcohol requires the advance endorsement of the Human Resources Manager. Prior to any testing, the employee must sign an Informed Consent form. In cases where a medical evaluation is deemed appropriate, medical personnel should be asked to collect a urine and/or blood sample for testing to determine the presence of alcohol and/or drugs. Blood tests will not be taken on board ship by vessel personnel. If circumstances prevent medical evaluation from being conducted soon after the "for cause" incident, Management may collect and properly process the urine sample.

3. Employees who acknowledge they have either an alcohol or drug dependency and who desire rehabilitation and are willing to cooperate by participating in a treatment program are encouraged to seek assistance through the Employee Health Advisory Program (EHAP) or the Medical Department.

   No employee with an alcohol or drug dependency will be terminated or; otherwise, disciplined due solely to a request for help in overcoming that dependency or involvement in a rehabilitation effort.

   However, if an employee's request for rehabilitation is made after the Company's discovery of a violation of the policy, the Company will take disciplinary action which may include termination. Such disciplinary action cannot be avoided by a request for treatment or rehabilitation at that time.

DEPARTMENT OF TRANSPORTATION, U.S.C.G., 33 CFR Operating a Vessel While Intoxicated

Effective January 13, 1988, the U.S.C.G. Regulations governing operation of a vessel while intoxicated became final. These regulations are far more explicit and stringent than previous rules. For commercial vessels, a blood alcohol content (BAC) of .04% is considered intoxicated. When an intoxicant, either alcohol or drugs, affects a person's manner, disposition, speech, muscular movement, general appearance or behavior, the employee is considered intoxicated and in violation of the regulations. The regulations also require that while on a commercial vessel, a crew member shall not be intoxicated at any time and shall not perform or attempt to perform any scheduled duties within four hours of having consumed alcohol. The penalty for being intoxicated while on board a vessel is a fine of up to $5000, imprisonment for up to one year, or both.

Copies of these regulations are on board all vessels for your review and information. These rules place the primary burden for detecting, reporting, and reducing the incidence of intoxicated behavior on marine employers.

United States Customs Service "Sea Carrier Initiative Agreement"

The United States Customs Service has recently adopted a "zero tolerance" policy with respect to illegal drugs found on board vessels. A vessel on which nominal amounts of illegal drugs are found may be subject to seizure and forfeiture, even if the drugs are in the possession of a crew member for personal use. As a result, the management of Exxon Shipping Company has a responsibility to take appropriate action. Toward that end, we have entered into a voluntary agreement of cooperation with the United States Customs Service to reduce our liability in the event illegal drugs are found on one of our vessels. This 15 point agreement is called the "Sea Carrier Initiative Agreement." A complete copy of the Agreement has been sent to the Master of each vessel, the elected union officials of all represented employees and to each shore based manager.

Labor Arbitrators Awards

Over the last several years, licensed and unlicensed employees have been terminated for use and possession of alcohol or drugs while on board a vessel. Several employees have been suspended for alcohol "possession only." Four unlicensed employees terminated for use or possession of alcohol or illegal drugs were reinstated by arbitrators for various reasons.

With respect to violation of the Company's Policy on the prohibition of use or possession of alcohol and illegal drugs, arbitrators have been critical of management when the discipline is inconsistent. For example, in the matter of arbitration between the Exxon Seamen's Union and Exxon Shipping Company, case no. 18 30 0062 85N, Arbitrator, Daniel F. Brent, stated in part:

> "...It must be emphasized that the Company is entitled to prohibit alcohol and drugs and to police its work force in order that it may insure the safety of its workers and protect the general public from harm by the Company's vessels or product. To this end, the Company may promulgate rules reasonably designed to insure that no alcohol or habit forming drugs enter its premises. If in the past the Company has permitted a variety of penalties to be imposed for similar infractions, the Company is entitled to give notice to the bargaining unit and to the Association that it will impose stronger penalties in the future (emphasis added) than it has in the past in order to guarantee that its prohibition against alcohol and habit forming drugs is universally observed..."

This letter will serve as the notice stated in the arbitrator's award.

Conclusion

In view of Management's responsibility to enforce the Company Policy, the USCG regulations on "Operating a Vessel While Intoxicated," our liability under the "zero tolerance" policy of the U. S. Customs and the USCG as well as clear direction from Labor Arbitrators, we must aggressively ensure that our employees are not using or in possession of alcohol or illegal drugs while on board a vessel. This document serves as another official notice that violation of the Company Alcohol and Drug Use Policy, or regulations governing alcohol or drug use in the work place will result in immediate termination from the vessel. While we must continue to thoroughly investigate the facts of each individual case and make a final determination on a case-by-case basis, termination of employment is the penalty for violation of these standards. We will continue unannounced alcohol and drug searches on owned or controlled property where there is reasonable cause to suspect that these substances may be present or in operations where use of the substances could create an unsafe situation. The tradition of providing wine at holiday meals will reluctantly be discontinued hereafter in order to ensure compliance with the new USCG regulations.

These actions will assist in providing a safe work environment free of alcohol and drug use and help assure uniform Company actions. If you have any questions or concerns regarding Management's position on alcohol or drug use while on Company property, please consult with the Master. You are urged to become familiar with all provisions to avoid placing your job in jeopardy.

Dan Paul

DJP:mdg
02861

The situation with one of the groups or pods of killer whales was much more serious. In 1989 seven animals from the AB pod were missing for an unprecedented mortality rate of 19.4 percent. In 1990, an additional six individuals were missing, which indicated an annual mortality rate of 20.7 percent. Typical prespill mortality for this pod ranged from 3.1 - 9.1 percent. In addition, no births were recorded in 1989 or 1990.

Due to the fidelity of killer whales to the pod and the strong bonds observed between mothers and calves, the missing whales are presumed to have died, though no killer whale carcasses were ever recovered.

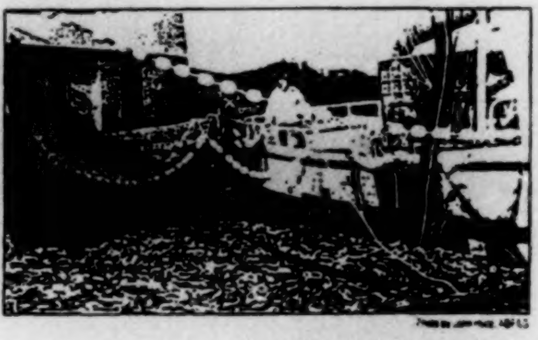
The cause of death of the killer whales is uncertain. Based on current knowledge of whale biology, the circumstances of the spill and the toxicity of crude oil, these deaths might not be due to contact with oil spilled by the *Exxon Valdez*. Regardless of the cause of the decline in numbers, Trustee Council surveys have observed that several calves were born in the last 3 years. It appears that the AB pod will probably recover to prespill condition around the turn of the century.

FISH

☐ *Pink Salmon*

As the oil moved through Prince William Sound and out into the Gulf of Alaska, the slicks were also swept into the mouths of streams where salmon breed and where the salmon fry were soon to emerge from the gravel and find their way to saltwater. Seventy-five percent of the wild pink salmon in the sound spawn at the mouth of streams. There was no apparent change in the use of this habitat by fish in the summer of 1989, and many salmon deposited their eggs in the intertidal portion of oiled streams.

In the autumn of 1989, egg mortality in oiled streams averaged about 15 percent, compared to about 9 percent in unoiled streams. Since 1989, egg mortality in the oiled areas has generally increased. In 1991 and 1992 approximately 40 to 50 percent of the salmon eggs in oiled streams did not survive, as compared



Trustee studies have documented injuries to several commercially important fish species, such as herring, pictured here, and pink and sockeye salmon. Projects planned and underway will continue to assess the nature of the injuries and take action to restore damaged fish stocks.

DX-5992

to an 15 to 30 percent mortality in unoiled streams. In 1993, though the rates of egg mortality had dropped to an average of less than 25 percent in oiled streams and less than 15 percent in unoiled streams, the differences still persisted.

Although the differences between salmon egg mortality in oiled and unoiled streams over the first two years were likely attributable to the effects of oil, scientists did not expect these differences to persist as long as four years after the spill. At first they thought oil was directly affecting survival of the pink salmon eggs, but as the amount of oil on the shorelines decreased, other explanations began to seem more plausible. Perhaps there was a genetic effect in the young which carried over to adulthood, and was even inherited by the next generation.

Researchers also suspected that the characteristics of the stream might play a role in egg mortality independent of effects of the oil. For example, most oiled streams were on rocky points, whereas unoiled streams were found in the backs of bays and inlets. Perhaps differences in the severity of natural conditions were contributing to mortality.

Then in 1993 this story took another turn. Returning adult pink salmon were captured as they entered oiled and unoiled streams, their eggs spawned in the laboratory and raised under controlled conditions. This experiment showed that the differences in egg mortality between pink salmon from the oiled and unoiled streams when both were raised in the laboratory were as great as the differences seen in the wild, essentially eliminating environmental factors from consideration. It now appears there is an inheritable difference in egg mortality for fish from oiled versus unoiled streams. The interpretation of these results is further complicated by the recently discovered fact that some fish sampled might not have originated at the stream where they returned to spawn. This egg mortality might translate into a decline of as much as 10 percent in the entire adult pink salmon run in Prince William Sound if all the other factors which contribute to salmon mortality are added together with the oiled stream effects.

Besides the fate of eggs laid in oiled gravel, the juvenile fish emerging into Prince William Sound in the spring of 1989 encountered oil in the water as slicks and small droplets, which were consumed along with food. Circumstantial evidence from tagged juvenile salmon points to growth retardation as an effect of the spill, which may have in turn affected the strength of the 1990 run. This indicates that despite the large size of the 1990 run of pink salmon, it might have been even larger, perhaps by as much as 1.9 million fish, if the spill had not occurred.

In 1992 and 1993, extremely low returns of pink salmon to Prince William Sound resulted in dire effects on the commercial fishery. The exact causes of these poor returns are not known. The effect of the oil spill on early salmon life, changes in climate affecting conditions in the Gulf of Alaska, decreases in food sources for juvenile fish growth in the last several years, and hatchery-wild stock interactions have all been proposed as contributing to the current poor state of the fishery. Trustee-sponsored programs for salmon are now shifting from injury determination to studying this species within the context of the ecosystem. Restoration and enhancement of pink salmon will depend on better knowledge of the ecological interactions of this species, namely sources of food and predation by large fish, particularly during its early life history.

The Trustee Council has embarked on a multimillion dollar research and monitoring program to attempt to understand these fishery declines and to identify effective restoration actions. A significant segment of the 1994 work plan is devoted to fishery research with these goals in mind.

☐ *Herring*

Shorelines in the spill region also included about 5-10 percent of the spawning habitat of Pacific herring. In 1989 and 1990 there were greater rates of abnormal development of herring larvae in oiled areas than in unoiled areas. There was also evidence gathered in 1992 that oil may have had an effect on herring reproduction. Like pink salmon, strong runs of herring right after the spill were followed in 1992 and 1993 by poor returns.

Fisheries biologists also observed the appearance of a high rate of infection by a virus in the Prince William Sound herring population. The fishery has seen a very poor return of the 1989 brood year.

It should be noted that it is not possible to blame the poor return of herring solely on the oil spill. The decline may be due to natural causes, or to some combination of oil spill effects with natural causes. Although there is not enough data to be certain, the Trustee Council is supporting studies to learn more about the factors which affect herring production.

☐ *Sockeye Salmon*

In 1989 the oil that left Prince William Sound traveled along the Kenai Coast and entered the southern part of Cook Inlet, a rich commercial fishery area. The prospect of oil-fouled gear and fish prompted the Alaska Department of Fish and Game to close the sockeye salmon mixed stock fishery in Cook Inlet.

As a result of this closure, there were higher than usual returns (overescapement) of spawning fish to the Kenai and Red Lake systems in 1989. This was the third consecutive year of salmon overescapement in the Kenai River system, due to a previous oil spill in 1987 and naturally high overescapement in 1988.

The apparent cumulative effect of too many spawning adults in the Kenai River system has been a decline in salmon smolt production. Although the exact mechanism by which this occurs is not clear, fisheries scientists believe that the availability of food is insufficient to meet the needs of the large number of fry produced. Fewer fry surviving their first winter in rearing lakes result in fewer smolt migrating to the ocean in the spring. Smolt production in the Kenai River system has declined as follows: 1989 — 30 million; 1990 — 6 million; 1991 — 2.5 million; and in 1992 and 1993, less than 1 million. The forecast is for returns in 1994 and 1995 to be below escapement goals.

ARCHAEOLOGICAL RESOURCES

The areas of Alaska affected by the *Exxon Valdez* oil spill have been occupied by Native peoples for at least 11,000 years. It is estimated that the spill area contains over 3,000 sites of archaeological and historic significance.

Currently, 24 sites are known to have been adversely affected by clean-up activities, looting or vandalism related to the oil spill. It is estimated that over 100 total sites were similarly affected, and injuries attributed to looting or vandalism linked to the oil spill are still occurring and on the rise because of on-going human intrusion into previously pristine areas.

Restoration cannot regenerate what has been destroyed, but it can successfully prevent further degradation of sites and preserve the scientific data. During the 1994 field season archeologists will continue work begun in 1993 to conduct site-specific restoration actions at thirteen sites within the oil spill pathway. The Trustee Council will continue to support projects to document injured locations and preserve the artifacts and scientific data which remain in the vandalized sites.

SUBSISTENCE RESOURCES

Native communities in the spill region have relied heavily on subsistence resources for many generations. Resources used include salmon, halibut, cod, and other fish; marine invertebrates such as clams, shrimp and crabs; marine mammals such as seals; land mammals such as deer; birds and bird eggs; and wild plants. Many families felt they could no longer trust the safety of their traditional foods after the oil spill, and use of these subsistence resources declined significantly in some communities.

Representatives of a number of organizations formed an Oil Spill Health Task Force to conduct subsistence foods testing and to inform community members of their findings. Since 1990, the Task Force has advised that all the fish, deer, ducks, seals and sea lions tested as part of the subsistence program were found to be safe to eat, but recommended against using shellfish from beaches where oil is still present.

Total Actual and Potential Cost of the Exxon Valdez Spill

DEFENDANT'S EXHIBIT
DX-6399A
A89-095-CV

Expenditures: Incurred and Fixed

Claims Payments	$304,000,000
Federal Fine	25,000,000
State and Federal Restitution	100,000,000
State and Federal Settlement	900,000,000
Clean Up Costs	2,097,000,000
Casualty Loss: Vessel, Cargo	46,000,000
Phase IIA Award	287,000,000
Phase IIB Award	20,000,000
Less:	
Tax Reduction	-1,115,000,000
Adjustment	-218,000,000
Subtotal	$2,446,000,000

Expenditures: Potential and Contingent

Plaintiffs' State Court Claims	165,000,000
Recoverable Costs	17,000,000
Interest	103,000,000
Plaintiffs' Phase IV Claims	174,000,000
Contingent State/Federal Settlement	100,000,000
Less:	
Tax Reduction	-207,000,000
Subtotal	352,000,000

Total Net Actual and Potential Cost	$2,798,000,000

H346_05

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re

THE EXXON VALDEZ

Case No. A89-095-CV (HRH)
(Consolidated)

RE: ALL CASES

DECLARATION OF EDGAR A. ROBINSON IN SUPPORT OF PROPOSALS OF EXXON DEFENDANTS TO SECURE PAYMENT OF THE JUDGMENT

I, Edgar A. Robinson, declare under penalty of perjury, pursuant to 28 U.S.C. §1746, as follows:

It also would be above that of Citicorp ($19.6 billion) and Mobil ($18.0 billion), and well above that of Amoco ($14.8 billion) and Chevron ($14.4 billion). The Debt-to-Capital Ratio, a measure of a company's capacity to take on additional debt, provides assurance of liquidity. At a 50% Debt-to-Capital Ratio, the financial strength of Exxon would be on a par with such well known and highly liquid corporations as DuPont, Atlantic Richfield and PepsiCo and stronger than AT&T, Xerox and Ford Motor. Taken together, these triggers are set at levels which would almost certainly be breached long before there would be any reasonable threat to or doubt regarding Exxon's solvency or liquidity. As a result, Exxon's commercial paper would be readily marketable even in the extremely unlikely event a breach were to occur, thereby readily allowing for the substitution of U.S. Treasury bills for Exxon commercial paper in the escrow.

29 Comments have been made regarding possible parallels between Exxon's current situation and that of Texaco Inc. in the period 1985 through 1987 as a result of the *Pennzoil* litigation. Beyond the obvious facts that both are large oil companies and both faced the prospects of multi-billion dollar judgments, the potential impacts of the judgments on each company could not be more different. The initial award in the *Texaco* case was $11.1 billion, which represented about eighty-one percent (81%) of its $13.7 billion 1986 Total Shareholders'

Equity, and interest on the judgment was accruing at a rate of ten percent (10%) per year. Even after a $2 billion reduction, the judgment was still in excess of $9 billion or about sixty-six percent (66%) of its $13.7 billion 1986 Total Shareholders' Equity. This situation left the company without the liquidity to pay the judgment. As a result, Texaco's own disclosure indicated that if the judgment were to be affirmed in whole or significant part, it would face the prospects of being subject to liquidation of significant assets and of having to seek protection in a Chapter 11 bankruptcy proceeding.

30 In the case of Exxon, beyond the fact that the Judgment is expected to represent only a small fraction (about 12%) of its Total Shareholders' Equity, both Moody's Investors Service, Inc. and Standard & Poor's Corporation have issued opinions stating that payment of the full amount of the Judgment would not have a material impact on the corporation or its credit quality. In the unlikely event that the credit trigger set at $20 billion of Total Shareholders' Equity were to be breached, the Judgment would still be expected to represent a small fraction (about 25%) of Exxon's Total Shareholders' Equity as compared to the 81% level initially faced by Texaco. In addition, the Debt-to-Capital Ratio trigger provides further assurance of liquidity. As a result, there can be no inference drawn from Texaco's situation that these credit triggers will not

provide real and valuable protection for plaintiffs and no credible parallel exists between the circumstances which Texaco faced in the *Pennzoil* litigation and those with which Exxon is now dealing in the *Valdez* proceedings.

31 The proposed escrow deposit would be subject to the Court's immediate direction and control to the same extent as any letter of credit approved by and filed with the Court.

G. Advantages Versus a Letter of Credit.

32 In addition to providing very secure and highly liquid mechanisms to collateralize the Judgment, the proposed irrevocable covenant to pay would be cost-free and the proposed escrow is estimated to cost approximately $700,000 per year in administrative costs on an ongoing basis. Although we believe that Exxon could obtain an irrevocable standby letter of credit for the full amount of the Judgment, this alternative would have a cost which we estimate to be in the range of $7 to $10 million per year during the pendency of Exxon's appeal, with the actual cost depending upon prevailing market conditions.

33 Choosing either the irrevocable covenant to pay or the escrow of Exxon commercial paper in lieu of an irrevocable standby letter of credit would therefore result in substantial savings of tens of millions of dollars while still providing plaintiffs with very secure and highly liquid collateral to secure the Judgment.

EXXON CORPORATION

1995 ANNUAL REPORT

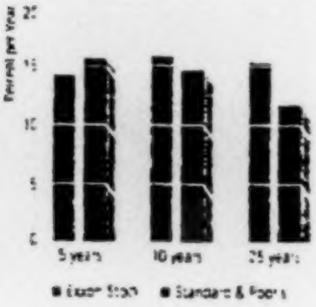
EXXON
SU
Self
EXXON

FINANCIAL/OPERATING HIGHLIGHTS

Financial	1995	1994
Net income, *billions of dollars*	6.5	5.1
Net income, *dollars per common share*	5.18	4.07
Dividends, *dollars per common share*	3.00	2.91
Shareholders' equity, *dollars per common share*	32.56	30.13
Revenue, *billions of dollars*	123.9	113.9
Capital and exploration expenditures, *billions of dollars*	9.0	7.8
Research and development costs, *millions of dollars*	525	558
Return on average shareholders' equity, *percent*	16.6	14.1
Return on average capital employed, *percent*	13.8	11.2

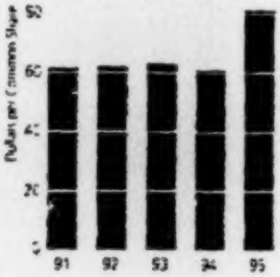
Operating	1995	1994
Net liquids production, *thousands of barrels daily*	1,726	1,709
Natural gas production available for sale, *millions of cubic feet daily*	6,013	5,978
Petroleum product sales, *thousands of barrels daily*	5,076	5,028
Refinery crude oil runs, *thousands of barrels daily*	3,422	3,412
Chemical prime product sales, *thousands of metric tons*	13,481	13,192

Shareholder Returns



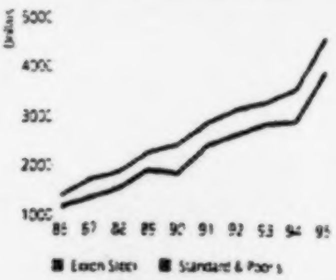
Returns are shown in comparison to average return for the Standard & Poor's 500 stock index.

Year-End Stock Price



Creating Shareholder Value

$1,000 invested January 1, 1986



A 10-year investment of $1,000 in Exxon Stock would have outperformed the average return for the Standard & Poor's 500 stock index. Assumes dividends are reinvested.

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Save The Tiger Fund Launched

Exxon and the National Fish and Wildlife Foundation have established the Save The Tiger Fund [illegible] tigers from extinction. Exxon has pledged $5 million over five years to [illegible] projects around the world. The survival of one of the world's [illegible] animals depends [illegible]. You can help by sending [illegible] donation to:

[illegible]
National Fish and Wildlife Foundation
1120 Connecticut Avenue, N.W., Suite 900
Washington, D.C. [illegible]-9584
Phone (202) 857-0166

FISH AND WILDLIFE FOUNDATION
THE NATIONAL
SAVE THE TIGER FUND

The term [illegible] company, Exxon, [illegible] as used in the report [illegible] to all of the companies affiliated with Exxon Corporation or to any one or more of them. [illegible] The following [illegible] are trademarks or service marks [illegible]

Letter to Shareholders

Profile of the Year

Record net income of $6.5 billion, up 27 percent from 1994

Record cash flow of $14.5 billion, further improving financial strength

Return on average capital employed of nearly 14 percent

Total shareholder return of 38 percent; dividend payments increased for 13th consecutive year

Exploration and production earnings of $3.4 billion, up 23 percent

Record chemical earnings of $2 billion

Additions to proved oil and gas reserves of 1.1 billion oil-equivalent barrels, replacing 110 percent of production, excluding property sales

Broad-based business growth, including:

- **Oil and gas production of about 1 billion oil-equivalent barrels – best since 1988**
- **Highest petroleum product sales since 1979**
- **Record petrochemical sales of 13.5 million tons**
- **Record copper production**

Exxon had an excellent year in 1995. We achieved record earnings of $6.5 billion, or $5.18 per share – a 27 percent increase over the prior year. Our strong performance represents the cumulative effect of many steps taken over time. We also made substantial progress to position the company for long-term earnings growth beyond the turn of the century.

Strong 1995 Performance

Earnings in 1995 reflected our strong operating performance – with record volumes in a number of areas – as well as improved market conditions for several of our businesses.

Exploration and production earnings of $3.4 billion improved by 23 percent, as higher volumes and crude realizations more than offset low natural gas prices in the United States. Chemicals earnings reached a record $2 billion, more than double 1994 results. Our coal, electric power and minerals segments also contributed higher earnings. Overall, refining and marketing earnings were lower due to very weak industry refining margins. Within this business, however, our fuel products marketing and lubricating oil businesses continued to perform well.

Exxon's return on capital employed in 1995 was nearly 14 percent, the highest level since 1988. Return on equity was about 17 percent, up from 14 percent last year. These returns have continued to lead the industry.

Cash flow, including asset sales, totaled a record $14.5 billion. Exxon's financial position strengthened further, with debt as a percentage of total capital reduced to 19 percent, an [illegible]-year low. Our financial strength provides the flexibility to respond to attractive high-quality investment opportunities.

Exxon's 1995 return to shareholders was one of the best in three decades. Total return exceeded 38 percent – higher than any of our major international competitors – benefiting in part from dividend payments that increased for the 13th consecutive year. Exxon has a history of providing attractive long-term returns – averaging almost 17 percent per year for the last 10 years.

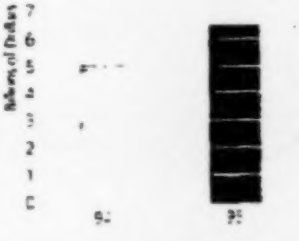
Keys to Success

Exxon's businesses are capital intensive, long term in nature and geographically diverse. They can, from time to time, be impacted by changing world economic conditions, volatility in product markets and developments in individual countries. Thus, the nature of our businesses requires that we have focused, long-term strategies with the flexibility to adapt to changing conditions.

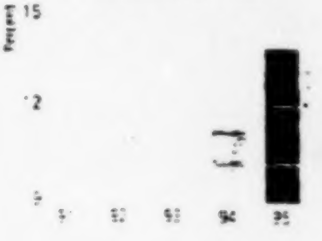
Exxon's future success requires continued commitment to all of our key strategies:

- Identifying quality investment opportunities, implementing the best on a timely and appropriate pace, while maintaining our selective and disciplined approach
- Being the most efficient competitor in all aspects of our businesses
- Developing and employing the best technology

Earnings Up 27%



Return on Capital Employed Increases to 14%



SUPPLEMENTAL APPENDIX

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78

445 pp (22)

No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL JOINT APPENDIX
VOLUME TWO

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Liaison Counsel for Plaintiffs

Honorable H. Russel Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re: The EXXON VALDEZ	Case No. A89-095-CV (HRH) (Consolidated)
THIS DOCUMENT RELATES TO ALL CASES	

DECLARATION OF DAVID W. OESTING

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David W. Oesting declares as follows:

1. I am competent to make this Declaration and make this Declaration on the basis of facts known to me.

2. I am Lead Counsel for Plaintiffs in this litigation. I was appointed lead counsel by this Court for all of the Plaintiffs and all of their counsel on December 22, 1989, Pre-trial Order No. 9, Clerks Docket No. 748. I was charged with the duty to and have supervised, managed and directed all of the litigation related activities of plaintiffs and their counsel in these consolidated cases from that date to the date hereof. With respect to the facts set forth in this declaration, I have personal knowledge of the same either because I supervised the gathering and distillation of the information set forth in the performance of my duties as lead counsel or thoroughly investigated and confirmed the existence of such facts for purposes of fulfilling my duties and responsibilities as lead counsel. I make this Declaration in connection with Plaintiffs' submission concerning the Court's determination of the maximum punitive damage award permitted by the Constitution. In particular, I attach, for the Court's convenience, copies of some of the materials cited in Plaintiffs' Memorandum in Opposition to Renewed Motion of Defendants Exxon Mobil Corporation (D-1) and Exxon Shipping Company (D-2) for Reduction or Remittitur of Punitive Damages Award, submitted herewith.

GENERAL

3. **Exhibits 1 and 2** are copies of this Court's Order Nos. 265 and 267.

EXXON'S CONDUCT

4. **Exhibit 3** contains excerpts from the testimony of Exxon witnesses in *Exxon Corp. v. Certain Underwriters at Lloyd's of London*, No. 93-40252 (Tex. D. Ct. May 28-29, 1996).

5. **Exhibits 5-10** are peer-reviewed professional journal articles and other reports summarizing the non-economic harm suffered by fishermen and Native Alaskans as a result of the Exxon Valdez oil spill. **Exhibit 4** is an excerpt of a similar paper presented at a symposium. Plaintiffs' Exxon Qualified Settlement Fund (EQSF) records indicate that there are approximately 14,000 fishermen (not counting unoiled fisheries) and approximately 4,300 Native Alaskans in the punitive damage class.

6. **Exhibit 11** is a representative example of the releases Exxon required commercial fishermen to execute in early 1989 before those claimants received any settlement from the Exxon Claims Program. This particular example was executed by Arne Berg on May 10, 1989 as a condition for receiving $12,736 for losses to his Prince William Sound herring season.

7. A total of 11.38% of any punitive damages recovery is being rebated to Exxon by virtue of the Seattle Seven and other processor cede-back agreements. Order No. 351 authorized the rebate of an 11% share in the wake of the Ninth Circuit's decision

in *Icicle Seafoods, Inc., et al. and Exxon Corp., et al. v. Grant Baker, et al.*; *Icicle Seafoods, Inc., et al. v. Alaska Sportfishing Ass'n, et al.*, 229 F.3d 790 (9th Cir. 2000). Order No. 352 affirmed the proposed distribution of the 2.1% processor share to various processors, set out in Table 1 to the Amended Plan of Distribution of Allocations to the Processor Claim Category filed in support of All Plaintiff's Lead Counsel's Motion for Order Approving the Amended Plan of Distribution of Allocations to the Processor Claim Category and Approving Stipulation for Amendment of Processor Plan of Distribution and Fixing of Shares of Certain Signatory Processors, Clerk's Docket No. 7372, attached as **Exhibit 12** to this Declaration, including shares of 9.997% to Copper River Fishermen's Cooperative, 13.910% to Sea Hawk Seafoods, 7.213% to Kodiak Salmon Packers, and 6.161% to Western Alaska Fisheries, Inc. The shares Exxon was to receive from Western Alaska Fisheries, Inc. (100% of the 6.161%) and Kodiak Salmon Packers (95.42% of the 7.213%) were not contested, and were confirmed in the Order Approving Stipulation for Amendment of Processor Plan of Distribution and Fixing of Shares of Certain Signatory Processors, p.7, Clerk's Docket No. 7371. The shares Exxon is to receive from Cooper River Fishermen's Cooperative (16.02% of the 9.997%) and Sea Hawk Seafoods (23.92% of the 13.910%) were established in Order No. 352. The allocation to Exxon of 11.38% is summarized in the following table:

Processor	Distribution Plan Share	Allocation Plan Share	Assignment %	Exxon Net
Seattle 7	11%		100%	11.00%
Cooper River	2.1%	9.997%	16.02%	.034%
Sea Hawk	2.1%	13.910%	23.92%	.070%
Western Alaska	2.1%	6.161%	100%	.130%
Kodiak Salmon	2.1%	7.213%	95.42%	.145%
TOTAL				11.379%

HARM

8. **Exhibit 13** contains excerpts from the Joint Reply Brief of Appellants filed April 21, 1997 in *Icicle Seafoods, Inc., et al. and Exxon Corp., et al. v. Grant Baker, et al.*; *Icicle Seafoods, Inc., et al. v. Alaska Sportfishing Ass'n, et al.*, Case Nos. 96-36038, 97-35036 (Consolidated), U.S. Court of Appeals, Ninth Circuit.

9. **Exhibits 14-30** provide support for the figures set forth in the Actual Harm section of Plaintiffs' brief, concerning verdicts and recoveries achieved thus far on behalf of eight groups of plaintiffs.

10. **Principal Fisheries.** The jury, in Phase IIA, determined that the harm to the principal salmon fisheries for the years 1989-1995 and to the herring fisheries for the years 1989-1994 totaled $286.8 million. Phase IIA Verdict. **Exhibit 14** is a copy of the Phase IIA Verdict. Of this amount, the jury awarded damages of $168.5 million for losses suffered by fisherman due to declines in prices paid for salmon and herring and for devaluation of permits, claims which Exxon never admitted and made no pre-trial

payments to settle. See answers to Interrogatories 6, 16, 17, 23 and 25, Phase IIA Verdict.

11. **Seafood Processors.** As of the time of trial, seafood processors had recovered $123.0 million in settlements from Exxon. Amended Stipulation Regarding Impacts for Phase III at 5, ¶¶ 5-6. In general, these payments were in settlement of claims for 1989 only. Subsequently, the Seattle Seven group of processors settled their post-1989 claims for an additional $6 million. **Exhibit 15** is a copy of the Amended Stipulation Regarding Impacts for Phase III, setting forth the $123.0 million figure. **Exhibit 16** is a copy of the 1996 Settlement Agreement from Appellants' Joint Excerpts of the Record filed January 30, 1997 in *Icicle Seafoods, Inc., et al. and Exxon Corp., et al. v. Grant Baker, et al.*; *Icicle Seafoods, Inc., et al. v. Alaska Sportfishing Ass'n, et al.*, Case Nos. 96-36038, 97-35036 (Consolidated), U.S. Court of Appeals, Ninth Circuit, setting forth the $6 million settlement at p.4. Processors also received $5,007,094 from the TAPL Fund, see ¶ 13, for a total of $134,007,094.

12. **Native Alaskans.** The claims of the Native Alaskan class that would have been tried in Phase IIB were settled for $20 million. Amended Stipulation Regarding Impacts for Phase III at 2. Members of the class who opted out subsequently settled their claims for an additional $2.6 million. Order No. 307: Final Approval of Settlement Between Native Opt-Out Settlement Class and Exxon, filed January 19, 1996, Clerk's Docket No. 6600.

13. **Data on Claims Paid from the Trans-Alaska Pipeline Liability Fund and from Exxon.** In connection with the administration of the Exxon Qualified Settlement Fund, the administrator sought and received information from the Trans-Alaska Pipeline Liability Fund regarding payments the Fund made to claimants during the Fund administration process and sought and received from Exxon regarding payments made to various claimants during its claims program. We have concluded that both sets of data, which were provided in electronic form, are reliable. See Affidavit of Timothy Petumenos filed in support of Plaintiffs' Memorandum Concerning the Maximum Punitive Damage Award Permitted by the Constitution on March 13, 2002, Clerk's Docket No. 7455. Further, the amounts Exxon reported it paid in its claims process have been almost uniformly confirmed by EQSF claimants who have been required to submit to the EQSF Administrator information regarding amounts received from the Exxon claims program as setoffs against their potential recoveries. To the extent there has been any difference between the payment amounts submitted by Exxon and those acknowledged by claimants, the administrator has thus far concluded in each case that the Exxon data is correct. In summary those data show the following payments by plaintiff group. The Fund made payments of $34,162,822 to Native Corporations, $33,191,344 of which was paid to the Native Corporations that ultimately tried their claims in state court (the "Chugach Group"), and $971,478 of which was to other Native Corporations. Processor workers received $1,787,232 from the Fund, and $10,787,886 from the Exxon

claims program. See **Exhibit 17** which is an excerpt from January 13, 1995 letter from Richard M. Clinton to Michael Woerner. Municipalities received $1,340,178 from the Fund. Area businesses and others received $388,596 from the Exxon claims program, and $219,305 from the Fund. Tenders received $2,144,635 from the Fund, and $1,159,517 from Exxon claims. See **Exhibit 18** which is Exhibit C to Memorandum in Support of Motion of Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) With Respect to Judgment to be Entered on the Phase III Verdict, filed March 28, 1996, Clerk's Docket No. 6684. Brokers received $139,827 from the Fund, and $17,410 from the Exxon claims program. See **Exhibit 18**. Processors received $5,007,094 from the Fund. When Plaintiffs sought Court approval of their settlement with the Alyeska Pipeline Service Company, Clerk's Docket No. 3718, Exxon initiated independent litigation against Alyeska in an attempt to reconfigure the settlement with respect to Exxon's contribution rights that would have made the settlement unacceptable to Alyeska. Objections of Exxon Corporation (D-1) and Exxon Shipping Company (D-2) to Alyeska Settlement, Clerk's Docket No. 3971.

14. **Chugach Group Native Corporations and Associations.** Six Prince William Sound Native Corporations recovered a total of $33,191,344 from the Trans-Alaska Pipeline Liability Fund and were paid an additional $2,808,003 by Exxon. The source of the latter payments is a report prepared by Exxon Community Liaison Manager W. Monte Taylor (the "Taylor Report"), a portion of which is attached hereto as

Exhibit 19. Taylor lists Exxon payments to the Chugach Corporations and Chugach Area Native associations as follows:

Corporation/Association	Claim Paid	Reference Page
Chugach Alaska Corp	$965,995	Z7301273492
The North Pacific Rim	$400,000	Z7301273431
Chugach Alaska Corp.	$289,616	Z7301273358
Chenega Village Corp.	$63,346	Z7301273358
The North Pacific Rim	$73,329	Z7301273358
Chenega Corp.	$1,015,717	Z7301273455
TOTAL	$2,808,003	

These PWS corporations also pursued their claims in Alaska Superior Court, obtaining jury awards totaling just under $9 million, **Exhibit 20** (Jury Verdict Forms), and settlements of additional claims totaling $592,500. **Exhibit 21** is the September 7, 1994 letter from Patrick W. Crumb to Ralph V.L. Ertz ($60,000) and **Exhibit 22** is the Settlement Agreement and General Release between ExxonMobil Corporation and SeaRiver Maritime, Inc. and English Bay Corporation and Port Graham Corporation dated June 1, 2000 ($532,500). To resolve issues concerning alleged overcompensation resulting from the overlapping Fund and jury awards, the Native Corporations received only $152,275 on the jury awards (representing the claim of Tatitlek (with interest), because Tatitlek recovered $243,948.60 from the jury and had received $94,090.55 from the Fund). Further, the other PWS corporations agreed to repay the Fund approximately $7.4 million. **Exhibit 23** is the Settlement Agreement and Release between the Native

Corporations and the Fund. The net total amount recovered by the PWS Corporations and Associations is thus $29.34 million.

15. **Other Native Corporations and Associations.** Several other Native Corporations pursued their claims through negotiations with Exxon and claims against the Fund. They recovered a total $1,410,159, of which $971,478 was from the Fund, ¶ 13 above, and $438,691 is described in the Taylor Report, as summarized in the following table:

Corporation/Association	Claim Paid	Reference Page
KANA	$300,000	Z7301273353
KANA	$93,425	Z7301273358
KANA	$45,266	Z7301273359
TOTAL	$438,691	

Thus, the net total recovery for all Native Corporations and Associations is $30.75 million, summarized as follows:

Description	Amount
Chugach Group Initial TAPL Fund Recoveries	$33,191,344
Exxon Settlements With Chugach Group	$2,808,003
Additional Settlements	$592,500
Tatitlek Net State Jury Recovery	$152,275
Repayment to the Fund	-$7,400,000
Other Native Corporation Fund Recoveries	$971,478
Other Native Corporation and Association Recoveries	$438,692
TOTAL	$30,754,292

16. **Municipalities and Villages.** Approximately two dozen municipalities and villages obtained $8.5 million in settlement payments from Exxon during 1989-1991, which are described in the Taylor Report. The sources of those payments and amounts are set out in **Exhibit 24**. Seven of these communities pursued additional claims against Exxon in Alaska Superior Court. Thus far, they have recovered $974,000 in settlements (composed of $245,000 received in 1995 by the cities of Seward, Old Harbor, Port Lions, Ouzinkie and Larsen Bay, **Exhibit 25**, attached; $255,000 for land claims of the cities of Old Harbor, Ouzinkie, Port Lions and Larsen Bay, discussed in paragraph (1) of **Exhibit 25** attached; $455,000 received in 1995 by the city of Cordova and Kodiak Island Borough, **Exhibit 26** attached; and $19,000 recovered by the City of Ouzinkie, **Exhibit 27** attached). Kodiak Island Borough successfully tried its land claims realizing $724,000 at trial. **Exhibit 28** is the jury's verdict. A group of municipalities pursued successful TAPL Fund claims totaling $1,340,178 (¶ 13, above) and another group of municipalities received $1,500,000 as part of the State of Alaska's recovery against Alyeska for their lost fish taxes. The Exxon Defendants successfully defended against several municipalities' claims in state superior court on the basis that Alyeska's payment to the state had satisfied these claims. The total recoveries for municipalities and villages is $13.059 million.

17. **Phase IV Plaintiffs.** Phase IV of the trial would have included claims by commercial fishermen in a variety of fisheries, as well as claims of landowners and

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aquaculture associations. The delay in waiting to try these claims, however, delayed the entry of judgment and, with it, the running of interest on the remainder of plaintiffs' claims. Ultimately, it became clear that plaintiffs stood to lose more in interest from delaying the entry of judgment than they stood to gain from trying these claims. Plaintiffs' Memorandum in Support of Joint Motion of Plaintiffs and Defendants for Preliminary Approval of Phase IV Settlement, Plaintiffs' Motion for Preliminary Approval of Plan of Allocation of Recoveries Obtained by Plaintiffs in Litigation Arising From the Exxon Valdez Oil Spill, and the Orders Requested in Those Motions Scheduling a Hearing on Final Approval of the Phase IV Settlement and Plan of Allocation, and Authorizing Notice to Class Members, pp. 32-33, filed January 12, 1996, Clerk's Docket No. 6592. Accordingly, the claims were settled, with no money changing hands, apart from the $13,357,000 that the Phase IV plaintiffs had previously been paid by Exxon and the TAPL Fund. Of this amount, $8,123,000 was paid to Prince William Sound Aquaculture Corporation by Exxon. Payments by the TAPL Fund provided $604,473, see ¶ 13, above. The balance, $4,629,418, is set forth in Appendix 3 to Settlement Agreement Between Exxon and Plaintiffs With Respect to Phase IV Claims, filed January 17, 1996, Clerk's Docket No. 6596, **Exhibit 29** ("Exxon Claims" column).

18. **Cannery Workers, Tenders, and Seafood Brokers.** These plaintiffs, whose claims have been restored by the Court of Appeals, have previously recovered

$16.0 million in voluntary payments by Exxon and recoveries from the TAPL Fund. The amounts paid are summarized in the following table:

Category	Fund Award	Exxon Claim Payment
Processor workers	$1,787,232	$10,787,866
Tenders	$2,144,635	$1,159,517
Brokers	$139,827	$17,410
TOTAL	$4,071,694	$11,964,793

19. **Area Businesses and Others.** Though Order No. 189 dismissed the claims of these plaintiffs, it encouraged them to seek to recover for their harm from the Fund. These plaintiffs did, in fact, recover, from the TAPL Fund and from Exxon directly, approximately $607,901. **Exhibit 30** sets forth the $388,596 recovered from Exxon. $219,305 was recovered from the Fund by area businesses.

20. There are presently pending, in this Court, claims for additional compensatory damages on behalf of four categories of plaintiffs, whose claims were dismissed by this court but reinstated by the Ninth Circuit. Plaintiffs anticipate seeking damages on the claims for economic losses restored by the United States Court of Appeals for the Ninth Circuit in *In re: the Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), of between $76,720,000 and $124,875,000 on behalf of tendermen and their crew, cannery workers, seafood processors, and seafood wholesalers/brokers, net of payments already received. The higher number of this range is derived in exactly the same manner as the damages figures were calculated for purposes of Plaintiffs' allocation and various

distribution plans. The lower number is calculated to reflect the actual harvest losses awarded to Plaintiffs by the jury in the 1994 trial of this case.

21. **Exhibit 31** contains excerpts from the trial testimony of Exxon witness Otto Harrison on July 11, 2002 in *Kodiak Island Borough v. Exxon Corporation, et al.*, Case No. 3KO-89-264 and *City of Seward et al v. Exxon Corporation, et al.*, Case No. 3KO-92-134, all consolidated in *In Re: Exxon Valdez Oil Spill Litigation*, Case No. 3AN-89-2533 CI in the Superior Court for the State of Alaska, Third Judicial District.

PENALTIES

22. **Exhibit 32** is the Government's Memorandum in Aid of Sentencing, *United States v. Exxon Corp.*, No. A90-C15-CR (D. Alaska Sept. 30, 1991).

EXXON'S FINANCIAL CONDITION

23. **Exhibit 33** is an excerpt from the Declaration of Edgar A. Robinson in Support of Proposals of Exxon Defendants to Secure Payment of the Judgment, filed August 23, 1996, Clerk's Docket No. 6879, in this Court, stating that "both Moody's Investors Service, Inc. and Standard & Poor's Corporation have issued opinions stating that payment of the full amount of the Judgment would not have a material impact on the corporation or its credit quality."

24. **Exhibit 34** is an excerpt from Exxon's Motion Pursuant to Rule 8 FRAP for Stay of Execution Secured by Escrow of Exxon Corporation Commercial Paper, filed

in the Ninth Circuit on March 31, 1997, stating that "Exxon's financial strength increased significantly" in the year following the verdict in this matter.

25. During the 13 years this litigation has been pending, over a thousand depositions have been taken, over 12 million documents produced and reviewed, and over 650 orders issued by the Court and Discovery Master. More than a dozen appeals have been generated. Plaintiffs' counsel have invested time over 13 years with a going value of $169,225,000 and incurred unreimbursed expenses of $21,919,000. Over the same period, Plaintiffs' records indicate that over 900 Plaintiffs have died (given normal life expectancies, plaintiffs suspect that the actual number is probably much higher), and many have filed petitions in bankruptcy.

26. **Exhibit 35** contains Exxon's Financial highlights through 2001, including Total Revenue, Net Income, Cash Flow from Operations and Asset Sales, and Shareholders' Equity at Year End. This document was obtained from Exxon's web site on July 12, 2002, in the section containing investor information, and is available at http://www2.exxonmobil.com/Corporate/InvestorInfo/Corp_InvestorInformation.asp. **Exhibit 36** lists the market capitalization for the ten larges New York Stock Exchange-listed companies and was obtained on July 15, 2002. This document is available in the Quick Facts section at http://www.nyse.com/marketinfo/marketinfo.html.

DATED this 17th day of July, 2002.

DAVID W. OESTING

Certificate of Service

The undersigned certifies that on July 17th, 2002, pursuant to Pretrial Order No. 9, § (2), dated December 29, 1989, a copy of the foregoing was served on the following attorneys or parties of record by:

( ) Mail
( ) Facsimile
(X) Hand Delivery

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Janet Easthope

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③

No. 93-40252

EXXON CORPORATION	:	IN THE DISTRICT COURT OF
	:	
vs.	:	HARRIS COUNTY, TEXAS
	:	
CERTAIN UNDERWRITERS AT LLOYDS OF LONDON	:	189TH JUDICIAL DISTRICT

STATEMENT OF FACTS

BE IT REMEMBERED that on the 28th day of May, 1996, before the Honorable Carolyn Marks Johnson, judge presiding, the following proceedings were had, to wit:

MARTHA C. ADAMS
OFFICIAL COURT REPORTER

EXHIBIT 3

A-P-P-E-A-R-A-N-C-E-S:

COUNSEL FOR PLAINTIFFS:

Mr. Don Bowen
Ms. Lynn Liberato
Ms. Eileen O'Neill
Mr. Robert Levy
Mr. John Tavormina

COUNSEL FOR DEFENDANTS:

Ms. Franci Crane
Mr. Harry Reasoner
Mr. John Murchison
Mr. Karl Stern

A Well, when we use the term "management," I want to be sure you understand that the courts have held that fleet managers, operational personnel, port engineers and superintendents have sufficient supervisory capacity to satisfy the privity or knowledge standard as a representative of the owner.

Q And with that clarification, there would be privity if management knew of Captain Hazelwood's incompetence due to use of alcohol?

A That's my understanding, yes.

Q And if you look down in the third paragraph on Page 10, you wrote: "Our inquiries leave no room for reasonable doubt that Exxon Shipping will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood."

A Yes, sir.

Q And that was your conclusion back in 1989?

A It was.

Q In the next paragraph you state, "The following facts which claimants will establish readily cannot be denied." Do you see that?

A Yes, sir.

Q You go on to write, "Exxon shipping obtained no medical report indicating that Captain Hazelwood has been successfully rehabilitated from alcohol abuse and that he was physically and emotionally fit to resume command."

Did I read that correctly?

A You did.

Q You go on to state, "Exxon Shipping obtained no professional guidance from experts in the field of alcohol rehabilitation on the proper handling of Captain Hazelwood on his return to work."

Is that what you wrote?

A I did.

Q That's an additional fact?

A Yes, sir.

Q The next fact you write is, "Exxon Shipping Company did not require Captain Hazelwood to submit to any random tests for alcohol use or to participate in any continuing maintenance program usually associated with alcohol treatment."

Is that right?

A That is correct.

Q You then state, "Exxon Shipping conducted no private investigation or surveillance of Captain Hazelwood's alcohol consumption onshore or at sea."

Is that right?

A Yes, sir.

Q Next you state, "Exxon Shipping had no policy which was designed to encourage employees to report unsafe practices of others, including superiors, particularly in regard to drug and alcohol use."

Is that right?

What I read was yet another fact that supported your view that Exxon Shipping would never be able to sustain its burden to show lack of privity?

A It was one of the facts that we were reciting --

Q And so --

A -- in support of that conclusion.

Q Now, returning to some earlier parts of the memorandum, beginning on Page 1 and continuing on Page 4 or to Page 4, you discuss or set forth your understanding of the applicable facts?

A Yes, between Pages 1 and the top of Page 4.

Q And you discuss the circumstances surrounding the grounding of the VALDEZ?

A They are included in -- in those facts, yes.

Q And you also have a brief history of Captain Hazelwood's treatment for alcohol and subsequent monitoring by Exxon Shipping Company? I'm looking at beginning on page 3.

STATE OF TEXAS :
COUNTY OF HARRIS :

I, Martha C. Adams, official court Reporter in and for the 189th District Court of Harris County, State of Texas, do hereby certify that the above and forgoing contains a true and correct transcription of all proceedings directed by counsel to be included in the statement of facts in the above styled and numbered cause, all of which occurred in open court or in Chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the day of , 1996.

Martha C. Adams
Certified Shorthand Reporter
In and for the State of Texas

Certificate No. 1614
Expiration 12-31-96
301 Fannin, 2nd Floor
Houston, Texas 77002
(713) 755-6366

No. 93-40252

EXXON CORPORATION	:	IN THE DISTRICT COURT OF
vs.	:	HARRIS COUNTY, TEXAS
CERTAIN UNDERWRITERS AT LLOYDS OF LONDON	:	189TH JUDICIAL DISTRICT

STATEMENT OF FACTS

BE IT REMEMBERED that on the 29th day of May, 1996, before the Honorable Carolyn Marks Johnson, judge presiding, the following proceedings were had, to wit:

MARTHA C. ADAMS
OFFICIAL COURT REPORTER

A-P-P-E-A-R-A-N-C-E-S:

COUNSEL FOR PLAINTIFFS:

Mr. Don Bowen
Mr. Richard Miller

COUNSEL FOR DEFENDANTS:

Ms. Franci Crane
Mr. Harry Reasoner
Mr. John Murchison
Mr. Jim Kronzer

you drinking again," was what I remember Herb telling me, his summary. And the response from Captain Hazelwood was, "No, I'm not drinking." "I'm clean," I believe was the term he used. And I recall Herb telling me that he put -- kind of put Captain Hazelwood on notice that if there was any drinking going on on the ship, that it had to stop. And if there was any alcohol on the ship, it needed to be removed. And that was what I remember him passing on to me.

Q You mentioned that Mr. Leyendecker told you that Captain Hazelwood denied that he was drinking. What was your reaction to what Mr. Leyendecker told you about that denial?

A I remember telling Herb that I'm -- that I wasn't sure that that was true.

Q And why were you not sure that that was true?

A I had -- I had been to lunch with a group from the vessel, I think, a week prior, early May, the 5th maybe, and -- at a local restaurant where I was -- I didn't really take notice specifically of what -- I wasn't keeping an eye on Captain Hazelwood, by any means, but I'm pretty sure that he had a beer with lunch, as most of the group did. So I passed that on to Herb at that time.

Q Was that the lunch that occurred at the Pal Shanty Restaurant?

A Yes.

Q Mr. Day, on May 19, 1988, five days after the Henry's incident, was there another occasion when you saw Captain Hazelwood and you believed him to be intoxicated?

A Yes.

Q On that occasion were you accompanied by Coast Guard Officer Greg Krivdo?

A Yes.

Q Tell us what happened on that occasion.

A The ship was preparing to sail on Friday. I believe it was the 20th. At the completion of the Coast Guard's inspection of the vessel, which occurred during that repair period, there was one outstanding requirement that the Coast Guard was issuing us. It's called a CG Form 835 is the -- is the term. And the ship was being required to reverify the maneuvering data, which is essentially the turning circles, how -- how much distance it takes to make a full circle at full rudder, part rudder. It's a requirement to have that information on board. So Chief Warrant Officer Krivdo and myself were -- arranged to meet on -- on board the vessel and present this requirement to Captain Hazelwood. The master is required to sign the CG 835 form acknowledging it, accepting it. So that was what we went on board to do.

Q What time of day did you go on board?

A It was approximately 2:00 in the afternoon.

Q And did you -- did you go to Captain Hazelwood's cabin?

A Yes.

Q Tell us what happened then.

A My recollection is we came -- we came across Captain Hazelwood in the doorway of -- I believe the official name of the room is the file room that's adjacent to the master's quarters, and Chief Warrant Officer Krido, you know, presented Captain Hazelwood with the 835 form --, and it's a small maybe 5-by-8 size form -- for him to read and sign.

Q What condition did Mr. -- Captain Hazelwood appear to be in when he met you there?

A He appeared to me to be intoxicated.

Q What made you think he was intoxicated?

A His eyes were very bloodshot. His speech was quite slurred. His stance was a bit unsteady as he was standing there trying to -- trying to read the 835.

Q Could you smell alcohol?

A I don't recall smelling alcohol, no.

Q Was Captain Hazelwood able to discuss the information needed for the Form 835?

A Not very well. My recollection is he made a few statements like -- such as, "What's" -- "What's this about." And didn't -- didn't seem to me that he really understood or was able to comprehend what was on the paper.

Q What was your reaction to Captain Hazelwood's condition?

A I was quite embarrassed, you know, for the company in my position as a representative of the company.

Q What did you do?

A Well, I kind of stepped aside from the doorway, because it was primarily Mr. Krivdo who was trying to explain the requirement to Captain Hazelwood. So I stepped off to the side a bit as he tried to explain it for a couple of minutes.

Q Was Mr. Krivdo able to explain the form so that Captain Hazelwood ultimately understood it and signed it?

A I can't recall specifically if he signed it that day or not. I believe that Mr. Krivdo's parting, you know, statement was something to the effect, "Well, Captain, if you" -- you know, "If you have any more questions tomorrow, we can go over it then. I'll be on board." But I can't remember specifically if he signed it that day or the following day.

Q I believe you testified earlier that you were embarrassed as a representative of the company. Did you have any other concerns?

A I was concerned that he might not be capable of piloting the ship down the river the following morning if his condition didn't improve from what I saw him that afternoon.

Q Was the VALDEZ due to depart soon after this incident?

A Approx -- at 7:00 a.m. on the 20th.

Q Were you concerned that you might have to take some kind of action with respect to Captain Hazelwood?

A Yes.

Q What did you think you might be required to do?

A I was concerned that I might have to stop the ship from sailing if he wasn't in a condition to -- to go down the river.

Q Did you have to take this action?

A No, I did not.

Q Why not?

A When I arrived on board the following morning at approximately 6:00 a.m., from my best recollection, I immediately, you know, sought out Captain Hazelwood to determine his condition; and he seemed to be fine. He -- so I didn't have to intervene, and the trip down the river went -- went fine. No problems. He performed his job just as I would expect him to.

Q You sailed with the ship down the river?

A Yes, I did.

Q How long were you gone?

A Oh, it was about a -- it's about a 12-hour trip.

Q Did you report this May 19, 1988 incident in which Captain Hazelwood appeared to be intoxicated to anyone?

A Yes, I did.

Q To whom did you report it?

A To Paul Myers.

Q Anyone else?

A No, not at that time.

Q When did you report the May 19, 1988 incident to Paul Myers?

A My best recollection is that I talked to him on the 19th by -- over the telephone.

Q Where was Mr. Myers at that time?

A My recollection is he was in the Benicia office, west coast fleet office.

Q What did you tell him when you talked to him on the phone that day?

A I informed him about the status of the repair, for one, you know, that the ship repairs were essentially complete and we were ready to sail the following morning. My recollection is that I also informed him of the incident with the 835 and Chief Warrant Officer Krivdo and of my concern that Captain Hazelwood may not be capable of performing his duties the following day.

Q And what did Mr. Myers say?

A My recollection is that he asked me to essentially monitor the situation and if there was something in the morning that -- if there was a problem in the morning with Captain Hazelwood's condition, that I -- you know, he had -- I had his support in stopping the operation and calling him or whatever I needed to could. That's my recollection.

Q Did Mr. Myers indicate at that time that he would make any attempt to talk to Captain Hazelwood before the ship set sail?

A No, he did not.

Q Do you recall if he ever indicated in that conversation that he would come up to the shipyard and talk to Captain Hazelwood personally?

A I remember -- my recollection is that we discussed that, that it was my preference that he do that. And I recall -- my recollection is that the timing was such that there were no flights available or he didn't feel he could get there in sufficient time to do that.

Q Why was it your preference that he come to talk to Captain Hazelwood?

A He was Captain Hazelwood's direct operational supervisor. Also, as I said before, me being a fleet officer on a temporary shore assignment, when I returned to the fleet Captain Hazelwood could have potentially been my -- you know, my supervisor and responsible for evaluating my performance, and I felt it might have some very adverse career implications for me to be involved in intervening in this case.

Q Did you talk to Paul Myers on another occasion about this Form 835 incident?

A Yes, I did.

Q Did you talk to him in person?

A Yes.

Q Do you recall when that was?

A It was when I returned to the Benicia office after the VALDEZ had sailed from Portland. Approximately -- probably would have been Monday. The ship sailed on a Friday. I left Portland on Saturday and went into the office the first time on Monday, I think it would have been the 25th. No. 23rd. 23rd. Well, the first day in the office after the vessel sailed.

Q And what did you do?

A I gave him a -- kind of a synopsis of the repair, you know, how the repairs went. And I also recall discussing these two incidents with Captain Hazelwood.

Q By "these two incidents," what do you mean?

A The Henry Weinhardts incident as well as the 835 incident.

Q Did you tell him about the lunch you had at Pal Shanty with Captain Hazelwood?

A I can't specifically recall that, no, at this point. I'm not sure.

Q What was Mr. Meyer's response to the information you gave him?

A I don't recall much of a response from Mr. Myers.

Q Not at all?

A No. He -- he has a very flat, you know, affect. He just kind of listened; and I don't really recall much of a response, physical or verbal, you know, just listened.

Q Did you ever hear that Mr. Myers took any further action with respect to those incidents?

A No, I did not.

Q Mr. Day, I'd like to show you what's been marked as Exhibit 1 to your deposition. This is a document entitled interview with Steven M. Day that purports to be a taped interview of you by Bud Barnum on April 4, 1989. Do you remember being interviewed by Bud Barnum?

A Yes.

Q Did you understand who Mr. Barnum was?

A Yes.

Q Who did you understand him to be?

A An -- an investigator for an outside law firm retained by Exxon Shipping.

Q And for what purpose did you understand he was retained?

A To investigate any, I'd say, background information regarding the VALDEZ and Captain Hazelwood.

Q Have you ever seen a copy of this transcribed interview before?

A Yes.

Q Would you look at that Exhibit 1 and tell me if it place in '88 on the VALDEZ with Hazelwood there -- I had the occasion to witness an incident in the doorway of the master's cabin between Paul Myers and Joseph Hazelwood where the -- Joe was acting, I thought, in somewhat a -- an erratic manner. He was gesturing and being loud and abusive towards Paul Myers. I had come upon the situation, thought it wasn't my place to hang around and overhear the situation, so I exited the area and they concluded their discussion.

Shortly thereafter I saw Paul Myers walking around in the superstructure of the VALDEZ and asked him, of course, "What was that all about," which was this behavior that I witnessed of Hazelwood's was, from my knowledge of Joe Hazelwood, uncharacteristic. And I thought it must be something very serious, and I was just curious as to what had brought this to pass.

During the conversation Paul Myers conveyed to me that it was some sort of a personnel-related matter that -- that Hazelwood didn't -- didn't agree with the way it had been handled, I suppose, by someone other than himself, perhaps shoreside staff. Joe also -- excuse me. Paul also mentioned to me that he thought that Joe had perhaps gone back to drinking because of his behavior. And during that conversation he also mentioned to me that -- perhaps he had mentioned to me that Joe had been in some kind of a program to correct that situation.

Q With regard to your duties that day, did you have any other duties or responsibilities other than to participate in the stewardship review?

A None formally assigned before I got there, that's correct.

Q And sir, were any duties subsequently assigned to you once you boarded the EXXON VALDEZ?

A Yes, they were.

Q And what were those?

A It was a -- as I recall, a singular request from Paul Myers that after -- I came across him after the -- excuse me, after the incident between Myers and Hazelwood. Myers had asked me to try to find out if Hazelwood had been ashore prior to our being -- "our" being Harvey, Myers and myself -- coming on board that morning.

Q And did you do that, sir?

A I attempted to do that, correct.

Q What did you find out as a result of your investigation?

A It was totally inconclusive. I made an attempt to interview -- I interviewed the unlicensed person who was watching the gangway, the place that people come on board the ship from the launch, to see if he had any recollection of whether or not Hazelwood had been ashore and gotten back on board sometime before we came on board. The results of the interview were inconclusive. The person either did not know or wasn't willing to share with me any knowledge he had of Hazelwood's comings and goings.

Q What did you tell Mr. Myers at this subsequent meeting when you --

A I came back.

Q -- shared the results of your investigation when you came back?

A That it was inconclusive, that I didn't learn anything.

Q And what did -- how did he respond to that?

A "Okay. You did the best you could."

Q Did he request that you do anything else to follow up?

A No, he did not.

Q Did you have any other discussions with Mr. Myers other than the ones you have mentioned prior to the stewardship review?

A Yes.

Q And when did that conversation occur?

A That conversation occurred when I initially came on board the VALDEZ.

Q And what was said during that conversation?

A Oh, I sought Mr. Myers out after I got on board the VALDEZ and asked him why they had -- that he and Harvey had instructed the people who ran the launch service not to tell me that they weren't currently running launch service and left me sort of like, if you will, figuratively speaking, sitting on the dock, waiting for the launch to go out on the VALDEZ. During the conversation Paul apologized for having done that and explained that it was Harvey's idea. And that by way of explanation as to why Harvey did that, Paul said Harvey wanted to get on board first and be sure everything was okay before I came on board.

Q And did Mr. Myers explain as to what Mr. Borgen meant by "everything being okay"?

A He did not.

Q And, Mr. Pitman, what do you mean by "in good shape," the term "good shape"?

A I'm sorry, I can't remember what context I might have used that in.

Q You just used it in the immediate -- immediately prior to this --

A Oh, that "Joe was in good shape"?

Q Yeah. "That Joe was in good shape."

A I'm presuming here that not intoxicated, that he was on board available for -- being there for the meeting.

Q Had you ever heard of an incident before where the ship coordinator or supervisor wanted to go out to the ship prior to any other individuals coming out for the stewardship review?

A No, I have no knowledge of any other instance similar to this.

Q From the time you first saw Captain Hazelwood that day, and that was when he was talking to Mr. Myers, how did Joe Hazelwood appear in his address and appearance?

A He was ill-kempt, hair uncombed. The most distinct impression I got from seeing Joe at that first meeting was his behavior more than his appearance. He seemed agitated, loud, aggressive, uncharacteristic of the Joe Hazelwood that I knew from my brief sailing with him years before.

Q Do you recall what you observed concerning Joe Hazelwood's appearance --

A Yes, I do.

Q -- and dress when you first entered the cabin?

A Yes, I do.

Q And what was that?

A Joe entered the room from the master's bedroom on the starboard side of the vessel. He came in dressed in a shirt, blue jeans, no socks, no shoes, and as I mentioned previously, his hair was uncombed, what there was of it. He -- his beard wasn't trimmed. His physical appearance was very bad. The man appeared to be in extremely poor health. He was pale, haggard, his eyes were bloodshot. He looked listless, just devoid of any life energy at all.

Q How about when you previously met Joe Hazelwood back in the 1970's?

A When he was a chief mate on the PHILADELPHIA, the difference was dramatic. It was night and day. Joe was a picture of health and well-being when I sailed with him, so that also is why some of these memories stuck so much in my mind, is that the tremendous contrast between the Joe I remembered and the Joe that I saw on the VALDEZ stewardship review meeting.

Q How long did this meeting last?

A Approximately an hour. One hour.

Q Do you recall on a general basis what was discussed during this review?

A My best recollection is that I led off the discussion and went through my package of stewardship factors, I was responsible for tracking, assembling and presenting at the meeting. They were politely and quietly received. During my presentation Joe fell asleep in his chair, and I wasn't quite sure what to do at that stage, so I looked over to the area of Paul Myers and Harvey Borgen where they were sitting to seek some guidance. They made a gesture to me -- one or both of the other -- "Just keep rolling, go on with your presentation," as if nothing happened, and I did. My presentation would have taken about 15 to 20 minutes, and I believe that's how long it took. After I was done, the rest of the meeting, while Joe slept, involved the primary discussion between Paul Myers and the chief engineer regarding shipboard mechanical repair expense-type items.

Q How did Joseph Hazelwood appear to you once he fell asleep? What was his appearance and demeanor?

A Well, he was very relaxed, of course, being asleep. He was kind of slouched down in a vertical fashion in the straight chair he was sitting in. He had a bottle of artificial beer in his hand that, after he fell asleep, the chief engineer got up, took it out of his hand and set it up on the table nearby so actually it wasn't fall and spill later on while he was sleeping.

Q When the chief engineer got up to take the artificial beer out of his hand, did Joseph Hazelwood wake up?

A He did not.

Q Did he appear to be in a deep sleep or a light sleep?

A He did not awake or arouse at having the bottle removed from his hand nor did he appear to be conscious or awake during any of the rest of the meeting.

Q And sir, when you use the term "artificial beer," what are you referring to? Is that a nonalcoholic beer?

A Yes. It's my best recollection is a small, squatty-looking, clear glass bottle that said "Moose" or "Moosy" or something like that on the side. The reason that sticks in my mind is that it seemed like a bit much for him to be drinking beer during this meeting. The front of it said beer on it and thought, "it couldn't be." And then I read the fine print on the bottle that said something like, you know, .00 percent of alcohol. And so it appeared to be some sort of artificial beer product.

Q Did anyone at any point in time attempt to arouse Joseph Hazelwood during the meeting?

A They did not.

Q Did you make any attempt to arouse Joseph Hazelwood?

A I did not.

Q And why was that, sir?

A The fleet manager and the fleet superintendent saw fit to let him sleep and I felt like that was the decision that implicitly been made, so I went along with it.

Q Sir, in any of your previous experiences or subsequent experiences in this position, did a master ever fall asleep during a stewardship review?

A Not in my presence, no.

Q Did you recall this or did you view this as being, for example, an unusual incident?

A Yes, I did.

Q And did you believe at this point in the meeting that Joseph Hazelwood might have been intoxicated or drunk?

A I had my suspicions that might be the cause of his behavior.

(End of video deposition excerpts.)

MR. GREEN: Your Honor, that concludes our offer for Mark Pitman.

THE COURT: Is there an additional offer from this deposition?

MR. LEVY: Yes, there is, your Honor.

THE COURT: Proceed, sir.

CROSS-EXAMINATION

(Video deposition excerpts.)

Q At any point other than the incident between Joseph Hazelwood and Paul Myers in the doorway of Joe Hazelwood's cabin, did you ever see Joe Hazelwood angry or upset during the rest of that day?

A No.

Q Now, sir, after the meeting concluded, what occurred next after that meeting and where was lunch?

A Lunch for me was in the officers' mess on board the EXXON VALDEZ.

Q And, sir, at some point you previously testified Joseph Hazelwood entered the lunchroom?

CAUSE NO. 93-40252

EXXON CORPORATION : IN THE DISTRICT COURT OF
v. : HARRIS COUNTY, TEXAS
CERTAIN UNDERWRITERS AT :
LLOYDS OF LONDON : 189TH JUDICIAL DISTRICT

STATE OF TEXAS

COUNTY OF HARRIS

I, Martha C. Baldwin, Official Court Reporter in and for the 189th District Court of Harris, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

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SER 1346

Community Recovery From the *Exxon Valdez* Oil Spill: Mitigating Chronic Social Impacts*

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EXHIBIT 4

Community Recovery From the *Exxon Valdez* Oil Spill: Mitigating Chronic Social Impacts*

Over the last 50 years, the human consequences of technological failure and environmental contamination have been documented in a variety of studies (Adler 1943; Erikson 1976, 1994; Couch and Kroll-Smith 1985; Baum, 1987; Kroll-Smith and Couch 1993A; 1993B; Freudenburg and Jones 1991; Brown and Mikkelsen 1988; Edelstein 1988; Baum and Fleming 1993; Green 1996). The preponderance of this research reveals that technological disasters impact communities in "new and strange ways," producing a unique pattern of social damages (Erikson 1994). The nature of this social damage is long-term, i.e. lasting for decades, and cumulatively degenerative, i.e., permeating both the collective social fabric and individual psyche (Erikson 1976; Baum 1987; Freudenburg and Jones 1991; Kroll-Smith and Couch 1993A; Green 1996). The concept of "corrosive community" frames these chronic negative outcomes in terms of increased social isolation, interpersonal antagonisms and distrust of groups and institutions (Freudenburg and Jones 1993; Horlick-Jones 1995; Freudenburg 1997; Picou and Gill 1999).

In terms of global environmental degradation, disasters of technology are viewed by European social theorists as one characteristic of "late modernity" or "risk society" (Giddens 1991; Beck 1992). According to Beck (1992), technological disasters pose transglobal threats to physical and social health, result in increased consciousness of environmental risks and emerge as one defining characteristic of social change in late modernity. Interestingly, Beck's macro theoretical system is illustrated by examples of localized technological disasters, such as Villa Parasi (Brazil), Bhopal (India) and Chernobyl (Ukraine) (Beck 1992). Technological failure and toxic contamination produce social risks which are embedded in the institutions of modernity and whose consequences portend serious social problems for the future (Beck 1992; Erikson 1994).

However, this emerging research consensus in both the United States and Europe is not without its critics. For example, Drabek (1996) has noted that the field research on community impacts of technological disasters, most notably represented by Erikson's research, is characterized by a lack of systematic survey data and based primarily on a qualitative interpretive methodology. Along other lines, Quarantelli (1998) and others have suggested that the classification of disasters by "natural" and "technological" origins makes no contribution to theoretical and paradigmatic development, rather reflecting "old wine in new bottles." Indeed, recent evidence on the long-term impacts of natural disasters suggest that earthquake victims commit suicides at significantly higher rates, implying that chronic consequences of all disaster events, such as earthquakes, hurricanes, tornadoes and floods may simply reflect a lack of longitudinal research in disaster studies (Frederick 1980; Solomon 1989).

Despite this controversy, it is obvious that any social event that takes on "extraordinary" or "extreme" characteristics is a potential stressor to communities and their residents. All disasters seriously disrupt the sociocultural and economic structure of communities. Community recovery from natural disasters has evolved to the systematic rebuilding of physical structures, medical service delivery and attending to acute trauma rehabilitation for victims (Tierney and Baisden 1979). The fact that there is a identifiable threat, which impacts the community and eventually culminated, structures the emergency response paradigm for natural disasters. Social support systems emerge with the rescue of victims and continues through the action of a host of informal groups, as well as formal organizations and institutions. In short, "therapeutic communities" emerge within social collectives impacted by natural disasters, oftentimes resulting in an "amplified rebound" of material and human resources for affected populations. Programmatic delivery of psychosocial therapy to victims contributes significantly to social recovery.

One of the most consistently identified consequences of technological disasters is the failure of a "therapeutic community" to emerge because of chronic social impacts. Although some immediate emergency response does occur, programmatic intervention is absent over the long-term (Baum and Fleming 1993; Kroll-Smith and Couch 1993A; 1993B). Yet, environmental contamination can last for decades, if not centuries. This fact places individuals and communities under continuing distress for extended periods of time. Instead of progressing through a typical natural disaster stage model, from "warning", to "threat," to "impact," and subsequently to "recovery" and "rehabilitation", technological disasters become locked in the early stages. Over time, "warning," "threat" and "impact" are reported in a continuing sequence (Couch 1996). Furthermore, given that ambiguous and contradictory scientific evidence regarding contamination and its economic, social and health consequences characterize technological disasters, different segments of a community come to see the problem as being in a different stage, providing another source of internal community conflict (Couch 1996). Many members of the victimized community see the problem as "overblown" by their neighbors, while others believe that threats are not taken seriously enough (Kroll-Smith and Couch 1993A; 1993B; Couch 1996). Additional community strain is caused by the fact that, since the disaster agent is extended through time, individual and social recovery must be attempted while social and psychological impacts simultaneously persist.

This point can be illustrated by looking at the ultimate outcomes of environmental contamination situations (Couch 1996; Couch and Kroll-Smith 1985). Generally, we find that cases fall along a continuum between two situations. The first is relocation--impacted people are moved away from the problem. Personal safety is restored, but at the loss of a certain geographic area, environmental resources and social community. The second situation has been identified as a "techfix," that is, technological solutions render the community safe again and allow community recovery to proceed. However, effective technological solutions and scientific understanding of contamination and contamination-related problems (such as destruction of a natural resource) usually do not exist (Couch 1996). Therefore, both experts and victims disagree over whether technological solutions are adequate, or even possible. This results in further controversy and conflict over the definition of the problem and what to do about it. In other words, in the "corrosive community," a pattern of chronic social distress emerges and is constantly reinforced by an ongoing adversarial discourse over threats, risks and consequences for victims (Freudenburg 1997).

Technological disasters have a human cause or a "principle responsible party" and often involve some form of irresponsible contamination of the environment, home, workplace and/or person (Picou and Rosebrook 1993; Erikson 1994). The response of the community and victims often requires litigation which fosters continued conflict, mistrust, social deterioration and psychological stress (Gill and Picou 199; Picou and Rosebrook 1993; Picou et al 1998). Principle responsible parties exercise their legal rights of discovery and appeal, which takes decades to complete. As a consequence, social and psychological recovery from such disasters is further disabled by the uncertainty of protracted litigation.

The *Exxon Valdez* Disaster: Chronic Community Impacts

Ten years ago the largest and most ecologically-damaging oil spill in North American history occurred in Prince William Sound, Alaska (Spies et al 1996). It could be argued that this was the worst technological disaster in twentieth-century America. Since 1989, hundreds of millions of dollars have been spent by both the federal government and Exxon documenting the nature and extent of the ecological damages.

In contrast, our best estimate is that not much more than one and one-half million dollars has been spent studying the community impacts of the *Exxon Valdez* disaster. This fact becomes relevant for understanding the long-term adversarial pattern of conflict that is launched by low probability, high consequence technological catastrophes. Victims are required to "prove" in a court of law that someone, or some entity, was liable, that damages were real and that some payment or retribution is required by the responsible party. Social support structures fail to emerge for communities impacted by technological disasters.

Although research on the social and psychological impacts of the *EVOS* has been limited, the results from those studies that have been conducted are remarkably consistent. Furthermore, the results of these studies also provide convergent evidence regarding the social impacts of other technological disasters, particularly for Three-Mile Island and a number of localized toxic contamination sites (Edelstein 1988; Brown and Mikklesen 1989; Kroll-Smith and Couch 1990; Gill and Picou 1991; Baum and Fleming 1993). In summary, *EVOS* studies reveal the following:

1) Immediate social impacts included the influx of large numbers of people into local non-native communities, increases in police responses, requests for mental health services and severe strain on local community resources (Rodin et al 1992).

2) High levels of psychological stress initially characterized residents of local communities (Donald et al 1990; Palinkas et al 1992; Palinkas et al 1993; Picou et al 1992).

3) Significant declines in subsistence harvests of Alaska Natives through 1991 (Dyer et al 1992; Fall and Field 1996).

4) Elevated levels of depression and psychological stress for Alaska Natives (Palinkas et al 1992; Picou and Gill 1999).

5) Severe disruption of social and cultural activities of Alaska Natives (Gill and Picou 1997).

6) Economic losses for commercial fishermen for 1989 and 1990 which totaled over 154 million dollars (Cohen 1995; 1997).

7) Estimates of an average economic loss for Cordova commercial fishermen from 1990-95 totaling nearly $200,000 per fishermen (Picou and Arata 1997).

8) The persistence of high levels of organizational distrust, litigation-related stress and perceptions of increased risks for future spills for Cordova residents through 1992 (Picou 1996; Picou et al 1998; Picou and Gill 1999).

9) High levels of social disruption and psychological stress for residents of Cordova and commercial fishers in Cordova from 1989-1997 (Picou et al 1992; Picou and Gill 1996; Gill and Picou 1998).

10) Symptoms of severe depression (40%), anxiety (20%), and post-traumatic stress disorder (34%) for male commercial fishers six years following the spill. Approximately one out of two commercial fishermen had symptoms of depression or PTSD or a combination of both (Picou and Arata 1997).

11) Deterioration of community social relationships, family relationships and the local community mental health service infrastructure in Cordova community through 1997 (Picou and Arata 1997; Picou and Gill 1999).

12) Significantly higher rates of alcohol admissions for mental health centers in Valdez and Cordova five years following the spill, when contrasted to admission rates five years before the spill (Picou and Arata 1997).

In summary, research on the community impacts of the *Exxon Valdez* Oil Spill clearly delineate a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress. These research findings provided the focus and rationale for developing a community intervention strategy designed to mitigate this long-term pattern of community disruption.

A Community Participation Intervention Model

It is the chronic nature of social deterioration and psychological stress that makes the mitigation of technological disasters a unique challenge for social intervention. Long-term recovery from technological disasters is a topic that has generally been overlooked by both disaster researchers and emergency management practitioners (Mitchell 1996). Bolin (1982) has suggested that recovery is multidimensional and includes economic, emotional, and quality of life dimensions. Technological disasters produce fundamental changes in culture and social structure which are based on social conflict over alternative social constructions of damage, liability and victimization (Couch 1996). As Edelstein (1988:9) has observed for technological disasters that result in the toxic contamination of the biophysical environment, "... recovery to a 'post-disaster equilibrium' is difficult if not impossible".

Indeed, most of what is known about community recovery from catastrophic events comes from the natural disaster literature (Mitchell 1996). Nonetheless, community recovery from any disaster must include the availability of knowledge, leadership and expert action (Rubin et al 1985). The development of our community education mitigation program utilized these components in a participatory program development model. Once all program components were finalized and reviewed by community residents, the "Growing Together" community education program was implemented in Cordova from January 1996 through February 1997.

Given that intervention program for reducing the chronic community impacts of technological disasters are virtually non-existent, a data-based model for program design was

REFERENCES

Adler, A. 1943. "Neuropsychiatric Complications in Victims of Boston's Coconut Grove Disaster". Journal of the American medical Association 12:109-1101.

Anonymous. 1993. Post Spill Key Informant Studies, Schedule C Communities. U. S. Department of the Interior. Anchorage, Alaska.

Baum, A. 1987. "Toxins, Technology and Natural Disasters". Pp. 5-54 in G. Van de Bos (ed.) Cataclysms, Crises, and Catastrophes. Washington, DC: American Psychological Association.

Baum, A . and I. Fleming. 1993. "Implications of Psychological Research on Stress and Technological Accidents". American Psychologist 48(6):665-672.

Beck, U. 1992. Risk Society: Toward a New Modernity. London: Sage.

Cecil, H. F. 1998. "Stress: Country Style--Illinois Response to Farm Stress." Journal of Rural Community Psychology 9(2): 51-60.

Cohen, M. J. 1994. "Technological Disaster and Natural Resource Damage Assessment: An Evaluation of the *Exxon Valdez* Oil Spill." Land Economics 7(1): 65-82.

Cohen, M. J. 1997. "Economic Impacts of the *Exxon Valdez* Oil Spill." Pp. 134-164 in J. Steven Picou, Duane A. Gill and Maurie J. Cohen (eds.) The *Exxon Valdez* Disaster: Readings on a Modern Social Problem. Kendall-Hunt Publishing Company.

Couch, S. R. and J. S. Kroll-Smith. 1985. "The Chronic Technical Disaster: Toward a Social Scientific Perspective." Social Science Quarterly 66:564-575.

Couch, Stephen R. 1996. "Environmental Contamination, Community Transformation and the Centralia Mine Fire: Toward a Stage Model for Industrial Contamination." In Community Response to Industrial Disasters, edited by James K. Mitchell. New York: United Nations University Press.

Donald, R., R. Cook, R. F. Bixby, R. Benda, and A. Wolf. 1990. The Stress Related Impact of the *Valdez* Oil Spill on the Residents of Cordova and Valdez, Alaska: A Comparative Study Conducted by the Valdez Counseling Center, Valdez Counseling Center, Valdez, Alaska.

Drabek, T. E. 1986. Human System Responses to Disaster: An Inventory of Sociological Findings. Springer-Verlag, New York.

Dyer, C. L., D. A. Gill, and J. S. Picou. 1992. "Social Disruption and the *Valdez* Oil Spill: Alaskan Natives in a Natural Resource Community". Sociological Spectrum 12(2): 105-126.

Edelstein, M.R. 1988. Contaminated Communities: The Social and Psychological Impacts of Residential Toxic Exposure. Boulder: Westview Press.

Erikson, K. 1976. "Loss of Communality at Buffalo Creek". American Journal of Psychiatry 133(3): 302-305.

Erikson, K. 1994. A New Species of Trouble: Explorations in Disasters, Trauma, and Community. New York: Norton.

Fall, J.A. and L.J. Field. 1996. "Subsistence Uses of Fish and Wildlife Before and After the *Exxon Valdez* Oil Spill." Pp. 819-836 in S.D. Rice, R.B. Spies, D. A. Wolfe and B. A. Wright (eds.) Proceedings of the *Exxon Valdez* Oil Spill Symposium American Fisheries Society Symposium 18.

Fetsch, R. J. and D. Gebeke. 1994: "A Family Life Program Accountability Tool." Journal of Extension 32(1): Feature 6.

Fetsch R.J. and D. Gebeke. 1995. "Strengthening Marriage and Family Programs." Journal of Extension 33(1): Feature Article.

Frederick, Calvin J. 1980. "Effects of Natural vs Human-Induced Violence Upon Victims". Evaluation and Change 71-75.

Freudenburg, W. R. and T. R. Jones. 1991. "Attitudes and Stress in the Presence of Technological Risk: A Test of the Supreme Court Hypothesis." Social Forces 69:(4):.1143-1168.

Freudenburg, W. R. 1997. "Contamination, Corrosion and the Social Order: An Overview". Current Sociology 45(3): 19-40.

Fried, N. 1994. "A Trends Profile – the City of Cordova". Alaska Economic Trends (March): 1-4.

Fritz, C. E. 1961. "Disasters." In R. K. Merton and R.A. Nisbet (eds.) Contemporary Social Problems. New York: Harcourt. 651-694.

Giddens, A. 1991. Modernity and Self-Identity. Cambridge: Polity Press.

Gill, D. A. and J. S. Picou. 1991. "The Social Psychological Impacts of a Technological Accident: Collective Stress and Perceived Health Risks". Journal of Hazardous Materials 27(1): 77-89.

Gill, D. A. 1994. "Environmental Disaster and Fishery Co-Management in a Natural Resource Community: Impacts of the *Exxon Valdez* Oil Spill. Pp. 207-235 in C. L. Dyer and J. R. McGoodwin (eds.). Folk Management in the World Fisheries: Implications for Fishery Managers. University of Colorado Press, Boulder.

Gill, D. A. and J. S. Picou. 1997. "The Day the Water Died: Cultural Impacts of the *Exxon Valdez* Oil Spill." Pp. 167-192 in J. Steven Picou, Duane A. Gill and Maurie J. Cohen (eds.) The *Exxon Valdez* Disaster: Readings on a Modern Social Problem. Dubuque, IA: Kendall-Hunt Publishing Company.

Gill, D. A. and J. S. Picou. 1998. "Technological Disaster and Chronic Community Stress". Society and Natural Resources 11: 795-815.

Green, B. L. 1996. "Traumatic Stress and Disaster: Mental Health Effects and Factors Influencing Adaption". Pp. 177-210 in F. L. Mak and C. C. Nadelson (eds.). International Review of Psychiatry, Vol. II. Washington, DC:" American Psychiatric Press, Inc.

Hirsh, W. B. 1997: "Justice Delayed: Seven Years and No End in Sight". Pp. 271-307 in J. S. Picou, D. A. Gill, and M. J. Cohen (eds.). The *Exxon Valdez* Disaster: Readings on a Modern Social Problem. Dubuque, IA: Kendall-Hunt Publishing Company.

Horlick-Jones, T. 1995. "Modern Disasters as Outrage and Betrayal". International Journal of Mass Emergencies and Disasters 13:305-316.

Horowitz, M. J., N. Milner and W. Alverez. 1979. "Impact of Event Scale: A Measure of Subjective Stress." Psychosomatic Medicine 41(3): 209-218.

Janson, L. E. 1975. The Copper Spike. Alaska Northwest, Anchorage.

Jurich, Anthony P. and Candyce S. Russell. 1987. "Family Interventions: Family Therapy with Rural Families in a Time of Crisis." Family Relations 36:364-367.

Kroll-Smith, J.S. and S.R. Couch. 1993A "Technological Hazards: Social Responses as Traumatic Stressors." Pp. 79-91 in International Handbook of Traumatic Stress Syndromes edited by J. P. Wilson and B. Raphael. New York: Plenum.

Mitchell, J. K. (ed.). 1996. The Long Road to Recovery: Community Response to Industrial Disaster. Tokyo: United National University Press.

Kroll-Smith, S. and S. R. Couch. 1993B "Symbols, Ecology, and Contamination: Case Studies in the Ecological-Symbolic Approach to Disaster." Research in Social Problems and Public Policy, Vol 5. 47-73.

Palinkas, L. A., J. Russell, Michael A. Downs, John S. Petterson. 1992. "Ethnic Differences in Stress, Coping and Depressive Symptoms after *EVOS*." The Journal of Nervous and Mental Disease 180(5): 287-295.

Palinkas, L. A., J. S. Patterson, J. Russell and M. A. Downs. 1993. "Community Patterns of Psychiatric Disorders After the *Exxon Valdez* Oil Spill." American Journal of Psychiatry. 150(10):1517-1523.

Picou, J. S., D. A. Gill, C. L. Dyer, and E. W. Curry. 1992. "Stress and Disruption in an Alaskan Fishing Community: Initial and Continuing Impacts of the *Exxon Valdez* Oil Spill". Industrial Crisis Quarterly 6: 235-257.

Picou, J. S., and D. R. Rosebrook. 1993. "Technological Accident, Community Class-Action Litigation, and Scientific Damage Assessment: A Case Study of Court–Ordered Research". Sociological Spectrum 13(1): 117-138.

Picou. J. S. 1996. "Compelled Disclosures of Scholarly Research: Some Comments on 'High Stakes' Litigation". Law and Contemporary Problems 59(3): 149-158.

Picou, J. Steven and Catalina M. Arata. 1997. Chronic Psychological Impacts of the *Exxon Valdez* Oil Spill: Resource Loss and Commercial Fishers. Draft Report to Regional Citizens' Advisory Council.

Picou, J. Steven, Duane A. Gill and Maurie J. Cohen (eds.). 1997. The *Exxon Valdez* Disaster: Readings on a Modern Social Problem. Duboque, IA: Kendall-Hunt Publishing Company.

Picou, J. S. and D. A. Gill. 1999. "The *Exxon Valdez* Disaster as Localized Environmental Catastrophe: Dissimilarities to Risk Society Theory". In M. J. Cohen (ed.) Risk in the Modern World. London: MacMillan.

Quarantelli, E. L. (ed.). 1998a. What is a Disaster? London: Routledge.

Smythe, C. W. 1988. Harvest and Use of Fish and Wildlife Resources by Residents of Petersburg, Alaska. Alaska Department of Fish and Game, Division of Subsistence, Technical Paper 164, Anchorage.

Solomon, S. 1989. "Research Issues in Assessing Disaster's Effects". In R. Gist and B. Lubin (eds.). Psychosocial Aspects of Disasters. New York: John Wiley and Sons.

Spies, R. B., S. D. Rice, D. A. Wolfe and B. A. Wright. 1996. "The Effects of the *Exxon Valdez* Oil Spill on the Alaskan Coastal Environment". American Fisheries Society Symposium 18: 1-16.

Stratton, L. 1989. Resource Use in Cordova: A Coastal Community of Southcentral Alaska. Alaska Department of Fish and Game, Department of Subsistence Technical Paper No. 153, December, Anchorage.

Tierney, K. J., and B. Baisden. 1979. Crisis Intervention Program for Disaster Victims. U. S. Department of Health, Education and Welfare, Washington, DC.

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Lessons for Modern Fisheries Management

Christopher L. Dyer *and* James R. McGoodwin,
Editors

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Toloa, F., R. Gillett, and M. Pelasio
1991 Traditional Marine Conservation in Tokelau. Paper presented to the South Pacific Commission, Twenty-Third Regional Technical Meeting on Fisheries, Noumea, New Caledonia, August 5–9, 1991.

Townsend, R., and J. A. Wilson
1987 An Economic View of the Tragedy of the Commons. In: B. J. McCay and J. M. Acheson (eds.), *The Question of the Commons: The Culture and Ecology of Communal Resources.* Tuscon: University of Arizona Press. Pp. 327–343.

Warren, C.A.B.
1988 *Gender Issues in Field Research.* Newbury Park, Calif.: Sage Publications.

Warren, D. M.
1989 The Impact of Nineteenth Century Social Science in Establishing Negative Values and Attitudes Towards Indigenous Knowledge Systems. In: D. M. Warren, L. J. Slikkerveen, and S. O. Titilola (eds.), *Indigenous Knowledge Systems: Implications for Agriculture and International Development.* Studies in Technology and Social Change No. 11. Ames: Technology and Social Change Program, Iowa State University. Pp. 171–183.
1991 *Using Indigenous Knowledge in Agricultural Development.* World Bank Discussion Papers 127. Washington, D.C.: The World Bank.

Yamelu, T.
1984 Traditional Fishing Technology of Bwaiyowa, Fergusson Island, Milne Bay Province. In: N. J. Quinn, B. Kojis, and P. R. Warphela (eds.), *Subsistence Fishing Practises of Papua New Guinea.* Lae, Papua New Guinea: Appropriate Technology Development Institute. Pp. 52–63.

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Environmental Disaster and Fishery Co-Management in a Natural Resource Community: Impacts of the *Exxon Valdez* Oil Spill

Duane A. Gill

Introduction

On March 24, 1989, the supertanker *Exxon Valdez* ran aground in Prince William Sound, Alaska, spilling approximately eleven million gallons of North Slope crude oil. A massive oil slick formed and washed ashore on the western edge of the sound days later. Oil made its way south into the Gulf of Alaska, eventually oiling more than 1,300 miles of Alaskan coastline. This environmental disaster had a devastating effect on the natural environment and the human communities that rely on the area's renewable natural resources.

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In particular, the region's commercial fisheries were severely impacted.

Alaskan commercial fishing is based on co-management. Fishers' organizations work with state and federal agencies in formulating and implementing fishery policies. Current policies divide the state into various regulatory areas. A diverse number of commercial fisheries exist in each regulatory area, based on locality (riverine or marine area), target species, and gear type (e.g., gill net, seine). Permits are required to fish in a particular fishery within a regulatory area, and a limited number of permits are issued for each fishery. Individual fisheries are further regulated by restrictions on when and where fish harvesting can take place. The regulatory area directly affected by the *Exxon Valdez* oil spill was Area E, which covers the Prince William Sound and Copper River Delta bioregion.[1]

Fisheries co-management is rooted in community values, orientations, and perceptions. In Prince William Sound, co-management originated from local folk management traditions of Native subsistence culture. Folk management was based on the communities' inextricable link to the environment for survival and existence. Communities in the bioregion are still inextricably linked to natural resources and are active in co-managing resources. The cultural orientation of contemporary co-management communities is influenced by Western culture tempered by a blend of Native traditions and a bond to the environment.

This chapter assesses impacts of an environmental disaster, the *Exxon Valdez* oil spill, on fisheries co-management in the community of Cordova, Alaska.[2] Historically, Cordova has been a center for fishery co-management activities in the bioregion as well as the state. The chapter will explore some of the linkages between the community and fisheries co-management, with a particular focus on community impacts of the disaster.

Impacts of an environmental disaster are best understood in the context of the bioregional ecology and cultural history of the community. Thus, the chapter begins with a brief description of the natural and human ecology of the bioregion. This is followed by a sociocultural profile of Cordova and an overview of fishery co-management activities. Next, a brief description of the oil spill and cleanup is presented, along with a description of some of the environmental consequences. Community impacts associated with the disaster are discussed next. Finally, some implications for co-management communities are identified and discussed.

Ecology of the Bioregion

Natural Ecology

Prince William Sound and the Copper River Delta constitute one of the world's most spectacular bioregions.[3] Rugged mountains capped with permanent ice fields provide the bioregion with natural boundaries to the north, east, and west, while the Gulf of Alaska borders the south. Large populations of several animal species annually migrate to the bioregion, which is rich in estuarine and marine food supplies. Annual salmon runs and the abundance of marine mammals gave rise to a 7,000-year-old subsistence culture among the Chugach Eskimo and Eyak natives.

The bioregion is located between 60° and 62° north latitude and 144° and 147° longitude. The area experiences nearly twenty-four hours of continuous daylight during the summer solstice and nearly twenty-four hours of continuous darkness during the winter solstice. The bioregion has a maritime climate characterized by heavy precipitation and moderate temperatures throughout the year. Vegetation generally consists of western hemlock and Sitka spruce, alpine tundra, and wet tundra. A variety of fish and shellfish are found in the bioregion, including salmon (king, silver, pink, red, and chum), herring, cod, halibut, crab (tanner, king, dungeness), shrimp, clams, and mussels. The bioregion is a habitat for marine mammals such as whales (finback, humpback, and gray), sea lions, harbor seals, and sea otters. The bioregion is inhabited by a variety of birds, including bald eagles, ravens, and jays. The coastal and inland habitat supports bears (brown and black), moose, deer, wolves, mountain goats, beavers, mink, martens, and weasels.

Prince William Sound is encompassed by the northern reaches of North America's temperate rain forest. It is characterized as a fjord-type estuary consisting of more than 2,000 miles of intricate shoreline formed by bays, fjords, islands, and tidewater glaciers. The sound's coastal forest strip maintains high water quality in areas where fish spawn and are reared. The cold waters of the sound are among the world's most biologically productive. When exposed to prolonged daylight in the spring and summer, highly oxygenated, high-nutrient waters sustain a complex ecological network.

The Copper River Delta encompasses 700,000 acres of pristine wetlands and is the largest contiguous wetland on the Pacific coast. It is composed of estuaries, muskeg, mudflats, and channels, which provide a rich habitat for a diversity of species. Nestled between the rugged Chugach and Wrangell–St. Elias mountain ranges, the delta is fed by the Copper River and several streams and other rivers that constitute a total watershed of 24,000 square miles. The delta fans out in a 65-mile arc into the Gulf of Alaska, where it is broken up by a series of barrier islands and outer sandbars. Commercial species of salmon and herring are found in the delta. Red salmon from the Copper River typically set the world market price for this commercial species.

Salmon are an integral part of the bioregion's ecological cycle. The life cycle of salmon is a focal point of the natural and cultural cycles of the bioregion. Salmon lay their eggs in gravel nests throughout the bioregion's streams and lakes. Salmon fry spend time in fresh water prior to heading to the open ocean to feed until they reach maturity. Upon full maturity, salmon return to their natal streams to spawn and die, thus renewing the cycle. The amount of time spent in fresh water and in the ocean to maturity varies depending upon the particular subspecies. During their life cycle, salmon provide sustenance to a wide variety of life, including other fish, birds, bears, and humans. Salmon have social and economic importance in every community in the bioregion.

Human Ecology

Prince William Sound is host to five human communities: Chenega Bay, Tatitlek, Whittier, Valdez, and Cordova. To varying degrees, these communities are reliant on the bioregion's renewable natural resources and can be classified as a natural resource community (NRC). An NRC is "a population of individuals living within a bounded area whose primary cultural existence is base on the utilization of renewable natural resources."[4] The predominate cultural relationship with the environment has evolved from the traditional subsistence culture of Alaskan Natives.

The subsistence culture of Alaskan Natives is based on the abundant renewable resources of the bioregion. Cultural cycles of anticipation, preparation, harvest, and utilization coincide with natural seasons and cycles of resource availability. Social and economic relationships in Native communities are shaped by folk traditions associated with natural resource utilization. A subsistence lifestyle creates patterns of family activities, religious and social ceremonies, cooperative social networks, and cultural identity based on the harvesting and sharing of natural resources.[5]

Cordova: A Profile of a Natural Resource Community

Cordova is a small, rural fishing community isolated from other communities by mountains, glaciers, rivers, and the sea. The community is located in an ecozone between Prince William Sound and the Copper River Delta. Historically, Cordova's beginnings are traced to four Eyak Native villages. Eyak villages in the region were exploited by Russian fur traders, and consequently, their populations were decimated. (As of 1990, there were only two living speakers of the Eyak language.) During the 1880s, salmon fishing and processing grew, attracting a stable population to the area. Four canneries were established in the vicinity of present-day Cordova.

In 1900, significant deposits of copper ore were discovered in the Wrangell Mountains to the north. The name "Cordova" was given to the site designated to be the point of transfer for the ocean transportation of ore mined in the interior. Cordova was linked by railroad to the mines, and copper mining flourished in the area for three decades. Although local fishing enterprises continued during this time, growth in commercial fishing coincided with the demise of copper mining in 1939.

After the closing of the mine, Cordova's population stabilized at about 1,000. During the 1970s Cordova's population doubled due to diversification in the commercial fishing industry and a generally high immigration rate for the state. Cordova now has a base population of 2,500, which nearly doubles during the summer fishing season. The majority of the residents are Anglo, as are most of the fishers. Alaskan Natives (comprising Eyak, Aleut, and other groups) constitute about 20 percent of the population and are highly integrated into the community and fishing industry. There is also a smaller, less integrated Oriental population, many of whom are employed in local canneries.

Commercial fishing dominates the economy of Cordova. Cordovan fishers own 55 percent of all Area E salmon fishery permits and 44 percent of all Area E herring fishery permits. Other commercial fisheries include cod, halibut, rockfish, sablefish, crab, and shellfish. More recently, commercial interests have developed in a pound-net fishery and an oyster fishery.

In addition to hosting the region's largest commercial fishing fleet, Cordova is home to several canneries, various support businesses (e.g., electronics, refrigeration, machinist, mechanic, net mending), and fishing organizations. The fishing industry provides the basis for locating various government agency operations in Cordova (e.g., U.S. Forest Service, U.S. Coast Guard, Alaska Department of Fish and Game). As Payne observed, "Nowadays, many would argue that without the fishing industry Cordova could not

persist. Employment and other economic activities are so bound up in fishing that the very essence of the town depends on the fishery."[6]

Cordova maintains a subsistence heritage that is interwoven with the commercial fishing economy. The majority of Cordova's residents engage in subsistence activities that include harvesting and sharing fish, shellfish, moose, deer, berries, and so on. In a recent sample of Cordova households, 90 percent reported receiving subsistence resources, and households averaged more than 400 pounds of harvested resources.[7] As is found in most subsistence cultures, resource sharing in Cordova provides a basis for establishing and maintaining social relationships. However, subsistence is similar to the cash economy in that both are highly dependent on fishing.

Like other communities dependent on renewable natural resources, Cordova has developed a cultural cycle that corresponds with the biological cycle of fish, particularly salmon (see Figure 8.1). Although fishing is a year-round activity, the primary fishing season coincides with the season of highest biological productivity: March through September. In early February, the community symbolically awakens from the long winter with a celebration: the Cordova Iceworm Festival. Ceremonies include a blessing of the fleet, a parade, a local talent show, and a food fair. The festival marks the beginning of the preparation stage. Preparation involves readying the boat and gear, selecting and hiring crews, and identifying potential fishing areas for the upcoming season. This stage is characterized by a high level of optimism regarding the success of the impending harvest season.

The harvest cycle begins with the first herring runs in March. Harvesting continues with red salmon runs (May through June), pink salmon runs (July through August), and silver salmon runs (August through September). The harvest season continues for many year-round residents with the subsistence hunting of deer, moose, and waterfowl.[8] Utilization involves activities that convert the harvest into usable products, as well as the consumption of

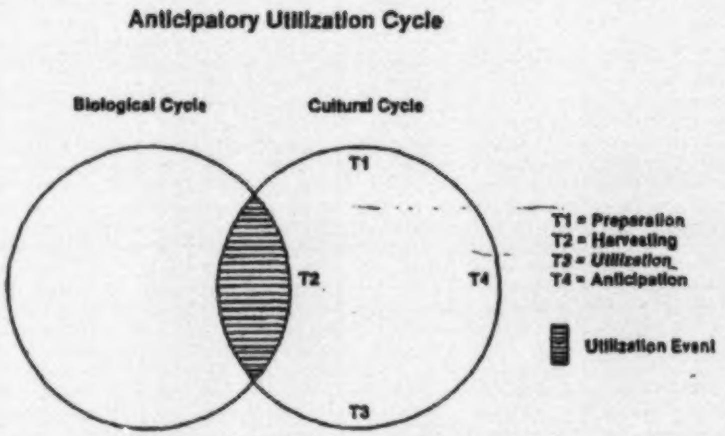

Figure 8.1 The cyclic relationship between cultural and natural events in a natural resource community.

these products. Utilization coincides with harvest (e.g., canning, smoking, and preserving fish and game as they are harvested) and extends into the fall and winter. The winter is marked by a period of reflection and anticipation. During this resting period, the previous harvest season is assessed, and plans for the upcoming season are contemplated and initiated.

The intertwinement of natural and cultural cycles leaves an imprint on the local inhabitants. They are acutely aware of their environment and the seasonal cycle. They become familiar with the currents of Prince William Sound and the shifting channels in the Copper River Delta. They develop a respect for the voracity of nature and an appreciation for the bounty nature provides. More importantly, they recognize the importance of stewardship. Stewardship forms a basis for co-management activities.

Fisheries Co-Management in a Natural Resource Community

As an environmentally aware community dependent on the natural resources of the bioregion, Cordova has traditionally been a leader in fisheries co-management. Commercial salmon fishing in the bioregion is 100 years old. In the beginning, commercial fishing had little impact on fishery populations, but as technology improved and fishers' numbers grew, signs of species stress and decline were observed. Fishers' organizations played an instrumental role in working with government agencies to co-manage the bioregion's fisheries.

Beginning with various fishers' unions in the 1920s and 1930s, fishers have been organized to have a voice in their business affairs. The Cordova District Fisheries Union (CDFU) emerged as fishers' representative in negotiations with canneries. The union was forced to disband in 1955 after a Department of Commerce ruling based on the Sherman Anti-Trust Act. However, the act did allow fishers to be organized as a marketing association through the Cordova Aquatic Marketing Association. CDFU continued as a representative in political and management issues and later changed its name to Cordova District Fishermen United.

CDFU has been an organizational leader in fishery co-management. When species stress and decline were observed, CDFU worked with branches of the state and federal government to manage the fishery. CDFU was a powerful entity during Alaska's transition into statehood and the ensuing development of fisher policies. CDFU represented fishers in developing co-management practices such as establishing limited entry, gear restrictions, and area closures.[9]

Statewide, Alaska's salmon harvest reached a low point in the late 1960s and early 1970s and threatened a collapse of the entire commercial fishery. In response, the 1971 state legislature created the Fisheries Rehabilitation, Enhancement, and Development (FRED) Division to ensure the perpetual use of Alaska's aquatic resources. Additional legislation in 1974 provided for the establishment of private nonprofit hatchery programs. Cordova fishers initiated the formation of the Prince William Sound Aquaculture Corporation (PWSAC) in December 1974 to establish a hatchery program to produce an adequate supply of common-property fish for all user groups. The PWSAC structure included representatives from commercial, subsistence, recreational, and personal use fisheries, as well as from fish processors, Native villages and corporations, and local communities.[10] The financial structure of PWSAC is based on salmon-enhancement tax revenues collected from all salmon fishers and on proceeds from the sale of fish returning to the hatchery.

PWSAC reflects the nature of the co-management orientation in the Area E fishery. It was initiated by fishers who are integrated with the resource and recognize the up-and-down cycles of fishing. The hatcheries were built by the fishers, who donated time and materials. For example, the Armin F. Koernig hatchery was built in 1975 through a complete volunteer effort of commercial fishers. Currently, there are five hatcheries in Prince William Sound, three operated by PWSAC, one by the Valdez Fisheries Development Association, and one by the state's FRED Division. The effort to develop and enhance the relationship with the environment seems to have paid off.

As plans for hatcheries were being developed, another plan, the construction of a pipeline from the rich oil fields of the North Slope to a terminal in Valdez, began to unfold.[11] CDFU actively opposed the location of a pipeline terminal in Valdez because of the high risks associated with terminal activities and with tanker transportation in the environmentally rich waters of the bioregion. An alternative overland trans-Canadian pipeline was proposed. The CDFU joined forces with Alaskan Native and environmental groups, and together they forced the issue to the Supreme Court, which upheld the CDFU coalition's position. In late 1973, however, a special right-of-way legislation was introduced in the U.S. Congress to circumvent the court rulings. In the U.S. Senate, the vote was a 49–49 tie, which was broken in favor of the Valdez terminal

plan by Vice President Spiro T. Agnew. A similar bill passed the U.S. House, and President Nixon signed the Pipeline Authorization Act on November 16, 1973.

Payne's description of the organization dynamics of CDFU and the community of Cordova during the pipeline controversy reveals four fundamental orientations toward resource management.[12] First, fishers are keenly aware of the local ecology and potential threats to their natural resource base. The fishery permit structure promotes a sense of ownership and stewardship over the economic base. They are in constant contact with the ecosystem.

Second, CDFU emerged out of a strong sense of solidarit vis-à-vis resource stewardship. Solidarity was enhanced by the democratic orientation of the organization and the respected leaders, who come from the ranks of the fishers themselves. The strong organization effectively channels the fishers' concern for managing fishery resources. Further, CDFU has been influential with fishers' organizations throughout the state in shaping co-management strategies and policies.

The nature of fishing also affects management orientations. Fishing promotes innovation to improve equipment and techniques and to make do with the resources at hand. Although fishing is an individualistic competitive activity, it also promotes cooperation. Fishing is dangerous work involving machinery, a threatening environment (sudden violent storms, cold, ice, wind, etc.), and a high degree of unpredictability. Each year is marred by occupational fatalities. Each individual fisher realizes the high likeliho of needing help someday, and thus, fishers as a group come to rely on each other.

Finally, the social fabric of a small community facilitates cooperative face-to-face relationships. The physical isolation leads to innovation, volunteerism, civic participation, and interest in community affairs. This fabric is further strengthened by subsistence networks that bind people to each other and the environment.

The community empowerment and co-management orientations of CDFU, PWSAC, and the Cordova community generated success. By the mid-1980s, commercial fishing appeared to be secure. Hatchery fish were plentiful, fishers were active in the management of the fishery, and they were earning a good income. But this security would be threatened at the end of the decade with an unprecedented environmental disaster: the *Exxon Valdez* oil spill.

The *Exxon Valdez* Oil Spill and Cleanup: A Brief Overview

The Oil Spill

The *Exxon Valdez* oil spill was a severe blow to the local fishery and its co-management structure.[13] The spill occurred at the beginning of the most biologically active season of the year, thus maximizing the threat to the bioregion: The 1,300 miles of impacted coastline included parts of Prince William Sound, Cook Inlet, and the Alaskan Peninsula. Kodiak Island was surrounded by oil. Coastal and subtidal habitats in these regions were exposed to oil and further disrupted by cleanup operations.

The oil spill had an immediate impact on the bioregion's marine and terrestrial life. Tens of thousands of birds died from exposure to oil and more than 1,000 otters were confirmed to have died. Mussels and clams were contaminated, as were various other marine subsistence resources. The oil contamination entered the food chain as predators and scavengers consumed carcasses tainted with oil. An extensive effort to remove dead birds and otters limited the impacts to the food chain, yet ecological damages did occur.

The fishery experienced disruption in the aftermath of the oil spill. Initial efforts were made by commercial fishers to secure the hatcheries, although it became apparent that hatchery fry were likely to be impacted. The fry and the oil would travel the same current out of the sound and into the Gulf of Alaska. Many fishers feared the impact on fisheries would be felt for years to come.

The Alyeska Pipeline Service Company, which was responsible for containing and cleaning up oil spills, was unprepared to handle a spill of such magnitude.[14] Further, the response was hampered by poor coordination among the corporate organizations, state and federal agencies, and local communities.

Controversy and outrage were generated within impacted communities and among the public regarding the slow response, effectiveness of cleanup techniques, and compensation strategies employed by the responsible corporate and government entities.[15] There was public sentiment that the spiller should not have been in charge of the cleanup effort. Local residents were incensed that their local expertise was ignored. Some felt cleanup efforts were futile, the job being too great to be undertaken by human hands. There were also concerns about the impacts of cleanup, secondary spills, and the disposal of waste beaches.

The Cleanup

Exxon and its primary contractor, Veco, took command of the cleanup operations and initiated a series of actions to contain and clean up the oil. These included subcontracting fishing vessels and hiring thousands of people to participate in the cleanup. Fishing vessels were used to lay containment booms around oil slicks while skimmer vessels collected the oil. Fishing vessels were also used to transport materials, wastes, and personnel. Oil was removed from beach surfaces by hand and by using cold and hot water from high-pressure hoses. Bioremediation processes, which entail the application of bacteria and fertilizer to oiled beaches in order to accelerate the natural breakdown of oil, and chemical dispersant were used in some areas.

Cleanup activities continued throughout the summer, ending in mid-September. At that point, nature was commissioned to clean the shores with its savage winter storms. Limited cleanup efforts would be made in subsequent years, but the ecological recovery was left to nature. However, there was uncertainty about the time needed for recovery.

Local communities experienced a boomtown phenomenon as an army of cleanup workers and media reporters inundated the area. The population of Valdez temporarily increased from 3,500 to more than 10,000 in two months. Cordova's population increased from 2,500 to more than 6,000. Population booms impacted housing, business patterns, mental health services, government services, and the judicial system. Community officials reported dramatic increases in violent crimes and drug and alcohol abuse.

The oil spill and cleanup disrupted community, family, and occupational lifestyles. For many residents, the spill lingers through litigation, poor fishing, and resource recovery uncertainty. Compared to the number of studies on ecological impacts, however, few studies were conducted on the impacts of the *Exxon Valdez* oil spill on humans. The critical question remains, What happened to the communities?

Analyzing the *Exxon Valdez* Oil Spill

Shrivastava's stakeholder model of industrial crises is an appropriate model for analyzing the *Exxon Valdez* oil spill.[16] Primary stakeholders in industrial crises are corporations, government, and affected communities. The public, public interest groups, and the mass media are secondary stakeholders. Each stakeholder operates from a self-interest frame of reference that determines its response to a crisis.[17] Primary stakeholders compete with each other to have their respective perspectives accepted by the public as "truth," with the corporate view of reality prevailing in most cases. The tendency in industrial crises is for corporations and government to minimize the extent of damage, appeal to scientific knowledge, and exclude victims from participating in critical decisions.[18]

Affected communities operate from a frame of reference based on personal experience and knowledge and are typically powerless to form a proactive response. Further, there may be a lack of community consensus as to the nature and extent of impact. These communities tend to vent anger, frustration, and bitterness toward the corporation and government.

The affected community is ultimately responsible for self-protection. Because corporations and government tend to resist changes in their frame of reference, even when such changes are in their best interests, community-based organizations must ultimately force such changes. However, communities and community-based organizations may be weakened in the aftermath of an industrial crisis.

Community Impacts of the *Exxon Valdez* Oil Spill

Industrial crises can be thought of as technological disasters. Social science research indicates a pattern of community disruption following a technological disaster. Because co-management is linked to the community, community disruption can lead to co-management disruption. Following is a brief summary of the literature on technological disasters.

An environmental disaster such as the *Exxon Valdez* oil spill poses problems that are unique when compared to natural disasters such as earthquakes, hurricanes, floods, and volcanic eruptions. Like other technological disasters, oil spills involve a *loss* of control over an activity that was perceived to be controllable, as oppos to natural disasters, which involve a *lack* of control over processes that are uncontrollable. Loss of control includes mechanical and structural failures as well as breakdowns in social organization.

Most communities are not experienced in or prepared for a technological disaster; thus, responses, information flows, and expert intervention patterns prove inadequate. Further, victims of technological disasters exhibit more anger, rage, and hostility than do victims of natural disasters. Social-psychological impacts tend to be more widespread and persistent in technological disasters than in natural disasters. Indeed, stress associated with technological disasters may actually increase over time. The initial technological disaster can be exacerbated by a series of secondary disasters fueled by litigation, uncertainty, and continued disruptions.[19]

In a natural disaster, social support networks and a therapeutic community atmosphere typically emerge, whereas a technological disaster may be accompanied by an abrasive community atmosphere. Internal segmentation of community groups typically develops along lines reflecting relative threats to property, livelihood, family, and the individual. Furthermore, "social conflict characterizes the 'spacial interaction' of *technology* and community as opposed to social cooperation characteristic of the 'spacial interaction' of *ecology* and community."[20]

The literature on technological disasters indicates that negative community impacts are the norm. When examining the community of Cordova, various types of impacts can be attributed to the *Exxon Valdez* oil spill. Community impacts can be broadly categorized as follows: economic disruption, fishery disruption, recovery uncertainty, community divisiveness, litigation, and social-psychological stress. As in other technological disasters, there is overlap between these categories, as well as interactive and cumulative effects.

Economic Disruption

Like other communities impacted by the oil spill, Cordova experienced tremendous economic upheaval. First, there was an economic bonanza as Exxon spent more than $2 billion in the cleanup effort. A significant portion of the money passed through the Prince William Sound economy. Some fishers were able to lease their boats to Veco at more than $1,500 per day to assist in the cleanup effort. This "money spill" created a temporary bonanza whereby some individuals made much more money cleaning up oil than they could have made from fishing. However, not all fishers received leases, or wanted them.

The local economy experienced occupational disruptions. The hourly wages for shoreline cleanup exceeded $16 an hour. With the fishing season in jeopardy, those relying on fishing-related occupations faced uncertain options. Fishing crew members and cannery workers had to decide between their occupation and cleanup employment. The $16-an-hour rate was significantly higher than most local jobs paid. Thus, a temporary labor shortage in lower-paying service occupations was created as people quit jobs to work on the cleanup.

The local economy was impacted further as traditional business patterns were interrupted. Buying and service pattern changed as oil spill cleanup temporarily replaced fishing as the dominant economic activity. The oil spill and cleanup also took a toll on the budgets of the town government, Native American–run corporations, and other established organizations as they incurred debt struggling to respond to the spill and cleanup.

Economic upheavals resulted in downward economic trends during 1990, 1991, 1992, and 1993 due to disruptions in the fishing industry. The price of fish dropped dramatically in 1990 and generally stayed depressed from 1990–1993.[21] Many individuals who made "spill" money in 1989 overinvested in their fishing business (new boats, equipment, etc.) and were unable to make the payments in the lean years that followed. Foreclosures and bankruptcies have recently become a more common occurrence. Occupational disruption continues as the future of fishing remains uncertain.

Fishing Disruption

The spill severely disrupted the 1989 commercial fishing season. The herring season was essentially closed, as was more than one-third of Prince William Sound fishing grounds. Those who chose to fish received a lower price for their product. In addition, there was concern that oil-contaminated fish might enter the market and damage public demand for the product.

The fisheries continue to be disrupted. Although 1990 was a banner harvest, the price for fish declined. The 1991 and 1992 seasons were marked by poor returns of herring and salmon and by low prices. The seine fishery for pink salmon was limited in 1991 and closed in 1992 due to weak returns. The 1993 herring season essentially was canceled. Although there is considerable scientific and public debate regarding the extent to which these seasonal disruptions are attributable to the oil spill, there is a strong perception among many fishers that the spill is the root cause of the problem.

Recovery Uncertainty

The patterns of disruption in the commercial fishery reinforce an underlying uncertainty regarding resource recovery. There is uncertainty about the oil's long-term effects on the region's natural resource base. There is uncertainty about whether the fish will come back, whether there will be enough fish, and how long it will take for the numbers to return to normal levels.

Science has been unable to adequately respond to critical information about bioregion impacts and recovery.[22] Experts have varying and conflicting reports regarding the degree of impact and recovery. Because they are unable to provide a consensus, there is a sense that scientific experts represent the interests of those who write the check rather than the interests of objective science. This fuels the uncertainty about resource recovery.

There is also a sense of uncertainty about community recovery. When will the local economy recover? When will community schisms heal? When will the litigation be settled? When will the aftershocks stop? When will it all be relegated to history?

Community Divisiveness

Every community is characterized by group conflict and fault lines where conflicting groups mesh. Conflict is ordered by consensus, which serves to diminish conflict by emphasizing the common good. Cordova contained preexisting conflict groups based on demographics (race, sex, occupation, age), attitudes (political, religious, regarding development), and residential status (permanent or seasonal, inside or outside city limits).

The oil spill weakened the social-fabric of Cordova by creating deep schisms along various community fault lines. First, the community became divided because some received or accepted "Exxon money" and others did not or could not. People were cast as being greedy or labelled as "Exxon whores" or "spillionaires" as a result of their participation in the cleanup effort. This strained and sp' family relationships and long-term friendships. The community was further divided by a series of lawsuits within the town government that placed an additional financial burden on the town.

Another source of community conflict derives from a decision by the local Chugach Alaska Native Corporation to engage in clear-cut logging of local corporation land. The logging decision was spurred in part by financial problems incurred during the oil spill and the ensuing economic difficulties in the community. Many residents view logging as a threat to the fishing industry and an affront to a healthy bioregion. Yet, some feel a need to diversify the local economy through this type of development.

Finally, a twenty-five-year-old conflict regarding the construction of a road to Cordova has reemerged. Half of the community is for such a road, and the other half is against it. Proponents cite the economic benefits of cheaper transportation costs and the e nomic diversity of recreation and tourism industries. Opponents see the road as a threat to their traditional way of life and lament the potential of a steady stream of tourists in Winnebagos interrupting their way of life. Others are suspicious that the road might speed up resource extraction and pose further threats to the bioregion.

Litigation

Litigation activities are another source of community impact. More than two thousand lawsuits have been filed in the case. Several Cordova businesses and residents are involved in litigation activities. Legal action by the federal and state government against Exxon were settled in 1992. The settlement included the establishment of a $900 million restoration fund and a Trustee Council to develop and implement restoration plans.[23] Although intended to restore the community, the fund and council have generated controversy and conflict, further dividing the community.

Various class-action and individual lawsuits remain unresolved. Native corporations, fishers and their crews, and oil spill cleanup workers are three major class action groups. Individual lawsuits have been filed by fishers, business owners, and other residents impacted by the spill. The ongoing litigation creates additional uncertainty regarding individual and community recovery.

The high stakes have heightened the traditional antagonistic posturing found in our legal system. Subpoenas and depositions can be intimidating and can be used as "weapons" to discourage plaintiffs from pursuing the suit. Further, a corporate cost-benefit approach leads to a strategy of delaying resolution of litigation over a long period of time.[24] Such a tactic prolongs the secondary disaster, the negative social impacts to the community.

Social-Psychological Stress

The *Exxon Valdez* oil spill took an immediate emotional and psychological toll on people and communities. Pain, anger, frustration, depression, betrayal, anxiety, despair, sadness, and grief were common emotions experienced by residents of the bioregion. Tremendous stress was created as livelihoods were threatened or destroyed. The social fabric was torn by broken friendships and business relationships. There was a sense that a way of life had been lost.

Impacted communities reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems, and occupation-related problems. Individuals in impacted communities experienced clinically measurable levels of generalized anxiety disorder, post-traumatic stress disorder, and depression.[25] These conditions placed increased demands on mental health services.

In Cordova, social-psychological stress was exacerbated by turnover in the community mental health administration and staff during this period of increased demand. Staff turnover in other community support agencies (e.g., law enforcement, town government) added to the sense of personal disruption.

Long-term social-psychological stress has been documented in the community and has actually increased over time among certain groups.[26] The combination of litigation, recovery uncertainty, and disruptions in the economy, fishery, and community maintains a higher-than-expected level of stress in Cordova.

In many respects the community is still grieving the environmental destruction and community disruption caused by the spill. Many individuals, particularly fishers and those connected to the industry, find it difficult to gain a sense of closure before the fisheries are clearly recovered and the litigation is resolved. This sets a stage for continued social-psychological stress within the community.

Summary of Community Impacts

Like other technological disasters, the Exxon Valdez oil spill had negative impacts on the community. Cordova experienced initial disruptions in its economy, commercial fishery, and way of life. Continuing economic and commercial fishing disruptions, along with uncertainty regarding resource recovery, contribute to a secondary disaster experience. Litigation provides another secondary disaster experience, as the legal process creates additional frustration and hostility for community victims. The abrasive community atmosphere resulting from the various schisms adds to the secondary disaster.

These community impacts have an affect on the ability to co-manage resources. The ongoing social disruption undermines the community's co-management network. This makes co-management more difficult and places additional stress on organizational leadership. Crises become politicized, with various special interests competing to influence the outcome. As a result, community leadership has different requirements placed upon it. One of the requirements is to respond to vulnerabilities exposed by the crisis.

Conclusions

The *Exxon Valdez* oil spill provides an important case study of environmental disaster impacts on a co-management community. The event created an abrasive community atmosphere characteristic of technological disasters. It also undermined trust between the local community and government, industry, and science. It underscored the conflict between state "progress" and local control. More importantly, the ecosystem, which is the base for community existence, was severely disrupted. These factors are threats to co-management and represent obstacles to recovery.

More generally, the oil spill provides an awareness of the need to think bioregionally in the co-management of resources. It demonstrates the vulnerability of single-resource economies and the inability of the scientific community to reach conclusions and consensus. The spill also shows that community empowerment is essential to obtaining greater control over resource management decisions.

Cordova continues to experience the *Exxon Valdez* disaster. The economic and fishing disruption, uncertainty, community segmentation, and social-psychological stress are predictable patterns of community impacts. There have been few attempts at cultural/community restoration. However, Cordova is a spirited community that has withstood previous disasters and crises. Recovery and restoration are difficult processes, but the community will prevail.

Lessons for Modern Fisheries Management

1. Natural resource communities should develop local strategies to ensure the protection of renewable resources against technological disasters.
2. Co-management communities need to be empowered by having a role in decisions regarding hazards and risks to their bioregion.
3. In the event of an environmental crisis, and where there is an absence of credible science, folk management strategies should be given particular attention.
4. In regions that are at risk for loss of natural resources, proactive diversification of the economy should be undertaken by local communities to provide an economic buffer in the event of a disaster.

Notes

1. "A bioregion is a part of the earth's surface whose rough boundaries are determined by natural rather than human dictates, distinguishable from other areas by attributes of flora, fauna, water, climate, soils and landforms, and the human settlements and cultures those attributes have given rise to. . . . The general contours of the regions themselves are not hard to identify, and indeed will probably be felt, understood or sensed, in some way known to many of the inhabitants, and particularly those still rooted in the land, farmers and ranchers, hunters and fishers, foresters and botanists, and most especially, across the face of America, tribal Indians, those still in touch with a culture that for centuries knew the earth as sacred and its well-being as imperative" (Sale 1974:227).
2. This description is based on information collected over the course of the four years since the oil spill. The author was part of a social science research team

that conducted research in Cordova with regard to community impacts of the oil spill. The study employed a variety of data collection methods such as ethnographic interviews, standardized household surveys, participant observation, archival searches, and retrieval of secondary data. Although at this time the research project is not complete, to date, the project has yielded five publications and a dissertation (Cohen 1993a, 1993b; Dyer, Gill, and Picou 1992; Dyer 1993; Picou and Gill 1993; Picou et al. 1992).

3. For a more detailed description of the regional natural and cultural ecology, see Thomas et al. (1991) and the Alaska Geographic Society (1993).

4. See Dyer, Gill, and Picou (1992).

5. Walter Meganack, traditional village chief of Port Graham Native Village, described the native natural resource community and the impacts the *Exxon Valdez* oil spill had on the Native way of life in an editorial entitled "The Day the Water Died." The text has been reprinted in Levkovitz (1990:44–45).

6. See Payne (in press).

7. See Stratton (1989).

8. Most hunting is done under the guise of recreation/sport, but the utilization and distribution of these resources typically follow subsistence networks.

9. A more detailed description of the legislative action toward limited entry and gear restrictions can be found in Cooley (1963), Kruse (1988), Morehouse and Hession (1972), Morehouse and Rogers (1980), and Royce (1989).

10. In 1976, the state of Alaska adopted the user-group structure established by PWSAC.

11. Payne (in press) provides a detailed description of the role of CDFU in the pipeline controversy.

12. See Payne (in press).

13. The spill was actually predicted hours before it occurred in a teleconference linkup with Mayor John Devens and a town meeting in Valdez. Cordova resident Riki Ott stated, "When, not if, the big one does occur and much or all of the income from a fishing season is lost, compensation for processors, support industries, and local communities will be difficult, if not impossible, to obtain" (Keeble 1991:24–25).

14. Indeed, at the time of the accident, Alyeska's primary response vessel was in dry dock, its supply of boom material and dispersant was inadequate, and only a handful of its personnel who were skilled in operating the needed equipment were available.

15. For a more complete description of the accident and cleanup activities, see Davidson (1990), Keeble (1991), and Lethcoe and Nurnberger (1989).

16. Shrivastava (1987). "An industrial crisis is a complex system of interdependent events and involves multiple conflicting stakeholders" (1987:19).

17. "A frame of reference is the method people or organizations use to select and process information" (Shrivastava 1987:87).

18. See Gephart (1984) and Shrivastava (1987).

19. For additional information on technological and natural disasters, see Ahearn (1981); Baum, Fleming, and Singer (1983); Couch and Kroll-Smith (1985); Edelstein (1988); Freudenburg and Jones (1991); Gill (1986); Gill and Picou (1989, 1991); Kroll-Smith and Couch (1991); Picou (1984); and Picou and Rosebrook (1993). For an alternative view espousing the existence of no distinguishable difference between technological and natural disasters, see Quarantelli (1985, 1987).

20. See Picou and Gill (1993).

21. As Cohen (1993b) notes, there was an economic recession at the national level during this time, as well as a general downturn in fisheries economics for the state.

22. For example, compare the proceedings from the Exxon Valdez Oil Spill Symposium in Anchorage Alaska (February 1993) and the Third Symposium on Environmental Toxicology and Risk Assessment: Aquatic, Plant, and Terrestrial, in Atlanta, Georgia (April 1993).

23. The $900 million will be paid over a ten-year period as specified in the settlement with the United States and the State of Alaska. As of 1993, approximately one-third of the fund had been spent.

24. It should be noted that litigation connected with the 1978 *Amoco Cadiz* oil spill remains unresolved as of this writing.

25. See Donald et al. (1990) and Palinkas et al. (1993).

26. See Picou and Gill (1993).

References

Ahearn, Frederick L.
1981 "Man-Made and Natural Disasters: A Comparison of Psychological Impacts." Unpublished paper presented at the annual meeting of the American Public Health Association, Los Angeles, CA.

Alaska Geographic Society
1993 *Alaska Geographic* 20(1).

Baum, Andrew, Raymond Fleming, and J. E. Singer
1983 "Coping With Victimization by Technological Disaster." *Journal of Social Issues* 39(2):117–138.

Cohen, M. J.
1993a "Economic Aspects of Technological Accidents: An Evaluation of the *Exxon Valdez* Oil Spill On Southcentral Alaska." Unpublished Ph.D. dissertation, Department of Regional Science, University of Pennsylvania, Philadelphia, PA.
1993b "Economic Impact of an Environmental Accident: A Time-Series Analysis of the *Exxon Valdez* Oil Spill in Southcentral Alaska." *Sociological Spectrum* 13(1):35–63.

Cooley, R. A.
1963 Politics and Conservation: The Decline of the Alaska Salmon. New York: Harper and Row.

Couch, S. R., and J. S. Kroll-Smith
1985 "The Chronic Technical Disaster: Toward a Social Scientific Perspective." *Social Science Quarterly* 166(3):564–575.

Davidson, A.
1990 In the Wake of the *Exxon Valdez*: The Devastating Impact of the Alaskan Oil Spill. San Francisco, CA: Sierra Club.

Donald, R., R. Cook, R. F. Bixby, R. Benda, and A. Wolf
1990 The Stress Related Impact of the Valdez Oil Spill on the Residents of Cordova and Valdez, Alaska. Valdez, AK: Valdez Counseling Center.

Dyer, C. L.
1993 "Tradition Loss as Secondary Disaster: Long-Term Cultural Impacts of the *Exxon Valdez* Oil Spill." *Sociological Spectrum* 13(1):65–88.

Dyer, C. L., D. A. Gill, and J. S. Picou
1992 "Social Disruption and the *Valdez* Oil Spill: Alaskan Natives in a Natural Resource Community." *Sociological Spectrum* 12(2):105–126.

Edelstein, M. R.
1988 Contaminated Communities: The Social and Psychological Impacts of Residential Toxic Exposure. Boulder, CO: Westview Press.

Freudenburg, William R., and Timothy R. Jones
1991 "Attitudes and Stress in the Presence of Technological Risk: A Test of the Supreme Court Hypothesis." *Social Forces* 69(4):1143–1168.

Gephart, R. P.
1984 "Making Sense of Organizationally Based Environmental Disasters." *Journal of Management* 10(2):205–225.

Gill, Duane A.
1986 "A Disaster Impact Assessment Model: An Empirical Study of a Technological Disaster." Unpublished Ph.D. dissertation, Department of Sociology, Texas A&M University, College Station, TX.

Gill, Duane A., and J. Steven Picou
1989 "Toxic Waste Disposal Sites as Technological Disasters." Pp. 81-97 in D. Peck (ed.), Psychosocial Effects of Hazardous Toxic Waste Disposal on Communities. Springfield, IL: Thomas.
1991 "The Social Psychological Impacts of a Technological Accident: Collective Stress and Perceived Health Risks." *Journal of Hazardous Materials* 27(1):77–89.

Keeble, J.
1991 Out of the Channel: The Exxon *Valdez* Oil Spill in Prince William Sound. New York: HarperCollins.

Kroll-Smith, J. Stephen, and Stephen R. Couch
1991 "What Is a Disaster? An Ecological-Symbolic Approach to Solving the Definitional Debate." *International Journal of Mass Emergencies and Disasters* 9(3):355–366.

Kruse, G. H.
1988 An Overview of Alaska's Fisheries: Catch and Economic Importance of the Resources, Participants in the Fisheries, Revenues Generated, and Expenditures on Management. Fishery Research Bulletin 88-01. Juneau: Alaska Department of Fish and Game, Division of Commercial Fisheries.

Lethcoe, N. R., and L. Nurnberger (eds.)
1989 Prince William Sound Environmental Reader 1989—*T/V Exxon Valdez* Oil Spill. Valdez, Alaska: Prince William Sound Conservation Society.

Levkovitz, T.
1990 The Day the Water Died: A Compilation of the November 1989 Citizens Commission Hearings on the *Exxon Valdez* Oil Spill. Anchorage: Alaska Natural Resource Center, National Wildlife Federation.

Morehouse, T. A., and J. Hession
1972 "Politics and Management: The Problem of Limited Entry." Pp. 279–331 in A. R. Tussing, T. A. Morehouse, and J. D. Babb, Jr., (eds.), Alaska Fisheries Policy: Economics, Resources, and Management. Fairbanks Institute of Social, Economic, and Government Research, University of Alaska.

Morehouse, T. A., and G. W. Rogers
1980 Limited Entry in the Alaska and British Columbia Salmon Fisheries. Fairbanks: Institute of Social, Economic, and Government Reseach, University of Alaska.

Palinkas, L. A., M. A. Downs, J. S. Petterson, and J. Russell
1993 "Social, Cultural, and Psychological Impacts of the *Exxon Valdez* Oil Spill." *Human Organization* 52(1):1–13.

Payne, James T.
(in press) "Our Way of Life Is Threatened and Nobody Seems to Give a Damn": The Cordova District Fisheries Union and the Trans-Alaska Pipeline. Anchorage: Alaska Pacific University Press.

Picou, J. S.
1984 Ecological, Physical, Economic, Sociological, and Psychological Assessment of the Illinois Central Gulf Train Derailment. Vol. 5: Sociological Assessment. Baton Rouge, LA: Gulf South Research Institute.

Picou, J. S., and D. A. Gill
1993 "Disaster and Long-Term Stress: Impacts of the *Exxon Valdez* Oil Spill on Commercial Fishermen." Paper presented at the annual meeting of the Southwestern Sociological Association, New Orleans, LA.

Picou, J. S., D. A. Gill, C. L. Dyer, and E. W. Curry
1992 Disruption and Stress in an Alaskan Fishing Community: Initial and Continuing Impacts of the *Exxon Valdez* Oil Spill. *Industrial Crises Quarterly* 6(3):235–257.

Picou, J. S., and D. D. Rosebrook
1993 "Technological Accident, Community Class-Action Litigation, and Scientific Damage Assessment: A Case Study of Court-Ordered Research. *Sociological Spectrum* 13(1):117–138.

Proceedings
1993 Proceedings of the Exxon Valdez Oil Spill Symposium, Anchorage, AK. February.
1993 Proceedings of the Third Symposium on Environmental Toxicology and Risk Assessment: Aquatic, Plant, and Terrestrial, Atlanta, GA. April.

Quarantelli, E. L.
1985 "What Is a Disaster? The Need for Clarification in Definition and Conceptualization in Research." In Barbara J. Sowder (ed.), Disasters and Mental Health: Selected Comtemporary Perspectives. Pp. 41–73. U.S. Department of Health and Human Services, National Institute of Mental Health. Washington, DC: G.P.O.
1987 "What Should We Study? Questions and Suggestions for Researchers About the Concept of Disasters." *International Journal of Mass Emergencies and Disaster* 5(1):7–32.

Sale, K.
1974 The Schumacher Lectures. Vol. 2. London: Random Century.

Shrivastava, P.
1987 Bhopal: Anatomy of a Crisis. Cambridge, MA: Ballinger.

Stratton, L.
1989 Resource Use in Cordova: A Coastal Community of Southcentral Alaska. Technical Paper No. 153. Anchorage: Alaska Department of Fish and Game Division of Subsistence.

SER 1377

Thomas, G. L., E. H. Backus, H. H. Christensen, and J. Weigand
1991 Prince William Sound/Copper River/North Gulf of Alaska Ecosystem. Cordova, AK: Prince William Sound Science Center, Copper River Delta Institute, and Conservation International.

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7 The *Exxon Valdez* Disaster as Localized Environmental Catastrophe: *Dis*similarities to Risk Society Theory

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> This . . . transformation of threats to nature from culture into threats to the social, economic, and political order is the concrete challenge of the present and the future.
>
> Ulrich Beck, *Risk Society*

INTRODUCTION

Contemporary social theorists have begun to devote increasing attention to the sources, nature, and consequences of ecological degradation in the modern world.[1] This work has begun to amend the historically conditioned social science view of the natural environment as an 'objective reality.' The pre-existing perspective legitimized opportunities for control by human social organization and created a theoretical void concerning the social [illegible] posed by massive environmental catastrophes and global environmental damage.[2] As such, recent conceptualizations of the environment–society relationship have provided both theoretical and empirical direction regarding the economic, social, and psychological consequences of contamination to the biosphere. The emergence of environmental harm as a barometer for the distribution of technological risks represents a paradigmatic shift in social theory to a more 'analytical heuristic' concern with global environmental degradation and its attendant social consequences. Although the latter issue is inextricably interwoven with postmodern thought, several European sociologists have begun to focus on technological risk and catastrophe, as well as on the emergence of a modern 'consciousness of threat,' as one perspective for explaining the demise of classical industrial society.[3]

In particular, the German sociologist Ulrich Beck argues that the broad contours of this social malaise of modernity include a variety of known risks, dangers, and impacts produced by industrial society and transformed through the process of 'reflexive modernization.' This transformation signals that, ultimately, the entire planet may succumb to the 'juggernaut of modernity,' the runaway train that leads down the 'road to hell.'[4] Toxicity in modernity is more threatening and ominous because it introduces new forms of uncertainty, posing decisive risks to humans which are irreversible and cumulative, and environmental degradation that can be disastrous in scope. These modern risks are often both physically and socially invisible, therefore inviting debate and conflict over the calculation of alleged impacts and damage claims.[5]

Beck also asserts that through a process of so-called 'organized irresponsibility' the institutions and calculus of classical industrial society fail to restore catastrophic damage in the risk society. The insecurity of the present is further elaborated by ongoing scientific debate and social criticism, mediated by reflexive modernization, which results in the unbinding of both science and politics. As Beck suggests, until now, 'sociology . . . has not asked what the threat of self-annihilation means to society.'[6] In his writings, environmental degradation becomes the focal point for a theory of modern society. This theoretical development out of European sociology is relevant to American environmental sociology, particularly that line of research concerned with the social effects of human-caused environmental contamination.[7]

As outlined in this volume's introductory chapter, environmental sociology in the United States has been rather atheoretical in its development through its failure to address adequately environmental degradation and to build a theoretical consensus.[8] Although issues of political economy, environmental values, social movements, and environmental attitudes have traditionally provided the content of courses on environmental sociology in American universities, none of these approaches conceptually integrates social structure and change with the biophysical environment.[9] Indeed, one can argue that the significance of the social is completely overlooked in environmental risk assessments that, as Beck asserts, '[R]esult in a sometimes trivial and meaningless discussion of nature without people.'[10]

John Hannigan criticizes this 'nonreflexive realist' position and proposes in its place a social constructivist paradigm for environmental degradation and the emergence of social movements around such issues.[11] Given that ecological consciousness and action show variation over the course of time, Hannigan argues that 'environmental problems do not materialize by themselves; rather they must be "constructed" by individuals or organizations who define pollution . . . as worrisome and seek to do something about it.'[12] Hannigan applies his constructivist model to environmental problems, communications, science, and risks through case studies of acid rain, biodiversity loss, and biotechnology, providing a conceptual framework for environmental sociology. However, this model ignores any realist account of environmental degradation and is limited by an 'oversocialized' conception of the environment.[13]

A more 'reflexive realist' view recognizes that the physical destruction of the environment can be empirically measured and scientifically monitored, thus avoiding an extreme form of naive constructivism. Both perspectives – constructivist and realist – are relevant and necessary for understanding the human consequences of environmental degradation. We need to view the physical deterioration of the natural environment, the social construction of this demise, and the subsequent consequences for the human community within a dynamic socio-cultural context. Culturally based relationships between the biophysical environment and human communities connect realist and constructivist positions. As Szerszynski and his collaborators have recently noted, risk society is characterized by 'the problematization of objective physical-biological dangers.'[14]

Contamination of the biophysical environment results in 'a social crisis in the relationship to nature.'[15] Risk society theory frames this crisis in terms of localized hazards and reinterprets them through global concepts such as 'organized irresponsibility,' 'anxiety community,' and 'reflexive modernization.' In this chapter, we will review selected themes from these macro-theoretical concepts and contrast them with data from a more localized catastrophic event.

The verification of elements of risk society theory for environmental catastrophes should provide important information for understanding social change in late modernity. As such, the remainder of this chapter will focus on an evaluation of the appropriateness of selected themes from Beck's theoretical approach for explaining community responses to catastrophic environmental degradation. Specifically, we will use longitudinal social impact data from the 1989 *Exxon Valdez* oil spill to illuminate the utility (and indeed non-utility) of themes from risk society theory for explaining community responses to the most environmentally destructive oil spill in North American history.

ENVIRONMENTAL CATASTROPHE AS TECHNOLOGICAL DISASTER

Beck elaborates a model of social change that moves from premodern through classical modern to late-modern society.[16] This global model identifies a historical shift from natural hazards to technological hazards for the risk society, as well as a corresponding transformation from local to global threats. Beck is rather adamant about the dire invisible, irremediable, and irreversible consequences of catastrophes arising from chemical, nuclear, and genetic technologies. Risks emanating from these industrial activities are also socially explosive and contribute to organized public mobilization efforts.

This perspective has commonalities with recent social science research concerning technological disasters in the United States. In particular, case studies of localized contamination have documented social conflict and disruption, psychological pathology, and negative health impacts.[17] These slowly evolving 'chronic technical disasters' and more sudden 'technological disasters' typically result in toxic contamination of the environment through organizational agency and involve the identification of a principle responsible party for legal reparations.[18] Researchers have debated the utility of distinguishing technological disasters from natural disasters and it is increasingly apparent that untoward events resulting from the failure of technology are coming to occupy key theoretical and empirical positions among scholars working in this field.

Although any type of disaster may impair a social system's ability to maintain biological survival, social order, social meanings, and social interaction, research has revealed some fundamental differences between the consequences of natural and technological disasters. Erikson describes these technological catastrophes as a 'new species of trouble,' in that these events 'contaminate rather than damage; pollute, befoul, and taint rather than just create wreckage' and 'scare human beings in new and special ways.'[19]

Whereas the literature defines events such as floods, volcanic eruptions, earthquakes, hurricanes, drought, blizzards, and tornadoes as disasters caused by 'nature' or 'acts of God,' the causes of technological disasters are frequently traced to human culpability or technological malfunction. Natural disasters involve a lack of control over processes perceived to be beyond human dominion, while technological disasters engender a loss of control over technical processes generally thought to be subject to management. Accordingly, technological disasters involve the identification of certain entities that can be blamed and held accountable for malfeasance. It is also worthwhile to observe that historical experiences with natural disasters have led communities to develop emergency preparedness and planning procedures, as well as disaster subcultures (sets of cultural defenses grounded in knowledge, norms, values, and technology) with which to respond to hazardous situations arising from the forces of nature. Society cannot wholly prevent adversity from such sources, but it can anticipate, predict, prepare, defend, and recover from nature's most extreme environmental events.[20] In contrast, we tend to perceive technological disasters as preventable and thus the organizations whose actions are ultimately responsible for these situations rarely anticipate them in advance. Government has certain responsibilities in all untoward events, but the plot thickens when industrial corporations become the focus of public blame and acrimony. The complexity of organizational and technological operations, combined with the secretiveness in which many firms shroud their manufacturing operations, confounds local efforts to prepare for a technological disaster.[21]

Because toxic contamination threatens assumptions about environmental safety, technological disasters frequently sever the relationship between people and the natural environment. This loss of 'lifescape' (i.e. the personal security of the biophysical surround) leads to the erosion of institutional trust among victims.[22] Natural disasters produce obvious physical damage to the built environment (e.g. buildings, roadways, bridges), but communities typically rebuild and recover quickly.[23] However, many technological disasters do not result in physical damage to infrastructure, but rather contaminate the local ecology. We cannot observe these agents through conventional means and, as Vyner notes, 'it is quite impossible for humans to determine if and when they are being exposed.'[24] The intractability of these events is further compounded when physicians using sophisticated equipment are unable to confirm cases of exposure. The undetectability of contaminants and the complex etiology of resulting health effects contribute to lingering uncertainty concerning the personal threats of exposure (see also the chapter by Michael Edelstein in this volume).

Within this milieu of indeterminacy, potential victims often advance rival interpretations of the situation. Kroll-Smith and Couch observe that, 'What emerges are competing views of the same local world: It is dangerous and uninhabitable; you should be concerned. No, the environment is safe and habitable; you should get control of yourself.'[25] Contamination engenders numerous risks – for instance to family and personal health, financial security, social relationships – and creates considerable distress among victims as they respond as best they can to these novel threats.[26]

As researchers have frequently observed, natural disasters follow a predictable pattern in which a community moves from a state of equilibrium through a series of stages: warning, threat, impact, inventory, rescue, remedy, recovery, and rehabilitation.[27] Technological disasters rarely follow such a linear pattern. Although some of these events have an identifiable beginning (e.g. Three Mile Island, Chernobyl, Bhopal), others originate long before people develop an awareness of a specific problem. Many instances of slow-onset chemical contamination, in which hazardous substances can remain buried underground and can seep slowly into homes and water sources over extended periods of time, fall into this latter category. Kroll-Smith and Couch contend that such cases of contamination 'trap portions of the population in the warning, threat, and impact stages.'[28] Efforts to secure assistance and gain recompense after a technological disaster typically require affected communities to enter into class-action litigation. Responsible organizations generally react defensively and attempt to minimize the perceived amount of damage for which they (and their insurers) could be financially liable. Protracted legal wrangling and processes of restoration following technological disasters may continue for decades and this creates ambiguous endings and deprives individuals of a sense of event closure.[29] These unsettling features usually give rise to a subsequent disaster – an emergent stressor that victims continue to experience over time. Such secondary disasters keep people locked into a state of long-term distress by evoking recurrent reminders of the original event and perpetuating incertitude regarding future outcomes. In short, this chronic pattern creates a 'corrosive community,' an important analogue to Beck's concept of the 'anxiety community.'[30]

The corrosive community is characterized by the deterioration of social relationships resulting from apprehension, fear, anger, confusion, and stress. This breakdown of the social fabr[illegible]urs in a milieu of anxiety and unease, facilitated by competing definitions of contamination, environmental damage, and pending threats. Victims also become distrustful of institutional offers of compensation and support. In some cases, as occurred at the infamous Love Canal, the community consequences of technological disasters are ultimate – residents disappear, although homes and buildings might remain intact.

This point is instructive because it suggests that American environmental sociologists have independently been investigating the outcomes of Beck's notion of 'localized self-annihilation,' providing micro-level evidence of themes found in contemporary social theoretical literature. In the following section we outline some of the global concepts from risk society theory that are relevant to environmental sociologists' empirical understandings of technological disasters.

CATASTROPHE IN MODERNITY: COMMUNITY IN RISK SOCIETY

Technological disasters are clearly part of the landscape of the twenty-first century. The modern age signals a shift in the nature of risk. 'Modernity is risk culture' and the acknowledgment of late and high modernity phases, or even a postmodern society, identifies a sociological concern with the 'unthinkable' or the 'dark side' of progress. This theme is embodied in the recent work of both Ulrich Beck and Anthony Giddens, who pose the 'risk of societal self-annihilation' and a social dynamic that creates doubt regarding incalculable high-consequence risks as characteristics of the present era. 'Risk society is catastrophic society' and Beck distinguishes a class of novel, contemporary hazards that are different from the natural disasters which have customarily threatened humanity.[31]

Beck's conceptualization of catastrophe is global in scope. Modern concerns such as anthropogenic climate change and ozone depletion have a holistic impact on all organic matter and extend across both time and space to encompass distant others and future generations. Importantly, these new threats preclude the provision of compensation for victims (or at least make this task very difficult given prevailing institutional mechanisms).[32] Such situations are technological breakdowns that harm the physical environment in largely invisible and unknown ways. Accountability for the social problem of environmental degradation cannot be determined and victims confront corporate, government, and legal institutions engaged in weaving webs of 'organized irresponsibility.'[33]

Although for Beck catastrophes are supra-national, he notes that the social risks of late modernity have both short- and long-term consequences for plants, animals, and people. Furthermore, in building his theory of risk society he uses the chronic mercury contamination of Villa-Parisi (Brazil) and the explosive industrial accident at Bhopal (India) to illustrate actual technological disasters in developing countries.[34] Elsewhere, he evokes Chernobyl as the classic example of the tendency of the risk society for self-annihilation.[35] Beck has also written that the risks of modernity can be geographically localized and forecasts their unpredictable social consequences to be tortuous.[36] He describes the emergence of a 'solidarity of anxiety' among victims and how such a condition contributes to the 'anxiety community.' Beck skirts the details concerning the anxiety community because, in his estimation, the ability of such a collectivity to withstand stress and not self-destruct is unknown. As he observes, 'anxiety has not been a foundation for rational action.'[37]

Beck's theoretical treatment contains occasional reference to more situated contexts. Specifically for our current purposes we suggest a more focused definition of catastrophe, relative to the concept of disaster. Furthermore, Beck's notion of the anxiety community, and his subsequent questions regarding this construct, suggests that environmental disasters may very well range in scope from ultimate global self-annihilation to instances of smaller-scale destruction. The accumulation of thousands of small-scale incidents of environmental harm could give rise to a pattern of collective anxiety in the culture of the risk society. Accordingly, an understanding of localized catastrophes and their social impacts, as well as the identification of either mobilized 'anxiety' or depressed 'corrosive' communities and subsequent patterns of social change, provides a pathway for verifying empirically aspects of Beck's theoretical work.

We are particularly interested in several of Beck's macro-level themes and his occasional examples of concrete, localized catastrophes. Our discussion will attempt to bridge these abstract theoretical concerns to the micro-context of the 1989 *Exxon Valdez* oil spill in Alaska. This objective is, at best, a hazardous undertaking. Nonetheless, Beck describes the articulation of risk society as containing 'some empirically oriented, projective social theory without any methodological safeguards,' and such a statement suggests relevance to the social impacts of localized environmental destruction. We derive some middle-range interpretations of risk society theory and contrast these themes with data on the *Exxon Valdez* disaster.

Beck's notion of catastrophe connotes an unthinkable and irreversible risk of environmental harm that threatens the lives and livelihoods of present and future generations of people, flora, fauna, air, water, and soil. Researchers have traditionally viewed the concept of 'catastrophe' in terms of extreme events in which the vast majority of residents of an area suffer dislocation. The incident disrupts normal, everyday routines for an extended period of time and strains the local social and cultural infrastructure with continuing threats to vulnerable human groups.[38] In short, we can differentiate catastrophes from disasters by the fact that they produce social damage for entire communities and this impairment can persist over an extended period of time.

Localized environmental catastrophes are highly probable in the risk society. Concrete experiences of technological failure from Chernobyl, Bhopal, Three Mile Island, and Love Canal, as well as a host of other less ignoble places, alert us to the possibility of the 'ultimate catastrophe,' that is the destruction of all organic life on the planet. However, the global risk society – particularly in a post-Cold War era – will in all likelihood come about through the accumulation of an ever-growing number of smaller-scale incidents. The proliferation of novel threats will occur within situated socio-cultural contexts engaging in processes of *reflexive modernization* and producing communities that are self-conscious of present and impending dangers.[39]

For Beck, it is this 'reflexivity of self-destruction' that drives people together, generating a 'solidarity of anxiety.' At this point, Beck becomes rather vague about the nature of the anxiety community. Initially, it seems to be a critical prerequisite for political action (i.e., a response of reflexive modernization), yet he acknowledges that it is unclear how such mobilization will occur.[40]

The important question at *present* is whether the anxiety community associated with the risk society is able to mobilize residents for collective action. Alternatively, will it generate a pattern of local social fragmentation and distress? Studies of the community impacts of technological disasters in the United States point to an important parallel with the concept of the corrosive community.

This socially destructive process tends to emerge during the aftermath of technological disasters, thereby denying the possibility of recovery or mobilization for recovery. Such collectivities are characterized by: (1) the ambiguity of biophysical damage, (2) the likelihood of a debilitating (rather than a therapeutic) process of social response, and (3) the overall tendency toward socio-cultural disruption.[41] In contrast to the solidarity of Beck's anxiety community, the conflict, uncertainty, fear, and distrust in the corrosive community loom as the 'tortuous' path for localized victims traumatized by these untoward events.

We turn our attention toward exploring these themes in the light of data on the social impacts from the *Exxon Valdez* accident. This examination will give a hearing to people Beck describes evocatively as the 'voices of the side-effects,' in this case those individuals who bear the risks of the sprawling technical system responsible for the global transport of oil. Industry experts estimated that an oil spill of catastrophic proportions would occur in Alaska only once every 227 years.[42] However, this low probability event did take place and it had profound consequences for the three small communities in the surrounding vicinity that are economically and culturally dependent on renewable natural resources.[43]

THE *EXXON VALDEZ* DISASTER AS LOCALIZED CATASTROPHE

On March 24, 1989, the supertanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound off the southcentral coast of Alaska resulting in an oil spill that caused extensive ecological damage. The vessel released over 11 million gallons of crude oil that over the course of the following weeks and months inundated a vast intertidal area and eventually spread south into the Gulf of Alaska. Alyeska, the consortium of multinational oil companies that operates the pipeline and the oil transport facility located in the coastal town of Valdez, was responsible for containing the spillage. Corporate officials, however, missed numerous opportunities to limit the effects of the accident within the first 72 hours due to inadequate communications and a lack of readily available equipment. Ultimately, the initial organizational response proved to be a complete failure. Ensuing storms and high seas over the next three-month period washed oil across approximately 1900 kilometers of rugged Alaskan coastline. Controversial clean-up methods, including the use of hot water and chemical detergents, resulted in further damage to the surrounding ecological resources and alarmed local residents.

Because the oil spill occurred during the season of greatest biological productivity, it had an immediate and devastating effect on both the natural environment and the human communities that rely on the region's renewable natural resources. The casualty list of most visible damage included more than 250 000 seabirds, 144 bald eagles, approximately 3500 sea otters, 300 seals, and 22 whales. Furthermore, marine scientists have linked declines in populations of pink salmon and herring to destruction of the bioregion's food chain and to contamination of spawning areas.[44]

Needless to say, the oil spill severely impaired the isolated local communities that are economically dependent on commercial fishing. Furthermore, the Prince William Sound area is home to several groupings of Alaska Natives, and village life, largely arranged around the subsistence gathering of fish and wild game, was severely disrupted.[45] These local residents could not conduct their traditional harvests of herring, seal, salmon, and clams because of fears of contamination (and a state-imposed moratorium). We have elsewhere described these settlements as *renewable resource communities*, that is localities with cultural, social, and economic structures organized around the collection and exchange of renewable natural resources.[46] There are three such communities in Prince William Sound – two Alaska Native villages (Chenega Bay and Tatitlek) with populations of less than one hundred persons and a primarily non-Alaska Native town (Cordova) comprising approximately 2500 people. All three communities are located in an extremely remote area and are accessible only by airplane or boat. Given their distinct dependence on renewable natural resources, these communities are extremely vulnerable to perturbations of the biophysical environment. In addition to its obvious immediate social dislocation, the oil posed longer-term threats to the cultural and economic viability of these communities due to the damage sufffered by local biota.

Commercial fishers in Prince William Sound have experienced a succession of unusual seasons since the accident. State authorities canceled the annual herring season five times during the seven years following the oil spill. Although there was a limited herring harvest in 1997, prospects for the recovery of this fishery remain uncertain. Pink salmon have experienced sporadic returns during most years since the accident and the stability of this species is questionable. Among local residents, economic hardships resulting from disruption of commercial fishing and uncertainty regarding resource recovery have contributed to ongoing cultural, social, and psychological stress.

The *Exxon Valdez* oil spill exemplified the basic features of a localized technological catastrophe for these Prince William Sound communities. The accident was the result of a loss of control over complex organizational and technical activities involving corporate, political, and societal arrangements.[47] The public variously assigned blame to the tanker captain, Exxon, Alyeska, oil corporations, and government agencies.[48] Litigants (many from the Prince William Sound communities) filed hundreds of lawsuits and the legal proceedings will likely continue well into the next century.[49] The biophysical damage stemming from the oil spill directly disrupted local environment–community relationships. Differing definitions of the amount of ecological damage, the threat to future economic viability, and the legal responsibility of corporate and government actors created deep schisms and sharp conflicts. Some community members earned considerable sums of money working on the clean-up during the oil spill's immediate aftermath, while other local residents did not, would not, or could not gain employment. Such inequity intensified internal disputes.[50]

For many local residents, the early announcements of a catastrophic oil spill virtually within sight of their homes served to give the event an identifiable beginning. However, few people living in the Prince William Sound area have experienced a sense of closure and, indeed, the accident's residual effects continue to take their toll. The aftermath of the oil spill, in the form of failed fisheries and protracted litigation, have contributed to a continuing pattern of social anxiety and distress. Over the past eight years, we have used survey and ethnographic methods to systematically collect data in several Alaskan communities on the accident's social impacts. In the following section, we draw upon this research to highlight selected themes in Beck's risk society theory.[51]

DISSIMILARITIES TO REFLEXIVE MODERNIZATION: SCIENCE, COUNTER-SCIENCE, AND ORGANIZED IRRESPONSIBILITY

The extent of the ecological damage caused by the *Exxon Valdez* oil spill has been the subject of numerous scientific debates that continue to be socially constructed nearly a decade after the actual event. Although it is indisputable that the *Exxon Valdez* spilled more than 11 million gallons of oil into Prince William Sound, it has been impossible to apply rigorous scientific models to determine unambiguously the accident's immediate and continuing ecological damages. This feature has given Exxon, the principle responsible party, a moral and legal rhetoric to avoid ultimate accountability.[52] During the four years following the oil spill, a judicially ordered moratorium prevented data pertaining to biological effects from being publicly released and this caused many local residents to question both the legal and scientific rationale for perpetuating uncertainty. Once researchers working for the state and federal governments made public their initial findings at an Anchorage symposium early in 1993, Exxon utilized one month later the annual meeting of an industrial research association, the American Society of Tests and Measurements, to present and promote the results of its own studies. While the evidence aired at the Anchorage conference described a pattern of serious – albeit in certain instances uneven and indistinct – damage, Exxon's investigations suggested that the oil spill had minimal, if any, ecological impacts.[53] More recently, a researcher who was working under Exxon sponsorship, suggested that because of 'environmental advocacy,' early calculations overestimated the oil spill's impacts, thereby exaggerating Exxon's moral and legal obligations. This assertion appeared in a peer-reviewed academic journal, adding credibility to the oil company's assessments of the damage caused by the accident.[54]

The socially constructed 'spill science,' or research into the event's effects premised on preconceptions, resulted in two distinct – and contradictory – bodies of purportedly objective data. Ott describes this incompatible discourse in the following manner:

> Something went terribly wrong with 'science' in the aftermath of the *Exxon Valdez* oil spill as illustrated by the extreme differences in the findings of key studies between government and industry. These differences are symptomatic of underlying problems with the scientific and regulatory processes that were designed to produce quality science.[55]

After the *Exxon Valdez* accident, as has become routine for large oil spills, the federal and state trustees for natural resources and the principle responsible party (i.e. Exxon) designed and executed studies to collect data to support their partisan positions. For the government, the claim was that the spillage injured resources and the relevant agencies conducted research to determine the extent of those damages. In contrast, Exxon held the position that resources may have been impaired, but natural recovery would be rapid and the company (and its contractors) proceeded to determine what and how much was unharmed to minimize its liability.[56]

For many residents of the Prince William Sound area this pattern of science and counter-science continues to be disconcerting and frustrating. A leading marine scientist residing in Cordova noted:

> The local people do not understand the complexity of determining spill impacts on the salmon and herring fisheries. There has been more variation in catch totals in the years preceding the spill than the years since the spill. So how can you absolutely say that poor salmon runs are due to the spill?[57]

Local residents interpreted this spill science as politics and the resulting litigation, in Beck's terminology, as 'institutional political discourse.' The following statements by Cordova residents illustrate this point:

> The whole mess – the spill, studies of impacts and the lawsuit – is all about money. Exxon's too powerful and rich – they will buy their own science and through their PR [public relations] make it real. We are just a gnat on an elephant's leg.
>
> I don't understand why scientific information hasn't been released. Decisions are being made that could be clarified by information.
>
> I think that it is all politics. Exxon is not really out to pay for what it has done. Exxon will fill a few pockets to avoid paying. It has also made money as a tax write-off.
>
> Exxon and politicians put pressure on the news media to suppress the news. What they claim to be real is not. It's all hype to make money.

Spill science created a sense of distrust among local residents. Many Cordovans soon after the accident became sensitive to this loss of control and lack of institutional trust. For example, a majority of respondents from a community-wide survey expressed skepticism about Exxon's ability and willingness to clean up the oil spill, the science of ecological damage assessment, and the legal system set up to distribute compensation. In August 1989, only five

months after the accident, roughly seven out of ten Cordovans felt that the legal system would not require Exxon to conduct a satisfactory clean-up. Furthermore, 83 percent of our respondents thought that the company had publicly presented misinformation, 55 percent opined that Exxon was not telling the truth, and 51 percent asserted that there was a lack of public information about the oil spill and its ecological impacts. Most residents also maintained that Exxon's activities following the accident and the ensuing clean-up reflected 'legal advice' rather than a sincere effort to restore Prince William Sound and the surrounding vicinity.

This disenchantment with institutional responsibility is further reinforced by the survey data in Table 7.1. We found that the overwhelming majority of both community residents and commercial fishers were dissatisfied with corporate, government, scientific, legal, and media responses to the oil spill. Perhaps surprisingly, only one out of three respondents expressed satisfaction with local government activities, suggesting estrangement from both primary and secondary institutions responsible for managing risks associated with the local transport of oil. The pattern of organized irresponsibility observed by local residents, as well as issues of uncertainty associated with incomplete scientific accounts of ecological damages, contributed to a loss of institutional trust among community residents.

These observations also relate to the 'unbinding of science' that Beck discusses as part of the process of reflexive modernization. For the *Exxon Valdez* oil spill, competing social constructions of ecological damage were correlated with institutional interests and local residents quickly lost faith in science's ability to measure impacts objectively. For many of our respondents the ecological damage and the long-term threat to Prince William Sound was obvious and logical. The community-wide consensus regarding dissatisfaction with the accounts emanating from the full range of institutional actors is clearly indicative of a lack of trust in experts and their relevant support systems. This pattern of 'social recreancy' deters participation in community social movements and restricts the emergence of the subpolitical structures Beck foresees as emerging out of the anxiety community.

Risk in the Modern Age

Social Theory, Science and Environmental Decision-Making

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EXHIBIT 6

Table 7.1 Community satisfaction with institutional truth regarding the *Exxon Valdez* oil spill in Cordova, Alaska, 1992

	Total community	*Commercial fishers*
Federal government	14.9	8.3
Alaska state government	14.1	14.6
Alyeska Corporation	5.2	2.1
Exxon Corporation	6.1	2.7
VECO Clean-Up Corporation	6.3	0.0
United States Coast Guard	31.9	17.0
Local government	30.4	22.9
Scientists	19.9	20.5
Lawyers	8.5	8.7
Local newspapers	26.5	23.4

DISSIMILARITIES TO THE ANXIETY COMMUNITY: SOLIDARITY OR CONFLICT?

Although the *Exxon Valdez* oil spill did not pose a direct threat to the human residents of Prince William Sound, it placed in jeopardy the viability of Alaska Native subsistence culture and the economic resources of commercial fishers. Local renewable resource communities faced both immediate and long-term ecological damage from the unknown consequences arising from the sizeable release of 'a toxic, persistent chemical' in waters so necessary for their way of life.[58] One Alaska Native stated, '[The spill] is hurting more than anything else we ever experienced. Its like losing everything you had.'[59]

The late Chief Walter Meganack, a widely respected Alaska Native elder, expressed the trauma of the unthinkable in the following manner:

> The excitement of the season had just begun, and then, we heard the news, oil in the water, lots of oil killing lots of water. It's too shocking to understand. Never in the millennium of our tradition have we thought it possible for the water to die, but it's true.[60]

Residents active in the local fisheries also felt immediately the impact of the oil spill. Following exceptional seasons during the two years prior to the accident, many commercial fishers invested their profits in additional capital equipment (e.g. boats, electronic equipment, nets). One of our respondents remarked in 1995:

> I made a lot of money in [19]88, so I bought a warehouse to start a new business, a new boat, and a pick-up truck. In six years I've lost everything – three [fishing] permits, the boats, the warehouse, my wife, my family – everything! I don't think I'll get anything from the court, either – if I do its way too late to help me.

Some especially prescient local residents began to recognize the seriousness and the enduring quality of the oil spill's economic impacts as early as 1992. Several of them described to us the financial dislocation that the accident produced:

> Since the spill I've lost a house in Montana, a lot in Montana, a new fishing boat, 25-foot Boston Whaler, 21-foot Munson Aluminum, 15-foot Boston Whaler, boat trailers, all my savings and my credit. Need I say more?

> Cordova is suffering economic disaster at this time and is causing extreme hardships here. These surveys do not accurately portray the fear and despair that many of us are feeling. We have always been highly independent and now seem to have no control over our lives.

> Since 1985 my husband and I have fought very hard to get ahead. We have worked very hard to get ahead. In 1988 we had $180,000 saved to build a new boat and since that time we have had to sell everything – crab pots, property, one boat – just to stay afloat which we are not. Last year we couldn't even make our [fishing] permit payment for the first time since we got it in 1985. Fishing is only opened half as much. We just can't make it.

Our survey data from 1995 reveals that from 1990 to 1994 the per capita economic loss (projected less *actual earnings*) *for local* commercial fishers was nearly $215 000. This continuing economic loss spiral severely affected the fishing economy of Cordova and is a major source of continuing social disruption and mental health impairment in the community.[61]

Beck acknowledges that anxiety communities are stressed. He also notes that it is an empirical question whether or not these communities can withstand stress, become politically mobilized, organize, and exert a reflexive political force. Table 7.2 addresses this theme by providing insight into the patterns of oil spill-related stress in Cordova over the last eight years. Data pertaining to the

Table 7.2 Intrusive stress and avoidance behavior scale means for the *Exxon Valdez* oil spill in Cordova, Alaska, 1989–97

	Intrusive stress	*Avoidance behavior*
Cordova community		
1989 (n = 117)	16.5	11.1
1990 (n = 68)	10.1	9.6
1991 (n = 221)	9.4	7.3
1992 (n = 151)	8.5	8.1
Cordova Commercial Fishers		
1989 (n = 49)	19.3	12.1
1990 (n = 27)	10.1	9.7
1991 (n = 73)	13.1	10.1
1992 (n = 48)	11.8	11.4
1995 (n = 88)	13.2	13.0
1997 (n = 65)	13.1	11.3
Cordova Alaska Natives		
1991 (n = 62)	13.4	11.5
1992 (n = 40)	14.6	10.7
Clinical cases[1]		
Clinical patients (symptoms due to bereavement from death of a parent 3–6 weeks after death)	21.6	n.a.
Clinical patients (6 months after therapy for symptoms due to bereavement from death of parent)	13.8	n.a.
Rape victims (2 years after incident)	11.4	n.a.

1. Data for clinical patients obtained from Howowitz (1976) and data for rape victims obtained from Seidner et al. (1988).

'impact of events' scale are available for the entire community and two high-impact groups: commercial fishers and Alaska Natives. The impact of events scale is a standardized psychological scale that measures two components of stress: (1) intrusive thoughts and recurrent images of a traumatic event, and (2) active attempts to avoid discussions or reminders of a traumatic event. This scale uses a specific event, in this case the *Exxon Valdez* disaster, to identify oil spill-related stress responses.[62] As noted, intrusive stress refers to the extent to which individuals endure recurrent memories of troublesome events. This component of the scale is informative because the frequent mental repetition of distressing experiences over long periods of time may indicate an increased vulnerability to disease progression and the deterioration of both physical and mental health.[63]

Table 7.2 clearly reveals a chronic pattern of collective stress. However, as presented these measures may not capture the full dimensions of the anxiety community because groups within such aggregates are affected differently. For instance, commercial fishers and Alaska Natives – two groups intimately linked to local environmental systems – experienced higher levels of intrusive stress. These incidences of stress among Cordovans appear substantial when contrasted to clinical patients (e.g. rape victims), further underscoring the scope of the chronic, debilitating consequences of this event for local communities.

Social disruption and psychological stress from the accident also affected utilization patterns for mental health facilities in the Prince William Sound area. Rates of mental health and alcohol counseling during the post-accident period in two local clinics (Cordova and Valdez) were significantly higher than those recorded for the pre-oil spill years. Despite this trend, mental health service delivery was severely restricted after 1989 by high personnel turnover (during an eight-year period Cordova's mental health center had five directors and over 14 staff members) due to heavy client loads and 'professional burnout.' Such evidence raises questions about whether anxiety communities are able to mitigate the long-term collective stress produced by technological catastrophes solely with local resources.

As previously described, event-related stress characterizes most communities that have suffered the effects of technological failures. In the case of the *Exxon Valdez* oil spill we have been concerned primarily with the psychological symptomology of members of vulnerable groups. We collected psychological data for commercial fishers in Cordova in July 1995 and included in our survey instrument items designed to ascertain respondents' psychological symptoms and interpersonal relationships.[64]

The results reveal that commercial fishers experienced relatively high levels of psychopathology – 20 percent of our sample evidenced severe anxiety and we classified 40 percent as having severe depression. Six years after the oil spill, we found 37 percent of commercial fishers had symptoms of spill-related Post-Traumatic Stress Disorder (PTSD). PTSD is a psychological disorder that identifies a delayed response to a traumatic event characterized by intrusive thoughts and images, avoidance behaviors, and hyper-vigilant reactions. These psychological symptoms result from a specific traumatizing event. Even more significant was the finding that one out of every two commercial fishers manifested either severe depression, PTSD, or a combination of these symptoms of psychological impairment.

The identification of severe depression and PTSD among commercial fishers provides an indication that within the anxiety community, serious emotional disorders are associated with vulnerable groups and this may preclude the emergence of collective political responses. Furthermore, our data identify two additional factors that may limit the politicization of the anxiety community, specifically the breakdown of social support systems and severe economic dislocation.

We found that commercial fishers who experienced severe depression and PTSD encountered difficulty with their interpersonal relations. Problems with relatives and within families were correlated with severe levels of psychopathology. Additionally, commercial fishers with severe levels of depression and PTSD also reported deterioration of their physical health since the oil spill.

These results clearly suggest that residents of anxiety communities may be preoccupied with resolving internal social conflicts, grappling with economic losses, and (for some) dealing with the effects of severe psychopathology. Beck notes that in risk society the 'quality of community begins to change' – indeed, our analysis of data from the *Exxon Valdez* accident suggests that the quality of community deteriorates sharply in the aftermath of an environmentally destructive event and the transformed collectivity resembles more the conflict-based corrosive community than it does the politically charged anxiety community.[46] This situation is apparent from our respondents' descriptions of community changes over a seven-year period:

> It is not the same small town with everyone pulling for each other. Now we are small groups going our own ways. Some old timers just couldn't handle the aftermath and moved away. The new people mostly seem to want to make a pocket full of money and leave for somewhere else.
>
> The oil spill has permanently changed our lifestyle, our community will never be the same. There is a different feeling to me; more stress, less open, less everyone helping each other. The community does not feel as safe.

> The food prices are atrociously high. Thirty families have moved away. People are drinking more – more alcoholism and more fights. Some friendships are only seasonal now.
>
> More harsh feelings. More separation of the town. Oil spill issues have affected the community.
>
> My husband got cancer three months after the spill. We believe that the stress from the oil spill caused cancer. There are many cancer cases in Cordova. The oil spill divided a lot of people, and it also reunited a lot of friendships. The spillionaires [residents who made sizable sums of money during the accident's immediate aftermath] caused a lot of resentment between those who helped and those who did not. Prices of groceries doubled and never went back down.
>
> The town remains split because of the spill and those who made too much money from it. Also, a lot of people have died – seems like more than usual – stress?
>
> Everyone got along well before, but now the city government and everybody else are fighting. There is a lot of bickering in the community.
>
> When asked this question, my immediate response is tears welling up. I don't know why, but the pain and loss I felt two years ago can suddenly come forth. The spill and the subsequent disfunctionalism of many people in this town feels like a horrible killing cancer has been planted in our community and I feel ineffectual in bringing a positive change. I even feel a diminished energy to seek solutions.
>
> The people in Cordova used to be so upbeat, but now they're so negative. There's a big split between the haves and have nots, particularly those who worked on the cleanup. Businesses are being told by banks to stop extending credit. Also backstabbing is going on, but before people were more congenial.

Other data collected from Cordova in 1992 do not support Beck's hypothesis that the anxiety community will evolve into a more active, politicized locality. This survey found that only 26 percent of our respondents had become more involved in community affairs since the oil spill. In contrast, over 40 percent indicated that they had become less active during the same time period. These findings point to patterns of social fragmentation, distrust, and isolation that are characteristic of corrosive communities.

While social and economic instability continue to plague Cordova, Exxon's legal strategy has perpetuated divisiveness and uncertainty.[66] Rather than enhanced community solidarity, a significant proportion of Cordova residents have experienced since the oil spill continuing social conflict, economic loss, deteriorated social relationships, increased social isolation, severe psychopathology, and loss of trust in self and others. A long-time Cordova resident summarized his corrosive situation as follows:

> I won't be the same, my family won't be the same, the community won't be the same. I don't go out on the Sound much any more. When I go, I don't see oil. (Unless you dig on the beaches) the scenery is just as nice as before, but is like someone turned off the sound. The [animals] are few, as are the birds. You cannot go two blocks in town without seeing some leftover from the spill. The papers, radio, and publications of any group talk about the oil spill, the environment, and our health. Every group has its own scientists, lawyers, and reports (none ever agree with anyone else). *Mostly I'm just mixed up, I don't know who to believe or why.* I don't trust my fellow man much any more and I don't know why. My life isn't as much fun and I don't know what to do about it.

CONCLUSIONS

Modern, high-consequence catastrophes are a critical element in Ulrich Beck's theoretical writings on risk society. We have attempted in this chapter to identify certain themes from Beck's oeuvre and to contrast his macro-level contentions with the micro-level formulations emerging from field studies of technological disasters. The conceptual *dissimilarity* between the anxiety community and the corrosive community provides one avenue for examining the social responses to the *Exxon Valdez* oil spill in the light of Beck's predictions concerning an emergent risk society. As we noted above, Beck is rather ambivalent about the outcomes of the anxiety community. Political mobilization, or meaningful subpolitical action, is also associated with other structural changes contained in his wide-ranging risk society theory. In this chapter, however, we have focused solely on the issue of technological catastrophe and subsequent community response. Our analysis suggests that the contrasting concept of the corrosive community is more applicable to victims of the *Exxon Valdez* oil spill. The lay public's loss of trust in relevant institutions, prolonged economic dislocation, chronic patterns of psychopathology, and continuing community conflict has not created a social context conducive to political mobilization, community solidarity, or social movements.

We observe that when viewed as a macro-level theory of social change, Beck's writings may be temporally bound to the post-World War II period, geographically limited to northern Europe, and (as noted by Jeffrey Alexander) subject to cultural modification.[67] Our analysis of the aftermath of the *Exxon Valdez* oil spill reveals that some aspects of Beck's theory are *simply not* generalizable to localized hazards. Nonetheless, other insights from his work – such as the unbinding of science and politics – appear to be outcomes that correspond quite favorably with our findings from the *Exxon Valdez* case. However, local responses to competing scientific claims of ecological damage resulted in hostility to institutional claims and less participation in community organizations. For this localized catastrophe, we witnessed a pattern of internal conflict and social isolation rather than a mobilized consensus for subpolitical change.

Current social theorizing with respect to the environment provides an abundance of hypotheses that require detailed sociological analysis. In this chapter we have attempted to draw on certain themes from Beck's writings and to evaluate their applicability in terms of one localized disaster. This daunting objective invariably involved some 'theoretical slippage' to transform macro-level heuristics to plausible middle-range empirical outcomes. We acknowledge this limitation and urge others to pursue empirical inquiries into the viability of the ambitious work now being produced under the rubric of environmental social theory. Through these efforts we may be able to establish the macro–micro linkages between these discourses.

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NOTES

1. R. Heilbroner, *An Inquiry Into the Human Prospect* (New York: W. W. Norton, 1974); A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991); U. Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992); and U. Beck, *Ecological Politics in an Age of Risk* (Cambridge: Polity Press, 1995).
2. For example, see T. Parsons, *Essays in Sociological Theory: Pure and Applied* (Glencoe IL: Free Press, 1949); T. Parsons, *The Social System* (Glencoe IL: Free Press, 1951); and L. White, *The Science of Culture* (New York: Farrar Strauss, 1949).
3. For example, see Beck, *Risk Society* and *Ecological Politics*. Refer also to A. Giddens, *The Consequences of Modernity* (Cambridge: Polity Press, 1990); Giddens, *Modernity and Self-Identity*; and U. Beck, A. Giddens, and S. Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Cambridge: Polity Press, 1994).
4. Giddens, *Modernity and Self-Identity*.
5. H. Vyner, *Invisible Trauma: The Psychosocial Effects of Invisible Environmental Contaminants* (Lexington, MA: D. C. Heath, 1988). See also Giddens, *Modernity and Self-Identity*; and Beck, *Risk Society*.
6. Beck, *Ecological Politics in an Age of Risk*.
7. J. S. Kroll-Smith and S. Couch, 'Symbols, Ecology and Contamination: Case Studies in the Ecological-Symbolic Approach to Disaster,' *Research in Social Science and Public Policy*, 5 (1993): 47–73; and K. Erikson, *A New Species of Trouble: Explorations in Disasters, Trauma, and Community* (New York: W. W. Norton, 1994).
8. See also S. Cable and C. Cable, *Environmental Problems, Grassroots Solutions: The Politics of Grassroots Environmental Conflict* (New York: St. Martin's Press, 1995).
9. See, among others, O. Duncan, 'From Social System to Ecosystem,' *Sociological Inquiry*, 31 (1961): 140–9; W. Catton and R. Dunlap, 'Environmental Sociology: A New Paradigm,' *The American Sociologist*, 13(1) (1978): 41–9; and A. Schnaiberg and K. Gould, *Environment and Society: The Enduring Conflict* (New York: St. Martin's Press, 1994).
10. Beck, *Risk Society*.
11. J. Hannigan, *Environmental Sociology: A Social Constructionist Perspective* (London: Routledge, 1995). See also U. Beck, 'World Risk Society as Cosmopolitan Society? Ecological Questions in a Framework of Manufactured Uncertainties,' *Theory, Culture, and Society*, 13(4) (1996): 1–32.
12. Hannigan, *Environmental Sociology*.
13. For critiques of the constructivist position see: T. Benton, 'Biology and Social Theory in the Environmental Debate,' pp. 28–50 in M. Redclift and T. Benton, eds, *Social Theory in the Global Environment* (London: Routledge, 1994); M. Redclift and G. Woodgate, 'Sociology and the Environment,' pp. 51–65 in the same volume. The social constructivist position can be expanded in terms of being 'more real' or 'less real.' That is, social constructions embedded within and corresponding to decisions and policies of institutions may appear to be 'more real' to the lay public. See M. Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford: Oxford University Press, 1995).
14. B. Szerszynski, S. Lash, and B. Wynne, 'Introduction: Ecology, Realism, and the Social Sciences,' pp. 1–26 in S. Lash, B. Szerszynski, and B. Wynne, eds, *Risk, Environment and Modernity: Towards a New Ecology* (London: Sage, 1994).
15. Beck, 'World Risk Society as Cosmopolitan Society?'
16. See, in particular, Beck, *Ecological Politics*.
17. For example see K. Erikson, *Everything in its Path: Destruction of Community in the Buffalo Creek Flood* (New York: Simon & Schuster, 1976); Erikson, *A New Species of Trouble*; M. Edelstein, *Contaminated Communities: The Social and Psychological Impacts of Residential Toxic Exposure* (Boulder, CO: Westview Press, 1988); and S. Couch and J. S. Kroll-Smith, eds, *Communities at Risk: Collective Responses to Technological Hazards* (New York: Peter Lang, 1991).
18. M. Brown, *Laying Waste: The Poisoning of America by Toxic Chemicals* (New York: Washington Square Press, 1981); S. Couch and J. S. Kroll-Smith, 'The Chronic Technical Disaster: Toward a Social Scientific Perspective,' *Social Science Quarterly*, 66 (1985): 564–75; and D. Gill and J. S. Picou, 'Toxic Waste Disposal Sites as Technological Disasters,' pp. 81–98 in D. L. Peck, ed., *Psychological Effects of Hazardous Waste Disposal on Communities* (Springfield, IL: Charles C. Thomas, 1989).
19. Erikson, *A New Species of Trouble*. Refer also to A. Baum and I. Fleming, 'Implications of Psychological Research on Stress and Technological Accidents,' *American Psychologist*, 48(6) (1993): 665–72; J. S. Kroll-Smith and S. Couch, 'Technological Hazards: Social Responses as Traumatic Stressors,' pp. 79–91 in J. Wilson and B. Raphael, eds, *International Handbook of Traumatic Stress* (New York: Plenum Press, 1993); and M. Cohen, Economic Dimensions of Environmental and Technological Risk Events: Toward a Tenable Taxonomy,' *Industrial and Environmental Crisis Quarterly*, 9(4) (1996): 448–81.
20. A. Barton, *Communities in Disaster: A Sociological Analysis of Collective Stress Situations* (Garden City, NY: Doubleday, 1969) and G. Baker and D. Chapman, eds, *Man and Society in Disaster* (New York: Basic Books, 1962).
21. P. Shrivastava, *Bhopal, Anatomy of a Crisis* (Cambridge, MA: Ballinger, 1987); C. Perrow, *Normal Accidents: Living with High-Risk Technologies* (New York: Basic Books, 1984); and Beck, *Risk Society* and *Ecological Politics*.

22. Edelstein, *Contaminated Communities*; and Erikson, *A New Species of Trouble*.
23. T. Drabek, *Human System Responses to Disaster: An Inventory of Sociological Findings* (New York: Springer-Verlag, 1986).
24. Vyner, *Invisible Trauma*.
25. Kroll-Smith and Couch, 'Technological Hazards.'
26. W. Hallman and A. Wandersman, 'Attribution of Responsibility and Individual and Collective Coping with Environmental Threats,' *Journal of Social Issues*, 48(4) (1992): 101–18; and Erikson, *A New Species of Trouble*.
27. Drabek, *Human System Responses to Disaster*; E. Garrity and B. Flynn, 'Mental Health Consequences of Disasters,' pp. 101–21 in E. Noi, ed., *The Public Health Consequences of Disasters* (New York: Oxford University Press, 1997).
28. Kroll-Smith and Couch, 'Technological Hazards.'
29. This approach is fairly standard in the United States where it is the judicial system that is positioned to intervene in such situations. See J. S. Picou and D. Rosebrook, 'Technological Accident, Community Class-Action Litigation, and Scientific Damage Assessment: A Case Study of Court-Ordered Research,' *Sociological Spectrum*, 13(1) (1993): 117–38; and J. S. Picou, 'Compelled Disclosure of Scholarly Research: Some Comments on High Stakes Litigation', *Law and Contemporary Problems*, 59(2) (1996): 149–57.
30. W. Freudenburg and T. Jones, 'Attitudes and Stress in the Presence of Technological Risk: A Test of the Supreme Court Hypothesis,' *Social Forces*, 69(4) (1991): 1143–68. See also Beck, *Risk Society*.
31. Giddens, *The Consequences of Modernity*; Giddens, *Modernity and Self-Identity*; S. Lash and B. Wynne, 'Introduction,' pp. 1–8 in Beck, *Risk Society*.
32. Beck, *Risk Society*; D. Goldblatt, *Social Theory and the Environment* (Cambridge: Polity Press, 1996); and M. Cohen, 'Risk Society and Ecological Modernization: Alternative Visions for Post-Industrial Nations,' *Futures*, 29(2) (1997): 105–19.
33. Beck, *Risk Society*; and Erikson, *A New Species of Trouble*.
34. Beck, *Risk Society*.
35. Beck, *Ecological Politics*.
36. Beck, *Risk Society*.
37. Ibid.
38. E. Quarantelli, 'What is a Disaster? The Need for Clarification and Conceptualization in Research,' pp. 41–73 in B. Sowder, ed., *Disasters and Mental Health* (Washington, DC: US Department of Health and Human Services and National Institute of Mental Health, 1985); E. Quarantelli, 'Disasters and Catastrophes: Their Conditions In and Consequences For Social Development,' University of Delaware, Disaster Research Center, No. 281; and Garrity and Flynn, 'Mental Health Consequences of Disasters.'
39. Goldblatt, *Social Theory and the Environment*. For a contrasting view refer to the chapter in this volume by Michael Edelstein.
40. Beck, *Risk Society*.

41. Freudenburg and Jones, 'Attitudes and Stress in the Presence of Technological Risk.'
42. Note that this probability estimate does not necessarily mean a disastrous oil spill would occur only *after* the elapse of 227 years. Rather, a strict interpretation of this statement advises us that a catastrophic accident would take place once *within* this time span.
43. J. S. Picou and D. Gill, 'The *Exxon Valdez* Oil Spill and Chronic Psychological Stress,' pp. 879–93 in F. Rice, R. Spies, D. Wolfe and B. Wright, eds, *Proceedings of the* Exxon Valdez *Oil Spill Symposium* (American Fisheries Symposium 18, 1996); and D. Gill and J. S. Picou, 'The Day the Water Died: Cultural Impacts of the *Exxon Valdez* Oil Spill,' pp. 167–91 in J. S. Picou, D. Gill, and M. Cohen, eds, *The* Exxon Valdez *Disaster: Readings on a Modern Social Problem* (Dubuque, IA: Kendall-Hunt, 1997).
44. R. Spies, S. Rice, D. Wolfe, and B. Wright, 'The Effects of the *Exxon Valdez* Oil Spill on the Alaskan Coastal Environment' pp. 1–16 in Rice et al., *Proceedings*.
45. J. Fall and L. Field, 'Subsistence Uses of Fish and Wildlife Before and After the *Exxon Valdez* Oil Spill,' pp. 819–36 in Rice et al., *Proceedings*.
46. Picou et al., *The* Exxon Valdez *Disaster*.
47. R. Gramling and W. Freudenburg, 'The *Exxon Valdez* Oil Spill in the Context of U.S. Petroleum Politics,' pp. 71–91 in Picou et al., *The* Exxon Valdez *Disaster*.
48. L. Clarke, 'Supertanker Politics and Rhetorics of Risk: The Wreck of the *Exxon Valdez*,' pp. 55–70 in Picou et al., *The* Exxon Valdez *Disaster*.
49. W. Hirsch, 'Justice Delayed: Seven Years Later and No End in Sight,' pp. 271–307 in Picou et al., *The* Exxon Valdez *Disaster*.
50. E. Piper, *The* Exxon Valdez *Oil Spill: Final Report, State of Alaska Response* (Anchorage: Alaska Department of Environmental Conservation, 1993).
51. Details on the methodological procedures used to collect these data are available in previous publications. See J. S. Picou, D. Gill, C. Dyer, and E. Curry, 'Disruption and Stress in Alaskan Fishing Community: Initial and Continuing Impacts of the *Exxon Valdez* Oil Spill,' *Industrial Crisis Quarterly*, 6 (1992): 219–34; J. S. Picou and D. Gill, 'The *Exxon Valdez* Oil Spill and Chronic Psychological Stress'; D. Gill and J. S. Picou, 'The Day the Water Died: Cultural Impacts of the *Exxon Valdez* Oil Spill,' pp. 167–91 in Picou et al., *The* Exxon Valdez *Disaster*; and J. S. Picou and C. Arata, *Chronic Psychological Impacts of the* Exxon Valdez *Oil Spill: Resource Loss and Commercial Fishers*, Report to the Prince William Sound Regional Citizens' Advisory Council, March 1997.
52. R. Ott, *Sound Truth: Exxon's Manipulation of Science and the Significance of the* Exxon Valdez *Oil Spill* (Anchorage: Greenpeace, 1994); and Hirsch, 'Justice Delayed.'
53. Ott, *Sound Truth*.
54. J. Wiens, 'Oil, Seabirds, and Science: The Effects of the *Exxon Valdez* Oil Spill,' *Bioscience*, 46(8) (1996): 587–97.
55. Ott, *Sound Truth*.
56. Ibid.

57. All quotations, except those noted, were collected in the field. See J. S. Picou and D. Gill, *The* Exxon Valdez *Oil Spill Open-Ended Responses to Household Survey, 1989–1992* (Starkville, MS: Mississippi State University, Social Science Research Center, 1997).
58. R. Steiner, 'Probing an Oil-Stained Legacy,' pp. 111–20 in Picou et al., *The* Exxon Valdez *Disaster.*
59. Gill and Picou, 'The Day the Water Died.'
60. Ibid.
61. Picou and Arata, 'Chronic Psychological Impacts.'
62. M. Horowitz, *Stress Response Syndromes* (New York: Jason Aronson, 1976) and A. Seidner, A. Amick, D. Kilpatrick, 'Impact of Event Scale,' pp. 255–7 in M. Hersen and A. Bellack, eds, *Dictionary of Behavioral Assessment Techniques* (New York: Pergamon Press, 1988).
63. S. Cohen and G. Williamson, 'Stress and Infectious Disease [illegible] Humans,' *Psychological Bulletin*, 109 (1991): 5–24 and A. Baum, L. Cohen, and M. Hall, 'Control and Intrusive Memories as Possible Determinants of Chronic Stress', *Psychosomatic Medicine*, 55 (1993): 274–86.
64. Picou and Arata, 'Chronic Psychological Impacts.'
65. Beck, *Risk Society*; Freudenburg and Jones, 'Attitudes and Stress in the Presence of Technological Stress.'
66. M. France, 'Corporate Litigation: Playing Hardball Is One Thing . . .', *Business Week*, 1 July (1996): 32; and Hirsch, 'Justice Delayed.'
67. J. Alexander, 'Critical Reflections on Reflexive Modernization,' *Theory, Culture, and Society*, 13(4) (1996): 133–8.

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Social, Cultural, and Psychological Impacts of the Exxon Valdez *Oil Spill*

LAWRENCE A. PALINKAS, MICHAEL A. DOWNS, JOHN S. PETTERSON,
and JOHN RUSSELL

The sociocultural and psychological impacts of the *Exxon Valdez* oil spill were examined in a population-based study of 594 men and women living in 13 Alaskan communities approximately one year after the spill occurred. A progressive "dose-response" relationship was found between exposure to the oil spill and the subsequent cleanup efforts and the following variables: reported declines in traditional social relations with family members, friends, neighbors and coworkers; a decline in subsistence production and distribution activities; perceived increases in the amount of and problems associated with drinking, drug abuse, and domestic violence; a decline in perceived health status and an increase in the number of medical conditions verified by a physician; and increased post-spill rates of generalized anxiety disorder, post-traumatic stress disorder, and depression. Alaskan Natives, women, and 18–44 year olds in the high- and low-exposed groups were particularly at risk for the three psychiatric disorders following the oil spill. The results suggest that the oil spill's impact on the psychosocial environment was as significant as its impact on the physical environment. The results also have important theoretical and pragmatic implications for the understanding and mitigation of adverse impacts of long-term processes of sociocultural change.

Key words: Alaska, disasters, psychosocial stress, sociocultural change, subsistence

ON FRIDAY March 24, 1989, the 987-foot supertanker *Exxon Valdez* ran aground on Bligh Reef (about 25 miles from the city of Valdez, Alaska), spilling over 11 million gallons (260,000 barrels) of crude oil into the once-pristine environment of Prince William Sound. Under the direction of Exxon and its prime contractor, VECO, a sequence of actions designed to contain and clean up the spill was initiated. Fishing vessels were hired to help lay containment booms, transport equipment, and ferry refuse to disposal or transshipment sites. Thousands of residents and non-residents were hired to participate in the cleanup effort. In some instances, entire communities such as Tatitlek were hired to protect their own beaches. Beaches were scoured with high-pressure water hoses, and countless numbers of rocks were scrubbed to remove surface oil. Hundreds of fishing vessels boomed floating oil slicks while larger vessels ("skimmers") siphoned off collected oil. The highly advertised wages ($17.69 per hour) attracted both the employed and unemployed—initially from within Alaska, but later from all over the United States. Such high wages for unskilled workers made it difficult for local hotels, shops, restaurants, grocery stores, and canneries to retain their employees. Local governments were also drawn into the response, committing the use of local community facilities (offices, meeting places, equipment services) to organize, coordinate, and perform cleanup activities. A chain reaction had begun that was to affect virtually every aspect of social and economic relations in the region.

The primary focus of public concern and subsequent mitigation efforts by Exxon and federal, state, and local agencies was initially on the direct environmental and economic impacts of the oil spill. There was also, however, concern about the indirect social and psychological impacts. This concern stemmed from the community conflict created by the unequal distribution of cleanup jobs and compensation for the use of boats and equipment owned by local residents, and the influx of outsiders and resulting strain on community services. This conflict was accompanied by a dramatic increase in visits to community clinics for primary care and mental health services reported throughout the affected region. Significantly increased rates of physical health symptoms and psychiatric disorders have been found in previous studies of other natural (Logue, Melik, and Hansen 1981; Shore, Tatum, and Wollmer 1986a, 1986b) and technological (Baum, Gatchel, and Schaeffer 1983; Bromet et al. 1980; Smith et al. 1986) disasters.

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EXHIBIT 7

But the story of the *Exxon Valdez* oil spill is more than an account of disaster-related psychosocial impacts. It is also an event of sociocultural change. For both Native and non-Native residents of the small, rural communities in the affected region, the event represents the alteration of a traditional way of life in response to contact with the larger Euro-American social system. In this particular instance, this contact assumed two distinct forms. The first was the oil itself: physically, during participation in cleanup efforts; culturally, in terms of effects on traditional subsistence harvesting activities; and economically, in terms of the subsequent closure of certain commercial fisheries. The second form of contact was the involvement of residents in the affected communities with the management and personnel of Exxon, VECO, representatives of numerous federal and state agencies, and a barrage of outsiders interested in participating in cleanup efforts for a variety of monetary or altruistic reasons.

The social and psychological impacts of the *Exxon Valdez* oil spill provide a model of the anticipated impacts of similar events which are increasingly likely to occur in circumpolar regions in particular as the quest for oil expands in response to the uncertainty of supplies from the Middle East, and in developing nations in general as they become dumpsites for toxic waste from the industrialized nations. These impacts extend beyond the event itself, however, for they provide an opportunity to examine the impacts of long-term processes of sociocultural change. It remains to be determined whether disasters result in severe long-term psychological impacts and provide the impetus to social change, or whether the social and psychological impacts are merely short-term and minimal (Shore, Tatum, and Wollmer 1986a). We contend that such events serve as a paradigm of long-term processes of sociocultural change in two respects. First, they provide case studies of individual and community responses to changes in the social and natural environment. These responses may be temporary, designed to establish some level of equilibrium with the environment, or they may be radical or permanent, resulting in a fundamental transformation of one or more components of the sociocultural system (Palinkas, Harris, and Petterson 1985). Second, they provide an opportunity to examine the association between processes of sociocultural change and subsequent health and wellbeing.

This paper presents data collected from a household survey of 594 residents living in 13 different communities in the Prince William Sound, Kenai Peninsula, Kodiak Island, Alaska Peninsula, and Southeast Alaska regions. Its focus is on the changes in patterns of social relations, traditional subsistence activities, and the prevalence of physical and mental disorders since the oil spill event. The objective of this study was to examine the association between levels of exposure to the oil spill and subsequent cleanup efforts and these social and psychological impacts.

Background

The *Exxon Valdez* oil spill covered a wide geographical area ranging from the upper Prince William Sound to southern Kodiak Island and west to the Alaska Peninsula area of Chignik Bay (Figure 1). Not all areas within this immense region were equally affected, however. In some areas, miles of shoreline and other areas used by local residents for fishing and other activities were heavily oiled while other areas were relatively untouched.

Within this wide-ranging area reside a number of distinct cultural groups of Native and non-Native origin. Non-Natives living in this region are predominately Euro-American but also include Filipinos, African Americans, and Hispanics employed in the seafood processing industry. The Native ethnic groups represented in the affected area include the Koniag, the Chugach, and the Unegkurmiut of the lower Kenai Peninsula, with all three groups identifying themselves as Aleut (Davis 1984:198). These groups possess distinct cultural traditions, but share two characteristics with Alaskan Native groups in general when contrasted with non-Natives: a history as indigenous peoples with a common experience of contact with the Euro-American sociocultural system; and a set of social relations and values based on practices of subsistence production and distribution.

Since contact with Russian fur traders in the late 18th century, the cultural history of the Native communities in the region has been one of intensive pressure for sociocultural change. Central to this process have been: an increasing involvement in the wage-labor economy; dependence upon federal, state, and local government for personal welfare and community services; and exposure to the Euro-American sociocultural system through the educational system, media, and interaction with non-Native residents (Braund and Benkhe 1979; Davis 1979; Petterson, Palinkas, and Harris 1982). Alas-

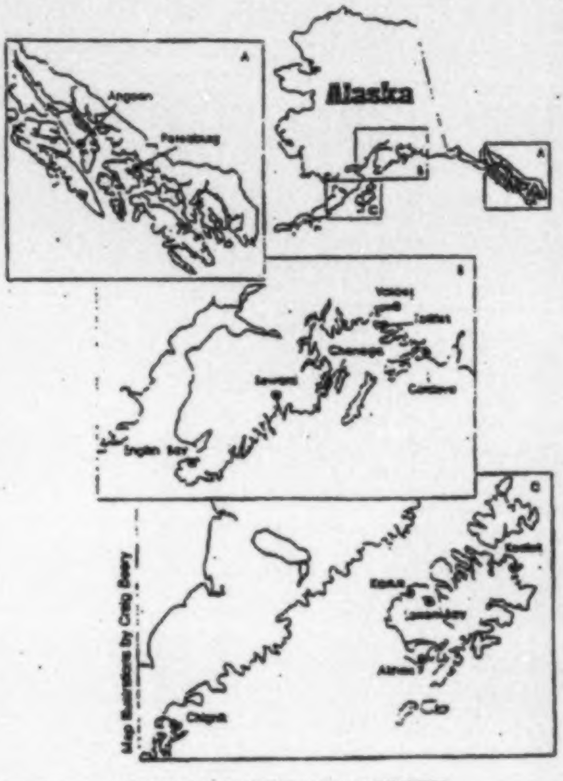

FIGURE 1. *EXXON VALDEZ* STUDY COMMUNITIES

kan Natives have also experienced a significant increase in accidental and intentional injuries, alcohol and drug abuse, and other mental disorders (Kraus and Buffler 1979, Palinkas 1987). This increase in Native morbidity and mortality has been attributed to a number of factors associated with sociocultural change, including: migration to cities and towns (Bloom 1973, Chance 1968, Parkin 1974); greater social complexity of modern community life with its demand for social conformity and group-oriented action (Chance 1965); discrimination, producing lack of self-esteem and cognitive conflict (Chance 1968, Parkin 1974); and the elimination of traditional, culturally sanctioned techniques for coping with these stressors (Foulks 1980, Kost-Grant 1983).

Associated with recent sociocultural changes is the disruption of traditional family bonds and the breakdown of organized, consistent, traditional relationships by the stresses of living in a cash economy (Parkin 1974). This disruption has taken three forms: the generational conflicts emerging between traditional Native value placed on "familism" and Euro-American value placed on individualistic success (Parker 1964); emerging conflicts of class stratification, resulting from increased cash and bureaucratic power being concentrated in the hands of a few (Klausner, Foulks, and Moore 1980); and loss of traditional male status associated with increasing numbers of women in the wage labor force (Travis 1984).

Rapid sociocultural change in rural Alaska has also led to conflict between rising expectations and limited wage labor opportunities (Parkin 1974, Travis 1984), and between the political and economic structures which constrain individual and community attempts to construct meaningful and rewarding social environments (O'Neil 1986). This conflict is particularly evident in small rural communities where Natives committed suicide at a rate 1.8 times that of their urban counterparts (Hlady and Middaugh 1986). Combined with the loss of traditional male status, these factors may also account for the fact that young Native males between the ages of 15 and 24 experience the highest rates of suicide (Blackwood 1978, Hlady and Middaugh 1988).

In addition to their experience with sociocultural change and the larger Euro-American society, the communities in the affected region share a common link to the ocean and its resources through commercial fishing, subsistence harvesting, or recreation. Commercial fishing constitutes the dominant sector of the economies of communities like Kodiak and Cordova, and plays a lesser but still important role as an economic sector in communities like Seward and Valdez. Furthermore, the lifestyle and quality of life of residents in these communities is tied to the ocean and its resources. For both Natives and non-Natives, the commercial harvest of these resources is essential to the purchase of culturally valued goods and services.

These marine resources, however, have varying degrees of cultural significance. Subsistence production and distribution play an important part in the lives of rural non-Native Alaskans as well, but such activities lie at the core of Alaskan Native culture and identity and provide the framework for traditional social relations (VanStone 1962, Fienup-Riordan 1983, Jorgensen 1990). In Native communities, marine life provides important foods that are valued and preferred over "western" foods. These foods include fish (e.g., salmon, halibut, rockfish, Dolly Varden trout); shellfish (crabs, clams); marine mammals (seals, sea lions); birds; and wild plants. Furthermore, the social processes of taking, processing, and distributing these foods has cultural significance beyond the importance of the food consumed. These activities form the basis for networks of social relations that link household members, community residents, and communities throughout the region. These activities also underlie certain values and patterns of behavior, including a disdain for social, political, or economic status differentiation, the practice of giving without expectation of reciprocity, and a respect for the physical environment to insure the renewal of its resources.

Methods

SAMPLE. A survey of 599 households in 13 communities, 11 in the region directly exposed to the oil spill itself and two control communities, was conducted by a research team of applied anthropologists between March 30 and May 15, 1990.[1] Sampling frames were developed in the field from a variety of sources, including Census Bureau tract maps, other city maps, and maps developed by interviewers and local experts. In each community, however, the number and location of households was verified by a census conducted by a research team member. After listing the addresses of all domiciles in the community, numbers were assigned to each household in the sampling frame.

Random samples of households were then drawn at a predetermined ratio using computer generated tables of random numbers.[2] Once each household was selected, a respondent within the household was randomly selected on the basis of birthdate. A household member at least 18 years of age whose birthday was closest to the date of the interview was selected as the respondent. If for some reason that person was unable to be interviewed, then the person with the next closest birthdate was selected. Informed consent was obtained from each respondent after the interview procedures were fully explained. Interviews were conducted by 15 trained fieldworkers and lasted between 45 and 120 minutes.

Incomplete information resulted in the elimination of five respondents, leaving a total sample size of 594. Approximately 84% of all randomly selected subjects agreed to participate. The sociodemographic characteristics of the sample were compared to those reported for each community in the most recent local census available. A high degree of correspondence was found, suggesting that overall the sample was representative of the population of each community. In addition, survey responses were cross-validated with data obtained from informal interviews with respondents, detailed interviews with key informants in each community, and participant observation of community activities by trained fieldworkers.

MEASURES. Demographic variables examined included age, gender, ethnicity, education, and total household income in 1988. Age was measured in years and grouped into two categories: 18–44 years and 45+ years old. Ethnicity was measured using a 12-item variable including: white/Caucasian, Koniag/Aleut/Sugpiaq, Eyak, Athapaskan, Yup'ik/Inupiaq, Other Alaskan Native, Filipino, Hispanic, Asian/Oriental, Black, American Indian, and Other. These categories were further classified into Alaskan Native and non-Native groups. Education was measured using an eight-item variable ranging from less than sixth grade to a graduate degree, and further classified into two groups on the basis of graduation from high school. Household income for 1988 was measured using a 13-item variable ranging from less than $5,000 to more than $150,000 and further classified on the basis of a median income of $40,000 into two groups.

Exposure to the oil spill and subsequent events was assessed on the basis of responses by residents of the affected communities to six different questions: 1) Did you or anyone in your household use, before the spill, areas along the coast that were affected by the spill; 2) Did you work on any of the shoreline or water cleanup activities of the oil spill; 3) Are there any other ways that you came into contact with the oil spill or cleanup activities, such as during recreation, hunting, fishing, or gathering activities; 4) Did you have any property that was lost or damaged because of the oil spill or cleanup; 5) Did the oil spill cause any damage to the areas you or other household members fish commercially; and 6) Has the oil spill directly affected the hunting, fishing, or gathering activities of any members of this household? Each response was coded 0 for a no response and 1 for a yes; the responses were then summed to provide a continuous measure of exposure with a range of 0 to 6. The Exposure Index was found to have an inter-item reliability (Cronbach's alpha) of .73 for this population. The mean exposure score for residents in the affected communities was 2.54 (S.D. = 1.69).

Following the procedure utilized in other cross-sectional studies of disasters (Robins et al. 1986; Shore, Tatum, and Wollmer 1986a, 1986b; Smith et al. 1990), subjects were classified into three groups on the basis of maximum level of exposure. Residents in the affected communities were classified as being either high-exposed or low-exposed, depending on whether their Exposure Index Score fell above or below the group median (3.00 for non-Natives and 4.00 for Natives). Residents living in the two control communities were classified as being not-exposed.

The oil spill's impact on social relations was examined by asking respondents if relations with spouse or partner, children living at home, other relatives, neighbors and friends, people from other communities, and co-workers had improved, stayed the same, or declined since the spill. Respondents were also asked whether they had experienced any problems with outsiders or with friends since the spill, and whether the spill had influenced patterns of social visitation, participation in religious activities and community events, and volunteer efforts.

The oil spill's impact on traditional subsistence production and distribution activities was assessed by asking respondents about time normally spent hunting, fishing, and gathering, time spent with people from other households on these activities, the amount of harvested resource foods shared with others and with elders, the amount of harvest resource foods received from other families, the number of household members engaged in subsistence production activities, and the opportunities for children to learn subsistence production skills. Respondents were asked whether these activities increased, stayed the same, or decreased since the spill compared with the same time in 1988.

Depressive symptoms were measured using the Center for Epidemiologic Studies Depression scale, the CES-D (Radloff 1977).[3] In this population, the CES-D was found to have an inter-item reliability (Cronbach's alpha) of .90 among Native respondents and .86 among non-Native respondents. A modified version of the Diagnostic Interview Schedule (Robins et al. 1981) was used to detect cases of "generalized anxiety disorder" (GAD), based on criteria outlined in the DSM-III (Diagnostic and Statistical Manual of Mental Disorders, Version III) (APA 1980). A modified version of Version III of the Diagnostic Interview Schedule was used to identify cases of post-traumatic stress disorder (PTSD), based on DSM-IIIR criteria (APA 1987, Robins et al. 1989).

Because of the cultural sensitivity in rural Alaskan communities over the issues of alcohol and drug abuse and domestic violence (Shinkwin and Pete 1982), respondents were not asked about changes in their own patterns of drinking or drug usage, or about their involvement in episodes of domestic violence. It was felt that such questions would not lead to useful response rates or meaningful results. Instead, respondents were asked if they thought people in their particular community and their close friends and family were drinking, using drugs, and fighting more than before, about the same, or less than before the spill. They were also asked if the amount of drinking, drug use, and domestic violence was leading to problems that weren't there before the spill.

None of the residents in the sample incurred injuries as a result of direct exposure to the oil spill, but the stressful nature of the events might be expected to have affected various aspects of their physical health. To explore this possibility, subjects were asked whether they had experienced a number of chronic conditions since the spill and whether or not these conditions had been verified by a physician. Chronic conditions verified by a physician were summed to provide a measure of illness. Self-perceptions of health status before and after the spill also

TABLE 1 Exposure Status by Community and Subregion, 1990

Subregion/Community	Number of subjects	Exposure status % High exposed	 % Low exposed	 % Not exposed
Prince William Sound	156	46.8	53.2	0.0
Chenega Bay	11	81.8	18.2	0.0
Cordova	66	50.0	50.0	0.0
Tatitlek	14	85.7	14.3	0.0
Valdez	65	29.2	70.8	0.0
Kenai Peninsula	84	57.1	42.9	0.0
English Bay	24	95.8	4.2	0.0
Seward	60	41.7	58.3	0.0
Kodiak Island	163	53.4	46.6	0.0
Akhiok	11	54.5	45.5	0.0
Karluk	11	54.5	45.5	0.0
Kodiak	119	48.7	51.3	0.0
Larsen Bay	22	77.3	22.7	0.0
Chignik	29	51.7	48.3	0.0
Chignik Bay	29	51.7	48.3	0.0
Southeast	162	0.0	0.0	100.0
Angoon	60	0.0	0.0	100.0
Petersburg	102	0.0	0.0	100.0
TOTAL	594	37.6	35.1	27.2

were assessed by asking respondents to rate their pre-spill and current health status as excellent, very good, good, fair, or poor. These indicators were then compared by exposure status.

STATISTICAL ANALYSIS. Post-spill prevalence rates of depression, generalized anxiety disorder, and post-traumatic stress disorder were calculated on the basis of percentage of respondents or groups of respondents meeting the criteria for these conditions. Diagnostic Interview Schedule algorithms were used to identify cases of generalized anxiety disorder and post-traumatic stress disorder, based on respondents' recollections of having experienced the symptoms within the past year (i.e., after the oil spill).[4] Comparison of prevalence rates and proportional distributions between residents of exposed and not-exposed (control) communities were based on chi-square tests.[5] Comparisons across the three exposure categories were based on a chi-square test for trend in proportions (Fleiss 1981). Comparisons of mean scores were performed using an analysis of variance procedure. Nonparametric tests (Wilcoxen) were used to compare changes in perceived health status before and after the spill in each exposure group.

Results

SUBJECT CHARACTERISTICS. The distribution of subjects by exposure status within each of the 13 communities and five subregions is provided in Table 1. The Kenai Peninsula subregion had the highest percentage of residents in the high-exposed category, followed by the Kodiak Island and Chignik subregions. In general, small, predominately Native communities like English Bay, Tatitlek, Chenega Bay, and Larsen Bay had a larger percentage of residents in the high-exposed category than large, predominately non-Native communities like Valdez and Seward.

Approximately half (50.1%) of the study subjects were male, and 68.8% of the population were between the ages of 18 and 44. More than 84% of the study population were high school graduates, and 47.5% had a median 1988 household income of $40,000 or more. The proportions of high school graduates and households with a 1988 median income of $40,000 or more were significantly greater among non-Natives than Natives ($\chi^2 = 87.43$; $d.f. = 1$; $p < 0.0001$; and $\chi^2 = 45.99$; $d.f. = 1$; $p < 0.0001$, respectively). Among non-Natives, there were significantly more men living in the affected communities than in the control communities ($\chi^2 = 4.10$; $d.f. = 1$; $p < 0.05$). There were no other significant differences with respect to age, gender, and socioeconomic status (as assessed by education and median 1988 household income) between study subjects living in the affected and control communities for either Natives or non-Natives.

CHANGES IN TRADITIONAL SOCIAL RELATIONS. The oil spill event dominated daily life for many in the affected communities. One-fourth of those interviewed actually worked on the cleanup. Another 40% had various other direct contacts with the cleanup activities, including those made during the course of commercial fishing, recreation, and subsistence activities. In addition, the spill and cleanup was a daily topic of discussion for more than two-thirds of the households in the study, indicating the level of involvement, both voluntary and involuntary, among residents in the affected communities.

One consequence of this community-wide preoccupation with the spill was the divisiveness and conflicts over participation in the cleanup. The impact of the oil spill and subsequent cleanup efforts on patterns of social relations among Alaskan Natives and non-Natives in the affected communities is illustrated in Table 2. The percentage of residents reporting a decline in relations with family members, relatives, co-workers, and friends and neighbors was significantly associated with exposure status.

Some of the statements taken from household surveys were exemplary of the types of interpersonal disruptions the cleanup created in various communities:

TABLE 2 Percentage of Respondents Reporting Declines in Traditional Social Relations by Ethnicity and Exposure Status, 1990

	Ethnicity					
	Natives			Non-natives		
Not getting along as well compared with the same period in 1988	% High exposed ($n = 60$)	% Low exposed ($n = 76$)	% Not exposed ($n = 52$)	% High exposed ($n = 130$)	% Low exposed ($n = 160$)	% Not exposed ($n = 109$)
Spouse or partner	17.8**	8.9	0.0	10.8***	3.1	0.0
Children living at home	14.3*	4.3	2.4	5.4**	2.5	0.0
Other relatives living at home	18.8*	8.0	0.0	4.6**	1.2	0.0
Relatives not living at home	13.6***	5.5	0.0	9.2**	5.6	0.0
Neighbors and friends	14.0**	8.1	0.0	12.3***	4.3	0.9
People from other communities	14.8*	8.6	2.0	11.5**	7.4	0.9
Co-workers	7.8	3.6	0.0	11.5*	8.6	4.6
Increased conflicts with						
Outsiders	53.3***	21.1	3.8	31.2***	23.6	1.8
Friends	40.7***	16.4	1.9	44.6***	14.8	2.8

χ^2 test for trend * $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

> Yes, as a family we kind of lost it . . . my husband . . . we were so close. Then the oil spill came and he is drinking more and [we] separated.
>
> . . . the loss of earnings or my husband [was bad] . . . and the fact that he wasn't here this summer. It was a burden on our relationship.
>
> My husband's alcoholism got worse. He had quit before the spill. Now we're separated because of the spill.
>
> [The cleanup] contributed to my break-up with my fiancee. The spill caused lots of pressure for me to keep my business going. I was stressed and it affected my relationship.

In some instances, those people who worked long hours on the spill simply had less time and energy to devote to their family relationships. In other instances, the cleanup created tensions related to family roles. For example, in Native communities the oldest child was often placed in charge of siblings as parents worked on the cleanup. When mothers and fathers returned home there were conflicts over the oldest child once again assuming a "child" rather than a caretaker role.

Exposure status was also significantly associated with the number of residents who reported conflicts with outsiders and with friends. Arguments between community members and outsiders who came to work on the spill cleanup were common in most of the communities. Between 30% and 50% of the respondents in all the affected communities indicated they had "problems" with outside cleanup workers in their communities. Many of the problems mentioned involved drunkenness and obtrusive behavior on the part of outsiders. In some communities respondents noted a very sharp cleavage in the community between insiders and outsiders, a cleavage accompanied by conflict and resentment.

Not all the social conflict caused by the cleanup occurred between residents and outsiders. There were also a number of conflicts reported among friends, sometimes resulting in the dissolution of friendships. One-fourth (24%) of the respondents said they knew of instances of conflict among friends in their communities; in several of the smaller Native villages, more than 40% reported cases of friendships ending over cleanup issues. Twenty-five percent of the respondents reported arguments with others over the spill. These disputes covered a range of topics including: the environmental effects of the spill, issues of fault and responsibility, whether to work on the cleanup or not, and related monetary and employment issues.

Money was the source of much of the friction experienced in the affected communities. In Kodiak, for example, disagreements among fishermen concerning the distribution of monetary compensation for lost fishing to permit holders and crewmen by Exxon were unresolved as late as the winter of 1989 and the spring of 1990. Instances of crew members who did not hold permits or receive any crew shares led to animosity toward those captains who declined to sign for their would-be crew members. These same kinds of concerns were problems in other communities as well.

Opinion of the unequal distribution of earnings from cleanup employment were also assessed in the survey. While the majority believed it was good that people were able to make money on the cleanup, there was significant variation of responses by community. For instance, 25% to 33% of the respondents in several of the small Native communities said that the unequal distribution of income derived from cleanup activities was bad. The resulting divisiveness and factionalism generated by the nature and organization of the cleanup process was further illustrated in the following statements taken from the household survey:

> It was both good and bad because older people couldn't do anything. Exxon should have given everyone something because it affected everyone from elders down to babies.
>
> Both good and bad—some people needed the money. Some people who made big money didn't know how to use it. One [person] would be gone for days and days working on the spill. When she got back she'd spend her time at the bar instead of with her children.

Related to explicitly monetary conflicts were those associated with the bureaucratic organization of the cleanup imposed on affected communities. Smaller communities were not used to working within such a hierarchically organized structure. In one Native village an informant reported significant interpersonal problems in the community associated with VECO employment.

> Just because of a job title attached to your name gave you the reason to be somebody who turned on the rest of your community people . . . you earn the same amount of money as everybody else but . . . it just made you tend to be a lot more arrogant, which is so unnatural for [the community], it's so unnatural for community members in that way.

Positive changes resulting from the oil spill and cleanup were indicated in some responses, and these often had to do with either economic benefits or an increased sense of communities pulling together in times of adversity. However, a dominant theme in the household survey responses was that when volunteer response groups formed, the increased sense of solidarity that often resulted was subverted by Exxon's efforts to provide monetary compensation for participation in cleanup activities. That is, volunteer efforts were turned into efforts for pay, and who got paid was often perceived to be inequitably distributed, thus creating conflict.

The spill and ensuing disruptions also resulted in a significant reduction in the frequency of social visits among families and friends. The extent of disruption in this activity was revealed in the fact that 20% to 40% of those interviewed indicated less time spent visiting with friends. Those who actually worked on the cleanup reported a 42% reduction in social visits with friends, compared to a 19% reduction for those who did not participate in cleanup activities. In two Native villages, more than 70% of those interviewed reported decreased social visitations.

Cleanup workers also had significantly less time available to participate in religious activities and community festivals and celebrations. Thirty-eight percent of those participating in cleanup activities reported reduced participation in community celebrations, compared to 12% of respondents who did not work on cleanup; and 28% of those participating in cleanup activities reported reduced participation in religious activities, compared to 6% of respondents who did not work on cleanup.

Another indicator of the decline in levels of social interaction was the fact that between 10% and 30% of the respondents in each of the affected study communities indicated less time spent in volunteer activities. In small communities, volunteer activities often provide otherwise non-existent social services and thus any reduction can be disruptive of those services. Overall, 27% of those who worked [illegible]he cleanup reported a drop in [illegible]unteer activities compa[illegible]o 8% of those who did not.

Changes in Subsistence Activities. Exposure to the *Exxon Valdez* oil spill and subsequent cleanup efforts had a dramatic effect on subsistence activities for both Natives and non-Natives (Table 3). The association between exposure status and decline in subsistence activities is to be expected since the Exposure Index included questions pertaining to subsistence-related contact with the oil spill and the spill's impact on household subsistence activities. It is noteworthy that residents in the high-exposed groups reported a decline in these activities at more than twice the rate as residents in the other two groups.

This reduction in subsistence activities can be attributed to three factors. First, many areas were closed to subsistence activities. Second, the safety of subsistence foods was a major issue, and many local residents voluntarily abstained from consuming subsistence products. Because the appearance of oil was sporadic in many villages, the testing of portions of beaches was not considered completely valid by residents. Marine life was not the only subsistence food threatened. Hunting was curtailed in many communities because deer had been seen eating kelp from oiled beaches and people were afraid the meat would be toxic. Conflicting information concerning the testing process, confusing messages about the safety of foods, and technical information that was not adequately interpreted for the affected communities increased anxieties, fears, and confusion about the potential toxicity of subsistence foods. The following is typical of the concerns [illegible]ressed about the safety of subsistence foods:

> There's no telling to what degree that shellfish is tainted. Until you get some real comprehensive results back from all the testing going on, they could go into a clam bed and take a sample here, and a sample there, and not get any tainted clams. But 15 feet over here, where a couple of (oil) mousse patties [blobs of oil slightly thicker in texture than oil in a barrel] sat down and went and sunk into the ground a little bit, you're gonna have a section of tainted shellfish.

A third reason for the decline in subsistence activities was that local residents had less time for traditional subsistence activities (ranging from 45% to 86% of those interviewed by village) because of the high level of participation in cleanup in most Native villages. As a result, they did less resource gathering, and had less food to share with kin and elders, thus reducing an important social activity between households.

Native villages in general were the most heavily impacted by disruptions in subsistence activities. The reduction or cessation of subsistence activities affects not only food supplies but an entire set of social relations and practices that are an essential part of kin group and community integration. Interruption of the cycle of activity associated with subsistence has important symbolic significance for continuity in maintaining Native culture. For example, according to one local resident:

> It was very stressful because, you know, in the summertime that's when a lot of the elderly or a lot of the women are left behind to tend to their family, tend to their children. This is a time to share, a time to gather. This is how you show them this is how you survive in a village. You go down to the reef and you pick the bidarkies (chitons), you pick seaweed, you eat snails, you taught your kids the way life used to be . . . this summer you couldn't do that.

Table 3 Percentage of Respondents Reporting Declines in Traditional Subsistence Activities by Ethnicity and Exposure Status, 1990

	Ethnicity					
	Natives			Non-natives		
Compared with the same period in 1988	% High exposed ($n = 60$)	% Low exposed ($n = 76$)	% Not exposed ($n = 52$)	% High exposed ($n = 130$)	% Low exposed ($n = 160$)	% Not exposed ($n = 109$)
Time normally spent hunting, fishing, and gathering	89.5***	47.4	8.5	74.8***	38.0	8.4
Time normally spent with people from other households hunting, fishing, and gathering	83.3***	50.0	6.3	66.1***	30.5	1.2
Amount of harvested resource foods shared with others	72.4***	47.3	8.3	60.9***	34.0	6.0
Amount of harvested resource foods shared with elders	69.6***	36.5	6.3	50.6***	23.6	0.0
Amount of harvest resource foods received from others	68.4***	37.0	6.1	49.0***	25.3	3.9
Number of household members participating in hunting, fishing, and gathering	60.3***	29.4	2.1	42.7***	13.9	1.2
Opportunities for children to learn hunting, fishing, and gathering	76.5***	40.9	4.4	54.5***	18.9	1.4

χ^2 test for trend * $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

Table 4 Post-Spill Prevalence of Psychiatric Disorders: Exposure Status and Sociocultural Characteristics, 1990

Diagnostic category and sociocultural characteristic	Exposure status % High exposed	 % Low exposed	 % Not exposed
Post-Spill GAD			
Native	41.7**	23.7	19.2
Non-native	24.6**	14.8	10.1
Male	25.4***	10.4	5.5
Female	36.9**	19.6	19.1
18–44 years old	35.2***	15.2	13.0
45+ years old	18.3	14.3	13.0
Post-Spill PTSD			
Native	25.0**	5.3	5.8
Non-native	10.0	6.8	8.3
Male	8.5	6.6	2.7
Female	20.2*	5.9	11.2
18–44 years old	15.4	6.5	9.3
45+ years old	10.0	5.7	3.7
Post-Spill Depression			
Native	28.8	21.6	17.6
Non-native	17.3	12.7	10.2
Male	16.1	12.7	7.1
Female	29.8*	13.9	16.9
18–44 years old	24.5*	14.8	13.9
45 years old	17.2	10.3	9.8

χ^2 test for trend * $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

Another person speaking about the disruption of subsistence indicated similar concerns:

> When we worry about losing our subsistence way of life, we worry about losing our identity . . . It's that spirit that makes you who you are, makes you think the way you do and act the way you do and how you perceive the world and relate to the land. Ninety-five percent of our cultural tradition now is subsistence . . . it's what we have left of our tradition.

The disruptions to maintaining Native culture raised pervasive fears and increased fundamental concerns about cultural survival for many in the affected Native villages.

Psychiatric Disorders. The post-spill prevalence of generalized anxiety disorder, post-traumatic stress disorder, and depression for the study communities with all degrees of exposure (including the control communities) was 20.0%, 9.7%, and 16.6%, respectively. Exposure status was significantly associated with the post-spill prevalence of generalized anxiety disorder (x^2trend = 20.06; *d.f.* = 1; $p < 0.0001$), post-traumatic stress disorder (x^2trend = 6.64; *d.f.* = 1; $p < 0.01$), and depression (x^2trend = 7.44; *d.f.* = 1; $p = 0.006$). When compared with the control group, members of the high-exposed group had a 2-fold relative risk of post-spill PTSD and GAD, and a 1.8-fold relative risk of post-spill depression. Approximately 43% of the high-exposed group had one or more of these disorders in the year after the spill, compared with 22.7% in the low-exposed group and 22.7% in the not-exposed group.

Each of these psychiatric disorders was further examined to determine if certain social or cultural factors contributed to the excess risk. Among Alaskan Natives, exposure to the oil spill was significantly associated with the post-spill prevalence of GAD (χ^2 trend = 7.15; *d.f.* = 1; $p < 0.01$) and PTSD (χ^2 trend = 10.55; *d.f.* = 1; $p < 0.01$) (Table 4). Among non-Natives, level of exposure was significantly associated only with the post-spill prevalence of GAD (χ^2 trend = 9.21; *d.f.* = 1; $p < 0.01$). Exposure status was significantly associated with post-spill prevalence of GAD in both men (χ^2 trend = 11.00; *d.f.* = 1; $p < 0.001$) and women (χ^2 trend = 9.76; *d.f.* = 1; $p < 0.01$), and the post-spill prevalence of PTSD (χ^2 trend = 3.93; *d.f.* = 1; $p < 0.05$) and depression (χ^2 trend = 5.34; *d.f.* = 1; $p < 0.05$) in women. Among younger adults between the ages of 18 and 44; significant associations were found between level of exposure and the post-spill prevalence of GAD (χ^2 trend = 20.65; *d.f.* = 1; $p < 0.001$) and depression (χ^2 trend = 5.44; *d.f.* = 1; $p < 0.05$). Among older adults, no significant associations were found between level of exposure and prevalence of any of the psychiatric disorders.

Substance Abuse and Domestic Violence. The oil spill's impact on community perceptions of patterns of substance abuse and domestic violence is presented in Table 5. Exposure to the spill and subsequent cleanup efforts was significantly associated with percentages of Natives and non-Natives who reported an increase in drinking, drug use, and domestic violence. There was also an increase in problems associated with these activities, both within the community and among family and friends, since the spill.

Health Status. Perceptions of health status among Natives and non-Natives before and after the spill are presented in Table 6. Perceived health status prior to the spill was not associated with exposure status, indicating that the three exposure groups were fairly well matched with respect to their baseline health status among both Natives and non-Natives. Exposure status was, however, significantly associated with the number of physician-verified illness conditions occurring since the spill in each ethnic group and with perceived current health status when the two ethnic groups were combined ($p < 0.01$). Approximately 7.2% of the study subjects believe they had a medical condition that was a direct result of the oil spill. Moreover, a significant decline in perceived health status (indicated by the larger mean score) was found in the high-exposed and low-exposed groups but not in the control group among both ethnic groups.

Discussion

These results document the profound impact that exposure to the oil spill had on social relations, traditional subsistence activities, the prevalence of psychiatric disorders, community perceptions of alcohol and drug abuse and domestic violence, and physical health of Alaskan Native and non-Native residents of the affected communities. As with any cross-sectional study, it is not possible to determine causality in the observed relationships. The consistent pattern of increasing impacts with increasing exposure to the spill and subsequent cleanup efforts

TABLE 5 Percentage of Respondents Reporting Substance Abuse and Domestic Violence by Ethnicity and Exposure Status, 1990

	Ethnicity					
	Natives			Non-natives		
Social unit and problem	% High exposed ($n = 60$)	% Low exposed ($n = 76$)	% Not exposed ($n = 52$)	% High exposed ($n = 130$)	% Low exposed ($n = 160$)	% Not exposed ($n = 109$)
Community						
More drinking	57.7***	45.6	4.3	54.2***	43.3	5.3
More drinking problems	51.0***	39.7	14.0	42.0***	31.1	3.2
More drug use	45.7**	45.5	10.8	50.6***	44.4	5.0
More drug problems	47.5**	32.7	15.4	38.5***	29.6	6.8
More fighting	45.2***	16.3	5.3	44.9***	38.7	2.7
More fighting problems	48.6***	14.9	6.8	29.6***	30.8	3.8
Family and friends						
More drinking	47.3***	37.1	2.1	18.0***	9.7	3.2
More drinking problems	46.9***	25.8	6.0	16.1**	9.5	5.1
More drug use	42.1***	24.4	5.3	11.1**	6.5	0.0
More drug problems	42.5***	14.9	4.8	11.6***	6.1	0.0
More fighting	35.1***	8.7	2.7	14.7***	3.9	0.0

χ^2 test for trend * $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

does, however, suggest a dose-response relationship. A similar relationship has been reported in other studies (Baum, Gatchel, and Schaeffer 1983; Bromet et al. 1980; Gatchel, Schaeffer, and Baum 1985; Shore, Tatum, and Wollmer 1986a, 1986b). Research on the impacts of the Three Mile Island accident by Baum and his colleagues found that residents reported significantly higher levels of somatic complaints, depression, anxiety, fear, suspiciousness, and alienation than controls (Baum, Gatchel, and Schaeffer 1983; Gatchel, Schaeffer, and Baum 1985). Exposure was associated with increased rates of generalized anxiety disorder, post-traumatic stress disorder, and single-episode depression among victims of the Mount St. Helen's disaster (Shore, Tatum, and Wollmer 1986a, 1986b). One study of the Times Beach flood and dioxin contamination found no significant increase in rates of depression, anxiety, and post-traumatic stress disorder in high-exposed individuals (Robins et al. 1986). But another study of this disaster found that exposed residents had higher rates of reported health decline than indirect exposure and no exposure groups (Smith et al. 1986).

Another potential limitation of this study lies in the assessment of exposure. The measures used to assess exposure are at best crude, overlapping, and incomplete approximations of the types of exposure to the oil spill and subsequent cleanup efforts in the affected communities. Because of the complex and overlapping nature of social relations in the study communities, especially in the small, predominately Native villages, the degree of exposure of an individual resident is also dependent on activities of other residents tied to the individual through these relationships. Individuals who are identified as low exposed may be affected by the high exposure of their family, friends, and neighbors. For instance, individuals who

TABLE 6 Physical Health Status by Exposure Status and Ethnicity, 1990

	Health status					
	Prior to spill		Since spill		Verified by M.D.	
Exposure status	Mean	S.D.	Mean	S.D.	Mean	S.D.
Natives						
High exposed ($n = 59$)	2.66	1.09	3.07**	1.29	1.42	1.60
Low exposed ($n = 74$)	2.68	1.07	2.93**	1.15	1.47	1.74
Not exposed ($n = 52$)	2.64	1.07	2.73	1.09	0.67	1.15
TOTAL ($n = 185$)	2.66	1.07	2.92	1.18	1.23‡	1.58
Non-natives						
High exposed ($n = 125$)	2.05	0.98	2.45***	1.12	0.94	1.36
Low exposed ($n = 162$)	2.27	1.06	2.38*	1.13	1.14	1.43
Not exposed ($n = 108$)	2.13	1.07	2.16	1.01	0.64	0.83
TOTAL ($n = 395$)	2.16	1.04	2.34	1.10	0.94‡	1.29

* $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$ compared to health status prior to spill.
† $p < 0.01$; ‡ $p < 0.001$ by exposure status.

receive subsistence items may be influenced by the inability of subsistence producers to distribute such items either because they were afraid to harvest such items or they were too busy working on cleanup activities.

As described above, exposure was assessed at the level of both the household and the community (affected and control) rather than the individual level. As noted in Table 1, assessment of household exposure was closely associated with a community's size, ethnic composition, and proximity to the source of the spill. Moreover, these measures were selected because they were identified by local residents during the ethnographic phase of the study as the most salient aspects of the oil spill. Similar results were also obtained when exposure was determined on the basis of proximity of community to the source of the spill (Prince William Sound) and on the basis of informants' assessments of percentage of coastline near the community that was contaminated by oil from the spill.

Younger age groups, women, and Alaskan Native residents of these communities appear to have been especially vulnerable to these negative impacts as evidenced by higher rates of psychiatric disorders. An inverse association between age and psychological distress has been reported in other studies of disaster victims (Logue, Melik, and Hansen 1981; Murphy and Cowan 1985). A study of the psychological impacts of the Mount St. Helen's disaster found that female disaster victims had significantly higher rates of psychiatric disorders than males (Shore, Tatum, and Wollmer 1986a, 1986b). Differences in the prevalence of psychiatric disorders in Alaskan Natives and non-Natives may have been due to culturally determined patterns of response to standardized diagnostic instruments (Kinzie and Manson 1987). A more likely explanation is that the Natives in this study were more exposed to the spill and subsequent cleanup efforts than non-Natives, and Alaskan Natives in general have higher rates of psychiatric disorders than non-Natives, reflected in significantly increased rates of suicide, alcohol-related morbidity and mortality, and inpatient psychiatric admissions (Hlady and Middaugh 1986, Kraus and Buffler 1979).

The *Exxon Valdez* experience provides a quantitative analysis of only one limited example of the social and psychological consequences of rapid sociocultural change, albeit an increasingly important example for the reasons discussed earlier. Furthermore, there are several aspects of these social and psychological impacts that conform to general models of psychosocial stress associated with rapid sociocultural change.[6] These factors include: the breakdown of traditional patterns of behavior, in this case the disruption of traditional social relations and subsistence activities; the increased social differentiation resulting from the wide disparity in income earned from cleanup activities; and the uncertainty over the long-term consequences of the spill. The fragmentation of traditional social relations is particularly noteworthy because it reflects an overall decline in social integration and hence the social support on which individuals and families rely in times of personal and communal distress. The disruption of subsistence activities is particularly salient for Alaskan Native communities because these activities lie at the core of Alaskan Native identity, ideology, and social organization.

It remains problematic whether the impacts identified in this study are short-term and transient, or long-term and permanent. On the one hand, the results reported in this paper represent the prevalence of psychiatric disorders and adverse social and cultural impacts approximately one year after the spill. Research documenting the delayed presentation of posttraumatic stress disorder in Vietnam war veterans (Van Putten and Emory 1973), however, suggests that a prolonged follow-up of any disaster-affected population may be necessary before conclusions are reached about the absence of disorder (McFarlane 1986). Horowitz and Solomon (1975) have emphasized that the detection of psychiatric disorders caused by stressful experiences is characteristically delayed or often missed. These data may therefore represent only a fraction of the psychosocial impacts of the *Exxon Valdez* oil spill.

On the other hand, a number of investigators have pointed to the enduring and adaptive nature of traditional subsistence production and distribution activities of Alaskan Natives in the face of increasing exposure to and participation in the Euro-American wage labor economy (Jorgensen 1990). With the cessation of cleanup activities by Exxon and the reduced presence of toxic levels of oil in the natural environment in time, local residents may gradually return to pre-spill levels of subsistence activity. In fact, the income earned from cleanup activities may be used to purchase new equipment for subsistence production and increase the level of sharing within kin-based distribution networks (Jorgensen, McCleary, and McNabb 1985; Little and Robbins 1984; Luton 1985).

But whether the psychosocial changes resulting from exposure to the oil spill and cleanup efforts are temporary or permanent, they illustrate the importance of three specific components essential to an understanding of the relationship between health-related stress and sociocultural change: the characteristics of the "pre-contact" sociocultural system; the nature of the environmental changes, whether they represent alteration of the physical environment or contact with another sociocultural system; and the degree of exposure to these environmental changes. Certain psychosocial characteristics such as precontact physical and mental health and social and economic status may influence individual and community responses to long-term patterns of sociocultural change in a way which is similar to responses to natural and technological disasters. Certain segments of the population (the young, women, minorities) may be as susceptible to adverse psychosocial impacts of long-term processes of sociocultural change as they are to the adverse psychosocial impacts of disasters (Bromet et al. 1980; Shore, Tatum, and Wollmer 1986a; Smith et al. 1990). Other investigators have attributed this risk to the larger Euro-American capitalistic system, which places certain segments of the population in a subordinate position and restricts their "access to and control over the basic material and non-material resources that promote life at a high level of satisfaction" (Baer, Singer, and Johnsen 1986:95).[7]

The psychosocial impacts of a disaster are influenced by the nature of the event itself (e.g., whether it involves loss of lives and property destruction, is sudden and unexpected) (Bolin 1985). In the same way, changes in the sociocultural system and resulting impacts on mental and physical health are influenced by the nature of the change in the social and physical environment. Environmental changes that are sudden and unexpected are more likely to result in more profound sociocultural changes with significant adverse impacts on health and well-being than changes that are gradual and expected. Nevertheless, both the environmental changes and the resulting psychosocial impacts represent a continuum. At one extreme, they y be as acute and as devastating as the massive loss of life r a nuclear conflict. At the other extreme, they may be as aronic and as prolonged as the increased incidence of leukemia resulting from long-term exposure to low-level radioactive wastes. As in the case of exposure to ionizing radiation, whether the "dose-response curve" of the relationship between exposure to less dramatic forms of environmental change and health and wellbeing is linear or quadratic, or whether it occurs after a certain threshold level is attained, remains to be determined by further research. It appears, however, that the same processes explaining the impacts at one end of the continuum of sociocultural change are evident at the other end as well.

Finally, just as the psychosocial impacts of a disaster are influenced by the degree of exposure to the event (Bromet et al. 1980, Quarantelli 1985), changes in the sociocultural fabric of a community and the mental and physical health of its individual members are influenced by the degree of exposure to the changes in the social and physical environment. This degree of exposure, in turn, is influenced directly by the precontact sociocultural system and the nature of the environmental changes.

The *Exxon Valdez* experience also contains a number of implications for managing the impacts of rapid sociocultural change. Rapid sociocultural change leading to increased rates of psychiatric disorders can be expected to lead to substantial increases in utilization of health care and social services. In the Medical Outcomes Study, Wells and his associates (1989) found that patients with depressive symptoms, even in the ab- ce of clinical depression, had poor functioning as assessed physical limitations, role performance, social activities, and number of bed days; their symptoms were thus of considerable clinical significance. A poor sense of wellbeing and impaired functioning are also of policy interest because of the societal costs due to loss of productivity, increased family burdens, and any associated use of health services (Lehman, Ward, and Linn 1982). This utilization does not extend merely to mental health services. Most persons suffering from clinically significant depressive symptoms do not receive treatment, and most in treatment consult a primary care physician rather than a mental health service (Weissman and Myers 1980). Reluctance to seek mental health services is particularly salient among Alaskan Natives because of the shame and cultural stigma associated with alcohol abuse and mental disorders (Klausner, Foulks, and Moore 1980; Kost-Grant 1983) and the constraints imposed on access to mental health care, especially in villages, by the necessity of leaving one's home, often for long periods. Respondents meeting criteria for somatization (those reporting a decline in perceived health status since the spill) are more likely to use health services than nonsomatizers; of those respondents meeting criteria for a psychiatric diagnosis, somatizers preferentially use medical over mental health services (Escobar et al. 1987).

Conclusion

hen the *Exxon Valdez* ran aground in Prince William nd, it spilled oil into a social as well as a natural environment. That spill resulted in a decline in traditional social relations and subsistence activities and increased rates of depression, anxiety, and post-traumatic stress disorder. It also resulted in perceived increases in the amount and problems associated with drinking, drug abuse and domestic violence and declines in perceived health status. Only further research will determine whether these impacts are transient or whether they are consequences of permanent changes in the sociocultural fabric of these communities.

NOTES

[1] Dr. Robert Bolin participated in the design and administration of the household survey.

[2] For communities with more than 650 households (e.g., Valdez, Cordova, Seward, and Kodiak) approximately 7% of the households were selected for interviewing. Smaller communities, such as Tatitlek, Chenega Bay, Chignik, and Akhiok, were intentionally oversampled at a 50% or higher ratio in order to obtain sufficient numbers of Alaskan Natives for intra-ethnic comparisons. Replacement households, necessitated in the case of refusals or unoccupied dwellings, were also selected from the same sampling frame using a table of random numbers.

[3] Respondents describe their mood over the past week by rating each of 20 items on a scale from 0 (rarely or none [less than 1 day]) to 3 (most or all [5–7 days]). A depression score was calculated for each respondent by summing the ratings, after first reversing the ratings of four reverse-worded items. If a respondent had completed 85% or more of the CES-D items but less than 100% ($n = 10$), responses to missing items were imputed by using the mean of that person's answers to the nonmissing items. Respondents with scores of 16 or above were classified as being depressed for the purpose of calculating prevalence rates. A number of studies have documented the validity of this cut-point in distinguishing groups with high depressive symptomatology from those with low depressive symptomatology (Roberts and Vernon 1983, Weissman and Myers 1980). The use of this cutpoint does not, however, provide sufficiently accurate measure to ascertain rates of clinical depression as defined by the DSM-III or III-R criteria in the general population.

[4] The authors wish to thank Drs. James Shore and Spero Manson for their advice and assistance in the administration of the Diagnostic Interview Survey questions.

[5] The comparisons between exposed and not-exposed subjects revealed an association between exposure and measures of health and well-being, but they are not reported in this paper because they do not provide as satisfactory an indication of causality as the dose-response relationship suggested by comparisons across the three exposure groups (Schlesselman 1982).

[6] Janes (1986:177–178) notes that research on the stress process in the contexts of social change can be divided into three broad categories: "cultural incongruity" studies (e.g., Cassel and Tyroler 1961); "status inconsistency" studies (e.g., Dressler 1982); and "stressful life event" studies (e.g., Dohrenwend and Dohrenwend 1974, Gunderson and Rahe 1974). The notion that mental and physical disorders are a consequence of unfulfilled needs subsequent to environmental change is derived from the work of the Leightons and their associates (A. Leighton 1959, D. Leighton et al. 1963).

[7] James O'Neil (1986) has been a forceful advocate of this perspective in his analysis of colonial stress and sociocultural change in the Canadian arctic.

REFERENCES CITED

American Psychiatric Association (APA)
1980 Diagnostic and Statistical Manual of Mental Disorders, 3rd ed. Washington, DC: American Psychiatric Association.

1987 Diagnostic and Statistical Manual of Mental Disorders, 3rd ed., revised. Washington, DC: American Psychiatric Association.

Baer, Hans A., Merrill Singer, and John H. Johnsen
1986 Toward a Critical Medical Anthropology. Social Science and Medicine 23:95–98.

Baum, Andrew, Richard J. Gatchel, and M. Schaeffer
1983 Emotional, Behavioral and Psychophysiological Effects of Chronic Stress at Three Mile Island. Journal of Consulting and Clinical Psychology 51:565-572.

Blackwood, Larry
1978 Health Problems of the Alaska Natives: Suicide Mortality and Morbidity. Anchorage: Alaska Area Native Health Service, Program Formulation Branch.

Bloom, Joseph D.
1973 Migration and Psychopathology of Eskimo Women. American Journal of Psychiatry 130:446–449.

Bolin, Robert
1985 Disaster Characteristics and Psychosocial Impacts. *In* Disasters and Mental Health: Selected Contemporary Perspectives. B. J. Sowder, ed. Pp. 3–28. Rockville, MD: National Institute of Mental Health.

Braund, Steven R. and Steven R. Benkhe
1979 Lower Cook Inlet Sociocultural Systems Analysis. Anchorage: US Department of the Interior, Bureau of Land Management.

Bromet, E., D. Parkinson, H. C. Schulberg, and L. Dunn
1980 Three Mile Island: Mental Health Findings. Pittsburgh, PA: Western Psychiatric Institute and Clinic and the University of Pittsburgh.

Cassel, John and Herman A. Tyroler
1961 Epidemiological Studies of Culture Change: Health Status and Recency of Industrialization. Archives of Environmental Health 3:25–33.

Chance, Norman
1965 Acculturation, Self-Identification and Personality Adjustment. American Anthropologist 67:372–392.
1968 Implications of Environmental Stress: Strategies of Developmental Change in the North. Archives of Environmental Health 17:571–577.

Davis, Nancy Yaw
1979 Kodiak Native Sociocultural Impacts. Western Gulf of Alaska: Petroleum Development Scenarios. Anchorage: US Department of the Interior, Bureau of Land Management.
1984 Contemporary Pacific Eskimo. *In* Handbook of North American Indians. Vol. 5: Arctic. David Damas, ed. Pp. 198–204. Washington, DC: Smithsonian Institution.

Dohrenwend, B. and B. Dohrenwend, eds.
1974 Stressful Life Events: Their Nature and Effects. New York: Wiley.

Dressler, William W.
1982 Hypertension and Culture Change: Acculturation and Disease in the West Indies. South Salem, NY: Redgrave.

Escobar, Javier I., Jacqueline M. Golding, Richard L. Hough, Marvin Karno, M. Audry Burnam, and Kenneth B. Wells
1987 Somatization in the Community: Relationship to Disability and Use of Services. American Journal of Public Health 77:837–840.

Fienup-Riordan, Ann
1983 The Nelson Island Eskimo: Social Structure and Ritual Distribution. Anchorage: Alaska University Press.

Fleiss, Joseph L.
1981 Statistical Methods for Rates and Proportions. New York: John Wiley and Sons.

Foulks, Edward
1980 Psychological Continuities: From Dissociative States to Alcohol Use and Suicide in Arctic Populations. Journal of Operational Psychiatry 11:156–161.

Gatchel, Richard J., M. A. Schaeffer, and Andrew Baum
1985 A Psychophysiological Study of Stress at Three Mile Island. Psychophysiology 22:175–181.

Gunderson, E. K. E. and Richard H. Rahe, eds.
1974 Life Stress and Illness. Springfield, IL: Charles C. Thomas.

Hlady, W. Gary and John P. Middaugh.
1986 The Recording and Epidemiology of Suicides in Alaska: 1983–1984. Anchorage: Epidemiology Office, Division of Public Health.
1988 Suicides in Alaska: Firearms and Alcohol. American Journal of Public Health 78:179–180.

Horowitz, M. J. and G. F. Solomon
1975 A Prediction of Delayed Stress Response Syndromes in Vietnam Veterans. Journal of Social Issues 31:67–80.

Janes, Craig R.
1986 Migration and Hypertension: An Ethnography of Disease Risk in an Urban Samoan Community. *In* Anthropology and Epidemiology. Craig R. Janes, Ron Stall, and Sandra M. Gifford, eds. Pp. 175–211. Boston: D. Reidel.

Jorgensen, Joseph G.
1990 Oil Age Eskimos. Berkeley: University of California Press.

Jorgensen, Joseph G., Richard McCleary, and Steven McNabb
1985 Social Indicators in Native Village Alaska. Human Organization 44:2–17.

Kinzie, J. David and Spero M. Manson
1987 The Use of Self-Rating Scales in Cross-Cultural Psychiatry. Hospital and Community Psychiatry 38:190-196.

Klausner, Samuel Z., Edward F. Foulks, and Mark H. Moore
1980 The Inupiat, Economics and Alcohol on the Alaskan North Slope. Philadelphia: Center for Research on the Acts of Man.

Kost-Grant, Brian L.
1983 Self-inflicted Gunshot Wounds Among Alaska Natives. Public Health Reports 98:72–78.

Kraus, Robert F. and Patricia A. Buffler
1979 Sociocultural Stress and the American Native in Alaska: An Analysis of Changing Patterns of Psychiatric Illness and Alcohol Abuse Among Alaska Natives. Culture, Medicine and Psychiatry 3:111–151.

Lehman, A. F., N. C. Ward, and L. S. Linn
1982 Chronic Mental Patients: The Quality of Life Issue. American Journal of Psychiatry 139:1271–1276.

Leighton, Alexander H.
1959 My Name is Legion. New York: Basic Books.

Leighton, Dorothea, J. Harding, D. Macklin, A. Macmillan, and Alexander Leighton
1963 The Character of Danger. New York: Basic Books.

Little, Ronald L. and Lynn A. Robbins
1984 Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island. Anchorage: Alaska Outer Continental Shelf Region, Minerals Management Service.

Logue, J. N., M. E. Melik, and H. Hansen
1981 Research Issues and Directions in the Epidemiology of Health Effects of Disasters. Epidemiologic Reviews 3:140–162.

Luton, Harry
1985 Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: Chukchi Sea. Anchorage: Alaska Outer Continental Shelf Region, Minerals Management Service.

McFarlane, Alexander C.
1986 Posttraumatic Morbidity of a Disaster: A Study of Cases Presenting for Psychiatric Treatment. Journal of Nervous and Mental Disease 174:4–14.

Murphy, Shirley A. and Mary E. Cowan
1985 Designing and Implementing a Disaster Study. *In* Perspec-

tives on Disaster Recovery. Jerri Laube and Shirley Murphy, eds. Pp. 61–109. Norwalk, CT: Appleton-Century-Crofts.

l, John D.

6 Colonial Stress in the Canadian Arctic: An Ethnography of Young Adults Changing. *In* Anthropology and Epidemiology. Craig R. Janes, Ron Stall, and Sandra M. Gifford, eds. Pp. 249–274. Boston: D. Reidel.

Palinkas, Lawrence A.

1987 Points of Stress and Modes of Adjustment in Southwest Alaska. Human Organization 46:292–304.

Palinkas, Lawrence A., Bruce M. Harris, and John S. Petterson

1985 A Systems Approach to Social Impact Assessment: Two Alaskan Case Studies. Boulder, CO: Westview Press.

Parker, Seymour

1964 Ethnic Identity and Acculturation in Two Eskimo Villages. American Anthropologist 64:325–340.

Parkin, Michael

1974 Suicide and Culture in Fairbanks: A Comparison of Three Culture Groups in a Small City of Interior Alaska. Psychiatry 37:60–67.

Petterson, John S., Lawrence A. Palinkas, and Bruce M. Harris

1982 North Aleutian Shelf: Non-OCS Forecast Analysis. Anchorage: US Department of the Interior, Bureau of Land Management.

Quarantelli, E. L.

1985 What is Disaster? The Need for Clarification in Definition and Conception in Research. *In* Disasters and Mental Health: Selected Contemporary Perspectives. B. J. Sowder, ed. Pp. 41–73. Rockville, MD: National Institute of Mental Health.

Radloff, L. S.

1977 The CES-D Scale: A New Self-Report Depression Scale for Research in the General Population. Applied Psychological Measurement 1:385–401.

ts, Robert E. and Sally W. Vernon

983 The Center for Epidemiological Studies Depression Scale: Its Use in a Community Sample. American Journal of Psychiatry 140:41–46.

Robins, Lee N., John E. Helzer, Jack Croughan, and Kathryn S. Ratcliff

1981 National Institute of Mental Health Diagnostic Interview Schedule: Its History, Characteristics, and Validity. Archives of General Psychiatry 38:381–389.

Robins, Lee N., John E. Helzer, Linda B. Cottler, and Evelyn Golding

1989 NIMH Diagnostic Interview Schedule, Version III, Revised. St. Louis, MO: Washington University.

Robins, Lee N., Ruth L. Fischbach, Elizabeth M. Smith,
Linda B. Cottler, Susan D. Solomon, and Evelyn Goldring

1986 Impact of Disaster on Previously Assessed Mental Health. *In* Disaster Stress Studies: New Methods and Findings. James H. Shore, ed. Pp. 21–48. Washington, DC: American Psychiatric Press.

Schlesselman, James J.

1982 Case-Control Studies: Design, Conduct, Analysis. New York: Oxford University Press.

Shinkwin, Anne and Mary Pete

1982 Alaskan Villagers' Views on Problem Drinking: "Those Who Forget." Human Organization 41:315–322.

Shore, James H., Ellie L. Tatum, and William M. Wollmer

1986a Evaluation of Mental Effects of Disaster, Mount St. Helen's Eruption. American Journal of Public Health 76:76–83.

1986b The Mount St. Helen's Stress Response Syndrome. *In* Disaster Stress Studies: New Methods and Findings. James H. Shore, ed. Pp. 77–98. Washington, DC: American Psychiatric Press.

Smith, Elizabeth M., Lee N. Robins, Thomas R. Przybeck,
Evelyn Goldring, and Susan D. Solomon

1986 Psychosocial Consequences of a Disaster. *In* Disaster Stress Studies: New Methods and Findings. James H. Shore, ed. Pp. 49–76. Washington, DC: American Psychiatric Press.

Smith, Elizabeth M., Carol S. North, Robert E. McCool, and
James M. Shea

1990 Acute Postdisaster Psychiatric Disorders: Identification of Persons at Risk. American Journal of Psychiatry 147:202–206.

Travis, Robert

1984 Suicide and Economic Development among the Inupiat Eskimo. White Cloud Journal 3:14–21.

Van Putten, T. and W. H. Emory

1973 Traumatic Neuroses in Vietnam Returnees: A Forgotten Diagnosis. Archives of General Psychiatry 29:695–698.

VanStone, James

1962 Point Hope—An Eskimo Village in Transition. Seattle: University of Washington Press.

Weissman, Myrna M. and Jerome K. Myers

1980 Psychiatric Disorders in a U.S. Community: The Application of Research Diagnostic Criteria to a Resurveyed Community Sample. Acta Psychiatrica Scandinavia 62:99–111.

Wells, Kenneth B., Anita Stewart, Ron D. Hays, M. Audry Burnam, William Rogers, Marcia Daniels, Sandra Berry, Sheldon Greenfield, and John Ware

1989 The Functioning and Well-being of Depressed Patients: Results from the Medical Outcomes Study. Journal of the American Medical Association 262:914–919.

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The Exxon-Valdez Oil Spill: Social, Economic, and Psychological Impacts on Homer

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April 22, 1992

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4/92

EXHIBIT 8

THE EXXON-VALDEZ OIL SPILL: SOCIAL, ECONOMIC, AND PSYCHOLOGICAL IMPACTS ON HOMER

INTRODUCTION

In the late fall of 1989 and early spring of 1990, a random sample of adults and a representative sample of community leaders were personally interviewed with respect to the effects of the Exxon-Valdez oil spill on Homer. This paper focuses on selected findings from that survey and follow a paper sent to various community leaders in the spring of 1991. Whereas the original paper focused on a comparison of responses from Homer, Port Graham and Seldovia community leaders, this paper focuses on a comparison of various groups within the Homer community.

SAMPLE

One hundred twenty-six residents in Homer were personally interviewed, or interviewed by telephone in the fall of 1989 and spring of 1990. Twenty-eight respondents were classified as community leaders (CL) --e.g., the mayor, fire chief, police chief, emergency medical personnel, social service providers, and business owners/employers. For purposes of this report, seventy-five residents represent the group labeled adults/seniors (A/S). Twenty-three adolescents (high school students) were also interviewed, and for the most part were sons and daughters of some of the adults who were surveyed. Herein this group will be referred to as the Youth (Y) group.

The CL sample was about equally divided between males (54%) and females (46%) with an age range of 20 to 75. The majority of the sample (60%) fell within the age range of 36-50 years old. Ninety-three percent of the CL's were white (26), with the exception of one Native Alaskan (4%) and one Hispanic (4%).[1] Overall, this group is well distributed on all demographic variables except ethnic status; the sample is almost all white.

For the A/S sample, 35% were males and 65% were females. About 24% of the residents were between the ages of 30-40; 31% were between 41-50; and 42% were 60 years or older. About 93% indicated they were white, while 6% indicated they were Alaska/American Natives. Overall, the A/S sample is somewhat overrepresented by females and caucasians.

The Y sample was comprised of 54% females and 46% males. The majority (57%) of the sample was 15 years old at the time of the spill, while 35% of the respondents were 16 years of age. A smaller proportion (4% each) were 14 and 17 years of age. Eighty-two percent of the youth were white, 9% Alaska Natives, 5% American Indian and 4% identified themselves as being from "Other" ethnic groups. Overall, this portion of the sample depicts a fairly good distribution, for the Homer community, with respect to gender and ethnic status.

WHERE WERE PEOPLE AT TIME OF SPILL AND WHERE DID THEY GET INFORMATION ABOUT SPILL?

Of the community leaders (CL), about 50% were at home when they learned about the oil spill, 32% were somewhere else, and 18% couldn't remember. Of the adults/seniors (A/S), 61% were at home and 39% were somewhere else. Forty-four percent of the youth (Y) were at home at the time of the spill, 26% where somewhere else and 30% couldn't remember where they were when they learned about the spill.

ECONOMIC EFFECTS

Community Leaders

As one of the areas that appeared to be of greatest concern to communities after the disaster was the economic impact, a number of questions that focused on economics were included in the surveys. The first question focused on the extent to which gross family income was affected. The largest percentage of community leaders (52%) responded to the question with "no difference", while 33% reported "a gain in income", and 15% reported an "income loss". Of all leaders reporting a loss or gain, the anticipated long term losses or gains ranged from a $700,000 loss to a $750,000 gain.

A view of Table 1 indicates the largest number of CL (39%) perceived the greatest economic impact of the spill on the community as a "cash gain". The second greatest financial impact perceived by the CL was that it would be "good for some, bad for others" (21%), "with some kind of change" (11%) ranking third. The fourth largest category (7%) reflects the CL's perceptions that there had been economic gain from money that community organizations/government had received. The remaining responses were distributed among effects such as "boom than bust", "various forms of change", and "economic benefits and/or losses".

TABLE 1 ABOUT HERE

Adults/Seniors

Similiar to perceptions of the CL group, the largest percentage of adults and seniors (50%) believed that there would be "no difference" in their personal income. However, about 25% reported there "would be a loss", and about 21% reported that the oil would "generate a gain" in their personal income. Three percent "didn't know" what the impact would be. The range of reported losses or gains was from a decrease of $20,000 to an increase of $150,000. This range is substantially lower than that reported by the CL group.

When residents were asked about any property damage to boats, businesses, cars, etc., most responded negatively. However, about 8% responded that they had suffered damages to their businesses and about 1% had suffered damages to their boats.

When residents were queried about whether they had taken out any loans in the past several years and whether the loans had been related to the oil spill, about 43% of the sample said they had taken out a loan. Of that number, only 3% responded that it was related to the oil spill.

When the A/S were asked about the long term economic effects of the oil spill on Homer, 42% thought it "would be harmful", 24% believed it "would benefit" the community, 24% said it would have "no effect", and 10% "didn't know".

Youth.

When the Y sample was asked how the spill would economically affect their community, 23% stated it would have "no effect". Fifty percent thought the oil spill would "hurt their community", and 27% thought it would "help their community", economically.[3]

SUMMARY: Wide variations exist with respect to how members/ families in Homer and the Homer community were economically affected by the oil spill. Perceptions of the immediate and future effects of the spill on Homer also show wide variations.

STRESS

Community Leaders

Disaster research suggests that a significant amount of stress accompanies such events, particularly those involving toxic disasters (Kushnir, 1982; Gibbs, 1982; Wolfenstein, 1957). Research also suggests that the stress may be felt immediately and/or in the future. In order to assess the amount of short-term stress experienced by individuals in our sample, several measures were included. One of these measures was a 10-point scale that asked CL to indicate how much stress they experienced during the oil spill and clean-up. As can be seen from Table 2, the extent of perceived stress was fairly high. About 50% of the CL's reported relatively high stress levels, ranging from 8-10, while about 18% reported stress levels of 5-7, and about 29% reported low stress levels, 1-4. (Four percent did not respond).

In order to measure specific types of stressors, CL were asked whether they had experienced any stress-related problems with such things as their nerves, worries, and depression. About 68% said they had. When asked what kind of problems these were, the largest mentioned category was stress/tension (29%), followed by feelings of anxiety (11%). Other areas mentioned by 7% of the sample were worry and depression, respectively. Four percent, respectively, mentioned exhaustion, confusion or feelings of powerlessness, insomnia and grief.

TABLE 2 ABOUT HERE

Adults/Seniors

The Fredericks Post Traumatic Stress Syndrome scale was included in the A/S sample. Using the stress categories assigned by Fredericks, it was found that 34% of the sample showed signs of "severe" or "very severe" PTS. Seven percent showed signs of "moderate" PTS, and 7% fell into the "mild" PTS range. The scale showed that 52% of the sample fell into the category of "doubtful that PTS exists". Thus, about one-third of the A/S sample appeared to suffer substantial PTS, while slightly over half appear to be unaffected.

The Frederick's Post Traumatic Stress Syndrome scale was also included in the Y survey. For this group, 9% fell in the "mild"

PTS range, 26% fell into the "moderate" range, and 65% scored in the "severe" PTS range.[3]

SUMMARY: Although the measures of stress for the samples were not the same, the findings suggest wide variations of stress levels within groups. Among groups, the CL appear to have been more affected by stress--at least immediate stress--then were either the A/S or Y samples.

COPING WITH STRESS

Community Leaders

In order to determine how individuals coped with stress, respondents were provided with a list of known coping mechanisms and asked to indicate how frequently they used each in dealing with everyday problems. The results are shown in Table 3. The largest category for CL was to "take action to solve problems"--everyone (100%) said they did this. This was followed by "ask for advice from others" (68%) and "stay busy" (46%). Most reported they did not use medicine as a way of coping with problems, but 14% (4) of the sample said they "sleep a lot" as a way of coping. As one can see from Table 3, there is considerable variation among coping mechanisms that involve such things as arguing with others, yelling and shouting, getting physical exercise, drinking, waiting for things to work themselves out in the future, worrying about troubles, and keeping hurt feelings to onesself. (In the paper sent to the Homer community leaders last spring gender differences were also noted).

TABLE 3 ABOUT HERE

Adults/Seniors

As can also be seen from Table 3, adults and seniors are somewhat similar to the community leaders with respect to how they cope with stress. However, fewer of this group seem to be willing to "let nature take its course" (think things will work out in a year or two/future), sleep a lot, or argue with others as a way of coping with stress. Both groups, however, are more likely to try to take some action to solve their own problems, or seek the advice of friends/family than they are to look to the "bottle", medicine, or social/mental health professionals for help.

Youth

The majority (56%) of the youth sample "keep hurt feelings inside" as a way of coping with stress. Forty percent stated that they "keep busy and get physical exercise" as a way of coping with stress. Similar to the adult/seniors and community leaders, a substantial number of the youth (45%) stated they take action to solve problems, and like the adult/senior sample, 61% of the youth indicated that they are not willing to sit back and wait for things to work out by themselves. The major difference between the adults, including community leaders, and the youth in Homer, is that the youth as compared to adult residents, are less likely to verbalize their concerns. This finding is not surprising, however, as it is consistent with overall research on characteristics of the adolescent stage of the lifecycle.

SUMMARY: Homer appears to be a "take action" community when it comes to coping with stress. All three groups, the CL, A/S, and Y also tend to seek the advice of others as a way of coping with stress. Homer residents, overall, report that they do not cope with stress by drinking or using medications. When compared with the CL and A/S samples, the Youth sample are less likely to cope with stress by verbalizing their concerns.

ALCOHOL/DRUG USE

Community Leaders

In times of crises many people turn to alcohol or drug use as a way of coping. In order to determine if the oil spill had any effect on individuals' use of drugs or alcohol, several types of questions were included. First, respondents were asked if the oil spill had any effect on their drinking patterns/use of drugs. About 7% of the CL reported being affected. In most cases, the nature of the influence was an increase in drinking.

With respect to drug use, respondents were queried about their use of prescription or non-prescription drugs. The majority of the CL's indicated that they did not use prespcription or non-prescription drugs. Seven percent indicated they did use prescription or non-prescription durgs, 4% indicated that the spill increased their usage of these drugs.

Adults/Seniors

Turning to the A/S sample, about 63% of the sample indicated that they drank alcoholic beverages, 33% said they never had, and about 4% said they had stopped. Of those who responded that they were drinkers, or who had stopped, 61% said the spill did not affect their drinking, while 1% indicated it had.

Turning to the use of drugs and/or medications, close to 60% of the A/S sample indicated that they had used either prescription drugs or non-prescription (usually prescription) for various reasons. However, only 1% indicated that the oil-spill had affected this use.

Youth

The Y sample were also asked about their consumption of alcohol. The majority of the sample (61%) indicated they had never drunk alcohol. However, 35% indicated that they did use alcohol and 4% said they had stopped drinking. When asked if the spill had an affect on their drinking 29% (of the 35%) said it did not have an effect.

SUMMARY: **The majority of respondents interviewed in this study indicated that the oil spill caused alcohol and drug use/abuse to increase in the community (See Tables 1 and 4). However, it appears that very few of the respondents we interviewed feel it**

affected their drinking or drug use behavior.

PHYSICAL HEALTH

Community Leaders

When the community leaders were asked about the negative effects that the oil spill may have had on their own or members of their family's physical health, or members of their family, 54% indicated that neither they nor their family had suffered any negative effects. However, 43% had been impacted. Of these, 18% indicated that the stress had them "burned out". The second largest area of effects mentioned were fatigue and insomnia (7%, respectively). Other problem areas mentioned were alcohol use (4%) and reduced breast milk (4%).

Adults/Seniors

When A/S residents were asked about negative effects that the oil spill may have had on their own or their family members' physical health, the majority (89%) indicated that neither they nor their family members had suffered any negative effects. However, 11% had been impacted themselves, and 8% said their family members had been impacted. Of the 11% impacted, the negative effects reported were stress (5%), respiratory infections, contaminated oil in body, weight gain, and/or pinched nerves and fatigue (1%, respectively).

Youth

The majority of the Y sample (96%) indicated that the oil spill had no negative effect on their physical health. However, 4% indicated that they had experienced negative effects, and traced these to added stress and fatigue caused by the oil spill.

SUMMARY: All groups interviewed indicated that their physical health had been impacted in some way by the oil spill; although, the CL group appears to have suffered the greatest impact. The majority of problems, for all groups, appear related to stress and fatigue.

MENTAL HEALTH

Community Leaders

When asked if there had been any negative effects on their mental health, 68% of the community leaders said they experienced a problem with nerves, worries, depression or anxiety. Twenty-nine percent of those said stress/tension was the biggest problem. Twenty-one percent of the community leaders believed the spill made existing mental health problems worse.

Adults/Seniors

While most community leaders reported no oil-spill related effects on their physical health, 50% of the adults/seniors reported that during the spill they had experienced increased levels of such things as worry, anxiety, nervousness, and depression. However, only a few (4.2%) attributed the problem directly to the oil spill.

Youth

When members of the Y sample were asked about their mental health in the past six months, 26% indicated they had experienced some problems. Of this percentage, half of these respondent's (13%) indicated that the problems existed prior to the oil spill, and none of them believed the oil spill caused the problems to increase.

SUMMARY: While a substantial number of the three populations sampled indicate that they have problems with such things as nervousness, worry, anxiety and depression, only community leaders appear to have a significant number reporting that the oil spill exaccerbated existing problems. These findings no doubt result from the fact that it was the community leaders such as the mayor, police chief, emergency professionals, and social/health service professionals who were faced with trying to resolve the problems cuased by the oil spill.

FAMILY RELATIONS

Community Leaders

Stress is frequently linked to increases in family problems. Hence, a section on family relations was included in the survey. A number of questions focused on spousal relationships in general, and then respondents were asked if the oil spill had affected their overall relationships with their partners; i.e., had their relationship "gotten worse", "improved", or "not been affected". Of all individuals who had partners, about 71% of the CL said the oil spill had not affected their relationships. However, 7% indicated that their relationships had "gotten worse", while 4% said they had "improved". Reasons given for worsening relationships were increased stress and more fighting, while better communication and working together were explanations for improving relationships.

Adults/Seniors

In comparing the A/S group with the CL's, none of the adult sample responding to the survey admitted to having any serious problems in their marriages or relationships before the oil spill, and no one believed the oil spill had affected their relationships or marriages. Hence, it appears that A/S sample saw their marriages/relationships impacted to a lesser degree than the C/L sample.

Turning to family members other than spouses, about 11% of the sample that they indicated they had serious conflicts with family members, but no one indicated that these conflicts were related to the oil spill. (There were no corresponding questions for the C/L sample).

Youth

For the Y sample, 91% indicated that the spill had not affected their family relations. Of the remaining 9%, respondent's felt that family relations had been improved by the spill.

SUMMARY: With respect to the effects of the oil spill on spousal and other family relationships, the CL sample once again appears to be the group most impacted by the oil spill, although only about 11% reported having their relationships affected. Of these the majority (7%) felt the spill had a negative effect, although some beleived the effect was positive (4%). The A/S group reported no adverse or positive effects of the spill on spousal or other family relationships. The Y majority of the Y group (11%) did not perceive the oil spill as affecting family members' relationships, but of the 9% that did, all thought it positively affected relationships.

PERCEPTIONS OF THE EFFECTS OF THE OIL SPILL ON COMMUNITY FABRIC

Community Leaders and Adults/Seniors

Using Figure 1 as a guide, the next level of analysis focused on perceptions of relational, institutional and community interactions that were influenced by the oil spill.

Social Problems

We turn our attention first to perceptions of social problems that existed in the community prior to the spill and whether or not the oil spill affected these. As can be seen from Table 4, the existing social problems that both the CL and A/S samples identified as most serious in their communities before the oil spill were alcohol use/abuse, drug use/abuse, employment problems, spouse abuse, child neglect, and, to some extent, stealing. Overall, these were also the ones that they viewed as having the greatest increases during the oil spill and clean-up. While no statistics are presently available to this author, verbal reports by police, alcohol treatment centers, and domestic violence shelters substantiate the perceptions about domestic violence and alcohol use as existing social problems, and the increases due to the oil spill. For example, where agencies existed in communities, significant increases were reported in (1) alcohol use/abuse, (2) clients referred for alcohol/drug abuse and spousal abuse, and, (3) an increase in the number of new clients. Further, with respect to domestic violence, social service professionals in Homer expressed concern about the increased lethality in these incidents--e.g., they were seeing an increasing number of broken bones, which in the past may have been bruises or black eyes. The social service workers traced many of the domestic violence incidents directly to times when oil spill workers were paid and spent part of their money on alcohol and/or drugs. Other incidents were tied to the oil spill work ending and husbands/partners sitting at home drinking and becoming violent.

TABLE 4 ABOUT HERE

In the fall of 1989, several social service/mental health professionals in Homer reported that they expected an increase in clients during the winter months. A follow-up on these reports was planned for Spring, 1991, but due to funding problems the project had to be cancelled. A follow-up is planned for Spring, 1992.

When the A/S sample were questioned about the long term effect the oil spill would have on increasing domestic violence in Homer, about 34% thought it would cause domestic violence to increase, 31% believed there would be no change, and 35% didn't know.

SUMMARY: The majority of repsondents in the CL and A/S samples viewed alcohol and/or drug use/abuse, employment and domestic problems as the most significant social problems existing in Homer prior to the oil spill as well as the ones most affected by the oil spill. These findings are similar to studies of the other communities impacted by the Exxon-Valdez oil spill (Impact Assessments, 1991:X-XIV and Chapter 2). With respect to the long term effects of the oil spill on the problems noted above, at least domestic violence, the sample respondents had mixed feelings about whether there would be an "increase," "no change," or "uncertain about effect".

Community Interactions

Table 5 depicts the types of conflictive or cooperative interactions that were taking place between community residents themselves, between residents and local institutions, and between local, regional, state, and federal agencies. As can be seen, the greatest amount of conflict was between residents and Exxon (82%). Another area that people perceived generating high amounts of conflict was between community residents and VECO (a contracting firm hired by EXXON to hire clean-up crews, rent/buy necessary clean-up equipment, etc.). About 75% of the sample reported conflicts between these groups. The next largest category of reported conflicts (71%) were between State and Federal agencies and local fishermen. A similar percentage (71%) reported conflicts between local fishermen who worked for Veco and those who did not. Forty-six percent reported conflicts between residents and local institutions, and between Federal and State agencies (e.g., U.S. Coast Guard and Alaska Department of Conservation). Table 5 also indicates that the CL's perceived a substantial amount of cooperation between community and regional institutions (79%).

TABLE 5 ABOUT HERE

SUMMARY: Basically these findings suggest that regional and community group interactions tended to have a cooperative tenor until Exxon, the State, or Federal government agencies become involved. At this point the nature of the relationships at all levels tended toward conflict.

TOURISM, FISHING, SUBSISTENCE

Community Leaders

We also asked some specific questions revolving around the impact the oil spill had on tourism, commercial fishing and subsistence. Responses to these questions are reported in Table 6. As can be seen, 14% of the CL indicated a noticeable reduction in tourism in Homer. With respect to a loss in commercial fishing income, a substantial number of CL (39%) also reported a noticeable negative effect.

Responses to the third question indicates that the oil spill did not heavily influence business or home purchases in Homer. However, 18% of the CL's thought that it might in the future.

TABLE 6 ABOUT HERE

With respect to subsistence pursuits, 61% of the CL's perceived that the quanity and quality of bags and catches were influenced by the oil spill. Similarly, a high percentage of leaders (71%) believed residents of their communities experienced threats to their health due to the oil spill (Table 6). Moreover, many CL (93%) believed that residents in their communities did not feel it was safe to eat fish that may have been in contact with the oil spill.

Adults/Seniors

The A/S sample was asked a set of specific questions about the effect the oil spill had on subsistence. The majority of respondents did not perceive that the oil spill had any major effects on their subsistence activities. That is, about 34% of the respondents felt that there was no decrease in the amount of subsistence activities they did. With regard to consumption of subsistence food, about 22% believed that there was no reduction in the quantity of subsistence food eaten. However, 15% stated that since the oil spill they have restrained from subsistence activities, and about 16% said that they had refrained from eating subsistence food. They were also asked about how the spill might affect the likelihood of children learning subsistence skills, although 23% felt that the spill had no effect, about 4% felt that there would be an increase in children learning these skills. Twenty-one percent felt that there would be a decrease in children learning subsistence skills.

In the A/S survey it was also asked if there was an increase in the social activities or communications related to subsistence. About 7% felt that there would be a decrease in the amount of time that was spent with relatives or on social activities, such as potlucks, church activities, and community celebrations. About 38% of the A/S sample felt there would be no effect in the ability to share with elders, while 11% felt there would be a decrease.

In the A/S survey residents were asked about the possibility of leaving Homer because of the oil spill. Eight percent indicated that they had thought of leaving, while 92% said they had not. We also asked them about leaving Homer if another spill happened in the area. About 4% indicated that it was "very likely" that they would leave, 13% said "maybe", 21% said they "probably would not" and the majority (63%) said "it was not at all likely." Thus, it appears that most people who live in Homer are committed to staying even if another oil spill occurs.

Youth

Turning to the Y sample, 39% of the Y indicated that subsistence food was part of their general meals. While thirteen percent of the sample indicated that the spill had affected the amount of subsistence activities they did, we were unable to determine if this was a positive or negative effect.

With respect to the affect it would have on children's opportunities to learn subsistence skills, 30% of the Y sample believed the oil spill would have no effect on the opportunities, 22% stated it would decrease children's opportunities, and 9% thought it would increase opportunities.

SUMMARY: The community leaders who responded to the survey did not believe that businesses or home purchases in Homer were affected, overall, by the oil spill. The area that the most CL did believe was affected was commercial fishing, and this was in a negative direction. With respect to subsistence activities, the community leaders, as compared to the A/S and Y samples, perceived much greater and more negative affects on the community. However, across all groups, there was a substantial number of respondents who felt the spill had affected subsistence-related activities--

usually in a negative way.

The A/S sample was asked whether they would leave Homer in the event of another oil spill--the overwhelming response was "No".

RESPONSIBILITY FOR THE OIL SPILL

Community Leaders

Community leaders were asked who they thought was/were responsible for the Exxon-Valdez oil spill. Table 7 indicates that Exxon takes first place, with 32% of the CL blaming them. Next in line for blame was "everyone", with 11%. The captain was 7% along with "state congress" and "Exxon crew" and "other" each received blame by 7% of the sample, respectively.

Adults/Seniors

The majority of the A/S sample (30%) blamed the captain for the Exxon-Valdez oil spill. Fifteen percent of the A/S sample blamed Exxon, followed by 9% blamed "everyone" for the spill. Seven percent of the A/S sample blamed "negligence" for the spill. The A/S sample (6%) blamed the state and another (6%) blamed alcohol.

Youth

The Y sample yielded somewhat different findings than those from the CL and A/S samples. Fifty percent of the youth believed the captain was responsible. Ten percent believed Exxon was responsible, and another 10% believed the crew was responsible for the oil spill. Others who were blamed by the youth at (5% each), were "the State, third mate, everyone, negligence, no one, and other".

TABLE 7 ABOUT HERE

SUMMARY: The best summary for this section appears to be that no one is quite sure who should be blamed for the oil spill. However, considering all three samples, the majority believe that Exxon and the Exxon-Valdez captain should shoulder the majority of the responsibility.

ASSISTANCE DURING THE OIL SPILL

Community Leaders

Following the oil spill there was much media attention, as well as substantial informal discussions about the assistance individuals, families, and communities needed, received and/or did not receive as a result of the oil spill. In order to evaluate this, a list of all possible groups that were involved in the oil spill assistance activities was compiled. These groups are presented in Table 8. As can be seen, there is substantial variation on how effective the CL thought these groups were in assisting with the clean-up related activities or problems.

TABLE 8 ABOUT HERE

Overall, the greatest percentage (50%) of community leaders believed that state law enforcement officials were the most effective in dealing with oil spill related problems. This was evidenced by verbal comments about the lack of preparedness, direction, organization, and knowledge of Exxon; the coast guard, and various federal/state agencies--hence, it was left to local mobilization efforts to get tasks accomplished.

Adults/Seniors

The A/S sample felt local volunteer groups (32%) and local law enforcement were more effective in dealing with oil spill related problems as compared to Exxon, or state and federal agencies. This somewhat contrasts with the CL's perceptions, who thought it was the state law enforcement agencies that were most effective. Both seem to agree, however, that law enforcement agencies were more effective than other state, regional, and federal agencies as well as Exxon/VECO.

Youth

The Y sample's perception of who was the most effective during the cleaning up of the spill is somewhat different than either the adults and seniors, or the community leaders. Forty-eight percent of the Y sample believed that regional-nonprofit organizations were most effective in cleaning up the oil spill.

SUMMARY: The overall concensus of the three groups sampled is that local and state law enforcement or regional groups were more effective in dealing with the oil spill and clean-up than either state or federal government agencies and Exxon.

EFFECTS OF THE OIL SPILL ON THE FUTURE

Open-ended questions were asked about how the CL thought the oil spill would affect future lifestyles, occupational or career plans, family relationships, community relationships and habits such as drinking, smoking, leisure activities, subsistence activities, and worldviews. As can be seen from Table 9, there was great variation on responses to these questions. Some leaders felt, in the long run, that there would be minimal or no effects on Homer, while others felt there would be both positive and negative effects. Specifically, with respect to future lifestyle changes, the greatest percentage of leaders believed that there would be an increased awareness of the environment and more prevention-related actions. The second largest perceived change seemed to be a sense that lifestyles would change somehow, and an uncertainty about the future if commercial fishing continued to be harmed (14%). A substantial number of leaders saw "no noticeable effects", or "some improvement".

TABLE 9 ABOUT HERE

Turning to employment/career plans, most leaders saw no changes or some improvements in their communities and indicated that "it all depends on fishing".

The perceived effect on family relations seems to be that it "will change somehow" (14%), with more leaders viewing a worsening (29%) rather than an improving effect (4%).

With respect to effects on future community relationships, the largest percentage of leaders saw "no effects" or some type of improvement (e.g., people working together).

Turning to the future effects on habits such as drinking, smoking and leisure activities, the largest number of CL's (39%) believed the affect would be for the worse.

With respect to the future of subsistence activities, there seems to be a sense of uncertainty, although the largest percentage of responses were that "they would decrease", (29%) followed by "no effect" and "will change somehow" (11%, respectively).

Finally, looking at the future of residents' worldview, the greatest changes are associated with both an improved awareness that oil spills can happen (21%), and an increased negative view which was reflected in peoples' statements about distrust of state and federal government and big business (21%). Leaders sensed feelings of (1) anger at profit-only oriented groups such as Exxon, and, (2) powerlessness to combat them because state and local government seemed to support them. For example, we frequently heard in our interviews, "they're all in bed together, so if we want anything to change we will have to do it at the local level".[2]

SUMMARY: The best way to summarize how community leaders perceive the effects of the Exxon Valdez oil spill on the future of Homer

and its residents is "uncertainty". With respect to changes in worldviews, there seems to be (1) some agreement that residents are now more aware that oil spills can happen; (2) an increase in negative attitudes and feelings toward state and federal governments and big business; and, (3) a sense of powerlessness to influence or change these large bureaucracies.

DISCUSSION AND CONCLUSION

The purpose of this paper was to report on selected social, psychological, and economic effects of the Exxon-Valdez oil spill on the community of Homer and its residents. Following are some general conclusions drawn from the analyses.

1) The actual and perceived effects of the oil spill appear to be mixed, with both positive and negative effects emerging. The negative effects, however, appear to outweigh the positive ones, however, if uncertainty and anxiety about the future are considered.
2) There appears to be an increasing distrust of big business and government with a belief that only empowerment at local levels can save the environment from "greedy" corporations that are directly or indirectly supported by "big government". The development of this "mindset," which interviewers heard recollected over and over by leaders and other community residents is depicted by Figure 2 and can be interpreted as frustrations developing as a result of perceptions of ineffective responses

to the oil spill. These perceptions ultimately lead to the formation and need for grassroots action. In the present study these actions resulted from perceptions of ineffective and/or conflicting clean-up efforts by EXXON -VECO, and state and federal agencies. Initially the spill created grassroot organizations (volunteer groups) that worked together (concensus). It was primarily when EXXON-VECO entered the clean-up activities that conflicts occurred within communities. These conflicts led to more frustrations with big business and state and local agencies, which in turn led back to the belief that empowerment at the local level was necessary and the only solution. In several communities this "empowerment" movement resulted in the formation of job offices that remain very visible and active to date. At the state level it prompted the formation of groups such as the Regional Citizen's Advisory Council (RCAC) which is funded by Alyeska.

3) Of the three groups sampled--CL, A/S, Y--the community leaders appear to be the group most negatively impacted in the areas of stress, spousal relationships, and use of alcohol. They were also the ones to report experiencing the most economic effects with about twice as many (33%) reporting an income gain as compared to a loss. Other differences among perceptions of the three groups sampled demonstrate two points. First, community leaders

appear to be the ones in the community who will need the greatest amount of support/assistance during the time of crisis events such as the oil spill. Second, perceptions about the effect of the oil spill on the community varied among these three groups, confirming the methodological assumption that surveying different groups in the community is necessary if researchers want to generalize about the "community's" perceptions of the effects of the oil spill.

In conclusion, the findings reported in this paper support previous research that demonstrates the complex interactions that take place between social, economic and psychological factors, as well as between the different levels of society identified in Figure 1. That is, the oil-spill related impacts affect not only peoples' behavior, but how they perceive and comprehend their lives both in the short and long term. It is also clear from our findings that actual, perceived, or anticipated stress leads to various coping responses. Similar conclusions have been drawn by other studies on the oil spill (National Wildlife Foundation, 1990; Impacts Assessments, 1990), and the findings reported herein are consistent with previous toxic disaster research (e.g. see Edelstein, 1988).

Finally, it is worth noting that while the State and Exxon, have reached a $900 million settlement, effects on the Alaskan people, as compared to the environment, water and wildlife, remain generally hidden and seemingly unimportant. And, because it is obvious from our findings that the spill continues to cause anxiety and fear about the future, more research, particularly longitudinal studies are needed to determine the full extent of the oil spill on residents and communities such as Homer. As previously noted, a follow-up survey is being planned by this author during the Spring of 1992.

NOTES

1. Cumulative percentages may not add to 100% due to rounding.

2. At present, the open-ended responses have not been coded and analyzed for either the A/S or Y samples.

3. The Child Form of the Federicks Post Traumatic Stress scale was used for the Youth sample. However, after a discussion with the author of the PTS scale, he suggested that we should have used the adult form. Thus, the stress scores for the Youth sample are probably inflated, and this caution should be used in interpreting of the results.

REFERENCES

Edelstein, Michael R., 1988. *CONTAMINATED COMMUNITY: THE SOCIAL AND* PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE. Boulder, CO: Westview Press, Inc.

Gibbs, Lois Marie, 1982. *LOVE CANAL: MY STORY*. Albany: State University of New York Press.

Impact Assessment, Inc., 1990. *ECONOMIC, SOCIAL, AND PSYCHOLOGICAL IMPACT ASSESSMENT OF THE EXXON VALDEZ OIL SPILL.*

Kushnir, Talma, 1982. "*Skylab Effects: Psychological Reactions To A Human-made Environmental Hazard.*" ENVIRONMENT AND BEHAVIOR, 14:84-93.

Milbrath, Lester, 1984. *VANGUARD FOR A NEW SOCIETY*. Albany: State University of New York Press.

The National Wildlife Federation, 1990. THE DAY THE WATER DIED. A Compilation of the November 1989 Citizens Commission Hearings on the Exxon Valdez Oil Spill. Anchorage, AK: The National Wildlife Federation, The Natural Resources Defense Council, The Wildlife Federation of Alaska and the Windstar Foundation.

Wolfenstein, Martha, 1957. *DISASTER: A PSYCHOLOGICAL ESSAY*. Glencoe, IL: Free Press.

Table 1. VARIOUS "FIRST-MENTIONED" EFFECTS OF THE OIL SPILL ON COMMUNITIES: PERCENTAGE OF RESPONSES MENTIONED IN OPEN-ENDED QUESTIONS CON'T.

EFFECT ON FAMILY PROBLEMS	Community Leader
Increase in general problems	18%
Increase in alcohol/drug related problems	0
Increase in marital problems	4
Increase in domestic violence	25
Increase in child neglect	4
Increase in elder abuse	4
Increase in miscellaneous abuse	11
EFFECT ON SCHOOL PROBLEMS	
Increased dropouts	7%
Kids coming in stressed/ neglected	0
Teacher stress	7
School/oil spill work conflict	0
EFFECT ON ALCOHOL AND DRUG USE	
General increase	57%
Increase due to increase of income	7
Decrease in use	0
EFFECTS ON SUBSISTENCE	
General increase--more for some because no one fishing	28%
Decrease due to contamination	11
Decrease because too busy/ working oil spill	11
Subsistence values threatened	4
Decreased subsistence, increased use of store bought food	4
Decreased subsistence due to other adaptations	4
Quality, Quantity of bags and catches influenced, (-)	6
EFFECTS ON JOB-RELATED PROBLEMS	
Decrease in local jobs/ labor force	32%
Increase in general work related problem	0
Increase in social change problems	0
Overworked, overstressed	14
Lost fishing related jobs	7
Positive effects: increased opportunities for many	4
Boom/bust trends	0
OTHER "FIRST MENTIONED" PROBLEMS	
Economic problems	21%
Leadership/government problems	4
Split between job and morality	7
Emotional effects	18
Increased environmental activism	4
Problems with Exxon and cleanup	7

Table 1. VARIOUS "FIRST-MENTIONED" EFFECTS OF THE OIL SPILL ON COMMUNITIES: PERCENTAGE OF RESPONSES MENTIONED IN OPEN-ENDED QUESTIONS.

FINANCIAL EFFECTS	Community Leader
Good for some, bad for others	21%
Boom then bust	4
Change (numberous examples)	11
Loss from fishing/cannery closure	4
Cash gain	39
Increased employment	4
Increased business	4
Community organization had economic gain	7
EFFECTS ON CRIME	
General increase	21
General decrease	0
Increase due to transients	7
Increase in fighting/hostility	4
Increase in vandalism/theft	4
Increase in domestic violence	21
Increase in alcohol/drug related	7
EFFECTS ON PHYSICAL HEALTH	
Increase in stress/overwork related	32%
Increase in eating/stomach disorders (including weight	4
loss or gain): nausea	4
General oil spill related work/ health problems	11
Respiratory problems	7
Internal problems	0
Nosebleeds	4
EFFECTS ON MENTAL HEALTH	
General increase in problems	21%
Stress/tension/burnout	29
Anxiety/fear/uncertainty/worry	11
Anger/irritability	11
Frustration	0
Depression	7
Powerlessness	4
Denial	4
EFFECTS ON HOUSING	
Housing shortage	50%
EFFECT ON DEMAND FOR SOCIAL SERVICES	
General increase	32%
Increase demand on police/ emergency services	4
Increase demand on mental health services	11
Increase demand on social services (miscellaneous)	7
Increased need for training	4
Decrease use of services more than expected	0
Increased amount of money anticipated for demands of spill related problem	0

Table 2 . RESPONSES TO EXXON-VALDEZ OIL SPILL STRESS SCALE: COMMUNITY LEADERS (N =16).

Extent of Perceived Stress		Community Leaders
1	Low	7.1%
2		7.1
3		14.3 = 28.5%
4	Medium	00.0
5		03.6
6		3.6
7		10.7 = 17.9%
8	High	17.9
9		7.1
10		25.0 = 50.0%

Table 1. METHODS OF COPING WITH STRESS BY COMMUNITY LEADER (N=16) AND ADULT/SENIOR GROUP (N = 24).

Methods of Coping	Community Leader			Adult/Senior			Youth		
	1	2	3*	1	2	3	1	2	3
Ask advice from others	11.0%	21.0%	68.0%	12.0%	21.0%	67.0%	26	44	30
Yell or shout to let off steam	68.0	21.0	11.0	49.0	33.0	17.0	39	52	9
Keep hurt feelings inside	36.0	57.0	7.0	41.0	44.0	15.0	35	9	56
Take medicine to feel better	82.0	7.0	4	88.0	8.0	4.0	86	9	5
Stay busy	29.0	21.0	46.0	19.0	15.0	39.0	17	35	48
Think things will get better in a year or two	29.0	32.0	36.0	48.0	28.0	24.0	17	52	30
Wait for things to work out by themselves	32.0	39.0	25.0	51.0	38.0	11.0	61	26	13
Have a drink or two	64.0	25.0	7.0	75.0	22.0	3.0	73	27	0
Take action to solve the problem	4	14.0	79.0	3.0	22.0	75.0	17	39	45
Get physical exercise	14.0	36.0	46.0	10.0	38.0	53.0	9	43	48
Sleep a lot	54.0	29.0	14.0	71.0	24.0	5.0	48	26	26
Argue with others	29.0	43.0	25.0	60.0	28.0	12.0	26	48	26
Pray	39.0	14.0	43.0	32.0	27.0	41.0	48	30	22
Get help from professionals	68.0	21.0	4.0	82.0	12.0	5.0	96	4	0

* Number refer to following responses, respectively. Never or almost never; Once in a while; Fairly often.

** Percentages rounded to nearest whole number.

Table 4. PERCEPTIONS OF EXISTING SOCIAL PROBLEMS IN COMMUNITY AND WHETHER OIL SPILL INCREASED PROBLEMS.

	COMMUNITY LEADERS								ADULTS/SENIORS							
Social Problems	Problem in Community?				Increased Because of Oil Spill?				Problem in Community?				Increased Because of Oil Spill?			
	NO 1	DK 2	YES 3	NR or NA	NO 1	DK 2	YES 3	NR or NA	NO	DK	YES	NR or NA	NO	DK	YES	NR or NA
Alcoholism/Alcohol Abuse	0%	4%	96%	0%	0%	18%	79%	4%	7%	18%	87%		30%	13%	57%	
Drug Abuse	4	4	93	0	4	18	75	4	4	9	87		26	22	52	
Spouse Abuse	0	11	89	0	7	25	64	4	26	13	61		30	26	44	
Child Physical Abuse	4	21	75	0	11	46	39	4	48	39	22		44	52	4	
Child Sexual Abuse	4	21	71	4	14	46	32	7	48	44	9		44	53	4	
Adolescent Physical Abuse	7	36	57	0	14	46	36	4	44	39	17		39	57	4	
Adolescent Sexual Abuse	7	43	50	0	14	57	21	7	74	26	0		65	35	0	
Elder Abuse	25	50	18	7	25	54	11	11	95	4	0		95	4	0	
Child Neglect	11	25	64	0	11	32	54	4	22	26	52		26	22	52	
Murder	57	21	21	0	32	36	29	4	68	32	0		64	36	0	
Rape	29	32	36	4	25	46	21	7	44	30	26		48	35	17	
Stealing	18	21	57	4	18	32	43	7	78	13	9		78	17	4	
Lack of Food	36	29	32	4	39	29	25	7	70	13	17		87	9	4	
Lack of Social Services	54	25	21	0	39	29	29	4	91	9	0		91	4	4	
Lack of Medical Supplies	75	21	4	0	54	32	7	7	78	22	0		78	22	0	
School of Dropout Rates	29	46	21	4	21	61	11	7	17	9	74		58	21	21	
Employment Problems	25	18	57	0	21	29	43	7	68	5	27		65	13	22	
Housing	46	18	36	0	25	25	43	7	87	9	4		75	13	13	
Crime in general	29	11	61	0	14	21	61	4	64	0	30		79	4	17	
Discrimination	39	32	21	7	21	43	21	14	69	0	30		68	9	23	

Table 5. COMMUNITY LEADERS' PERCEPTIONS OF CONFLICTS/COOPERATION WITHIN COMMUNITIES.

	HOMER			
Confilcts	NO	DK	YES	NA or NR
Residents and Exxon	7%	4%	82%	7%
Residents and VECO or VECO Contractors	7	11	75	2
Residents Themselves (i.e., Neighbors, Friends, and Families	18	0	68	14
Residents and Local Institutions	18	36	46	0
Federal and State Agencies (e.g., U.S. Coast Guard and Alaska Dept. of Conservation	14	39	46	0
State and Federal Agencies and Local Fishermen (A & B)	14	14	71	0
Native and Non-Native Institutions	39	39	21	0
Local Fishermen or Cannery Employees and Non-local Commercial Fishermen	43	29	29	0
Local Fishermen Who Worked for VECO and Those Who Did Not	11	18	71	0
Cooperation				
Public/Social Institutions In The Community and Region Cooperated In Working On Spill Problems	21	0	79	0

* Percentages rounded to nearest whole percent.

Table 6. COMMUNITY LEADERS' RESPONSES TO SPECIFIC QUESTIONS CONCERNING IMPACTS ON COMMUNITIES.

Questions	NO	DK	YES	NA or NR
Was tourism reduced by the oil spill?	68%	18%	14%	0%
Did the loss of commerical fishing income noticeably affect community businesses and residents?	32	25	39	4
Did people in the community express a reluctance to invest in businesses, houses and the like?	68	14	18	0
Did people express an interest in moving out of the community/village?	61	11	25	4
Were subsistence pursuits and the quantity and quality of bags and catches influenced by the oil spill?	31	36	61	4
Do you think that persons in your community perceive threats to their health from the oil spill?	21	0	71	7
Do people in your community think that it is safe to eat fish that may have been in contact with the oil spill?	93	0	4	4

Table 7. PERCEPTIONS OF WHO COMMNUNITY LEADERS THINK ARE RESPONSIBLE FOR THE EXXON-VALDEZ OIL SPILL ON MARCH 24, 1989.

	Community Leaders	Adults/Seniors	Youth
RESPONSIBLE FOR OIL SPILL			
Exxon	32%	15%	10%
Captain	7	30	50
State	4	6	5
Coast Guard	4	4	0
Third Mate	0	4	5
Crew	7	4	10
Everyone	11	9	5
Alyeska	0	0	0
Legislators/Congress	7	0	0
Alcohol	4	6	0
Negligence	4	7	5
Oil industry	4	4	0
No one	0	3	5
Other	7	7	5

Table 8. PERCEPTIONS OF COMMUNITY LEADERS AND ADULTS/SENIOR AND YOUTH ON EFFECTIVENESS OF VARIOUS ORGANIZATIONS IN CLEANING UP OIL SPILL.

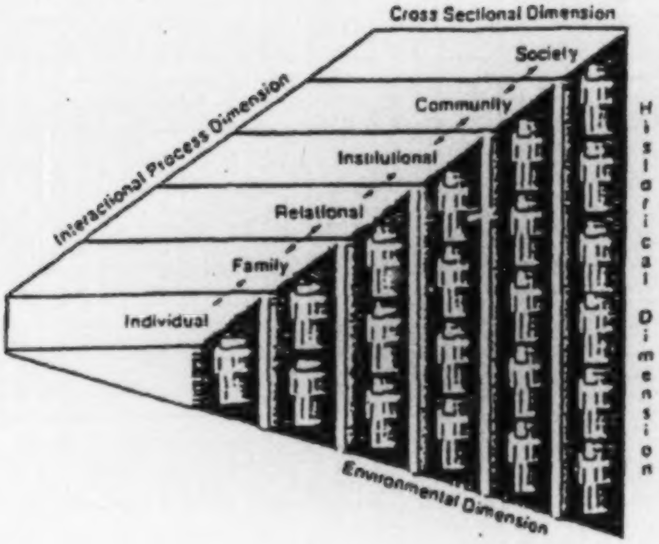
ORGANIZATIONS	Community Leaders				Adults/Senior				Youth			
	Low (0-2)	Medium (3-5)	High (6-7)	NR/NA	Low (0-2)	Medium (3-5)	High (6-7)	NR/NA	Low (0-2)	Medium (3-5)	High (6-7)	NR/NA
Exxon	43%	46%	7%	4%	46.0%	39.0%	8.0%	7.0%	22.0%	48.0%	17.0%	13.0%
Federal Government Agencies (e.g., U.S. Coast Guard)	43	46	7	4	38.0	51.0	6.0	6.0	22.0	30.0	9.0	39.0
State Government Agencies (e.g., State Dept. of Conservation; Fish and Game	21	57	14	7	34.0	52.0	7.0	7.0	4.0	48.0	9.0	39.0
Regional Profit Organization (e.g., VECO	4	43	7	46	26.0	15.0	9.0	51.0	13.0	35.0	13.0	39.0
Regional Nonprofit Organizations? (e.g., Volunteer Groups)	21	39	14	25	4.0	29.0	32.0	35.0	4.0	13.0	48.0	35.0
Village Corporations	11	39	4	46	12.0	26.0	17.0	45.0	9.0	17.0	13.0	61.0
Local Government Agenices	18	54	21	7	22.0	48.0	19.0	12.0	17.0	30.0	18.0	35.0
Indian Reorganization Act (IRA) Council	7	0	0	93	19.0	2.0	2.0	78.0	13.0	9.0	9.0	70.0
Local Business	18	36	18	29	21.0	46.0	19.0	14.0	18.0	50.0	9.0	23.0
Insurance Companies	14	11	7	68	46.0	14.0	3.0	46.0	17.0	30.0	9.0	44.0
Schools	14	21	11	54	25.0	36.0	15.0	25.0	26.0	35.0	9.0	30.0
Churches	18	22	22	39	19.0	39.0	16.0	27.0	22.0	22.0	13.0	44.0
Medical Professionals	18	18	19	39	14.0	34.0	24.0	28.0	13.0	22.0	13.0	52.0
Social Workers	7	29	36	29	15.0	38.0	25.0	22.0	13.0	30.0	18.0	39.0
Local Law Enforcement	7	36	32	25	14.0	44.0	26.0	16.0	22.0	30.0	4.0	44.0
State Law Enforcement	11	39	50	29	19.0	44.0	17.0	20.0	17.0	39.0	4.0	39.0

* Percentages rounded to nearest whole number.

Table 9. PERCE ONS OF EFFECTS OF OIL SPILL OI JTURE OF HOMER.

	Community Leaders
LIFESTYLE	
Less fishing	04.0%
Depends on fishing	14.0
Increased awareness/ prevention	25.0
Both positive and negative effects	00.0
Improve	11.0
Worsen	07.0
Will change somehow	14.0
No effect	18.0
EMPLOYMENT/CAREER PLANS	
Depends on fishing	21.0%
Improve	21.0
Worsen	07.0
Will change somehow	04.0
Educate kids awareness	07.0
New skills/less dependence	00.0
No afffect	18.0
FAMILY RELATIONSHIPS	
Both positive and negative effects	00.0%
Improve	04.0
Worsen	29.0
Will change somehow	14.0
No effect	21.0
COMMUNITY RELATIONSHIPS	
Improve	18.0%
Worsen	14.0
Will change somehow	04.0
Both positive and negative effects	04.0
People working together more	14.0
No effect	25.0
HABITS, e.g., DRINKING	
Improve	11.0%
Worsen	39.0
Will change somehow	04.0
Both positive and negative effects	04.0
No effect	21.0
SUBSISTENCE	
Increase	04.0%
Decrease	29.0
Will change somehow	11.0
Not taken for granted	04.0
Improve politically	00.0
No effect	11.0
WORLDVIEW	
Improve	11.0%
Worsen	21.0
Will change somehow	07.0
Improved awareness	21.0
Both positive and negative effects	00.0
No effect	11.0

Figure 1. The Social Process Model (Edelstein, 1988).


Cross Sectional Dimension
Interactional Process Dimension
Society
Community
Institutional
Relational
Family
Individual
Historical Dimension
Environmental Dimension

Perceptions and Outcomes Result from Interactions Between/Among Different Levels of Society, The Environment, and Past Histories.

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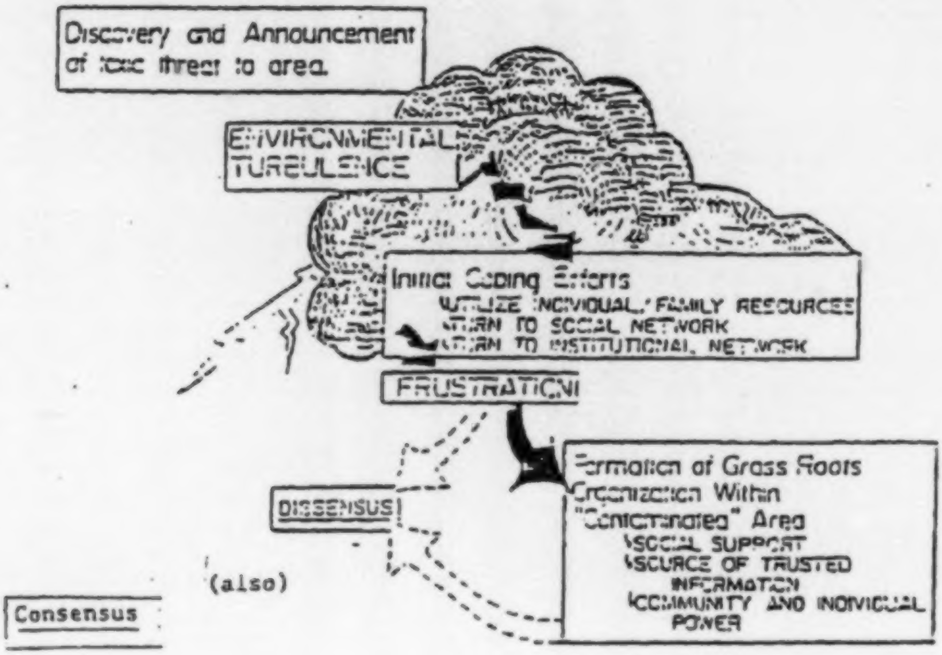
Figure II. An Exploratory Map of Community Response to Toxic Contamination (taken from Michael R. Edelstein and Abraham Wandersman, "Community Dynamics in Coping with Toxic Exposure," in Irwin Altman and Abraham Wandersman (eds.), Neighborhood and Community Environments [New York: Plenum Press, 1987].


Discovery and Announcement of toxic threat to area.
ENVIRONMENTAL TURBULENCE
Initial Coping Efforts
UTILIZE INDIVIDUAL/FAMILY RESOURCES
TURN TO SOCIAL NETWORK
TURN TO INSTITUTIONAL NETWORK
FRUSTRATION
Formation of Grass Roots Organization Within "Contaminated" Area
SOCIAL SUPPORT
SOURCE OF TRUSTED INFORMATION
COMMUNITY AND INDIVIDUAL POWER
DISSENSUS
(also)
Consensus

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THE STRESS RELATED IMPACT OF THE VALDEZ OIL SPILL ON THE RESIDENTS OF CORDOVA AND VALDEZ, ALASKA

A Comparative Study Conducted by the Valdez Counseling Center

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EXHIBIT 9

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Abstract

A one year study of the human effect of the Exxon Valdez oil spill on residents of Cordova and Valdez, Alaska, using stress related criteria found that the majority of residents experienced symptomatology consistent with a diagnosis of Post-Traumatic Stress Disorder. Stress symptomatology was found to be greater in Cordova than in Valdez in incidence, intensity and duration. The variation in individual stress scores was generally found to be greater than the central tendency of subgroups.

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The Problem and Its Setting

On March 24, 1989 the tanker vessel "Exxon Valdez" ran aground on Bligh Reef in Prince William Sound, Alaska. The grounding resulted in the spill of almost 11 million gallons of crude oil into the surrounding water. This was the largest oil spill in U.S. history; furthermore, the event took place in a remote area renowned for its wilderness quality and abundant wildlife. The commercial fishing value from the Sound typically ran into the tens of millions of dollars per year.

Thousands of sea birds and other wildlife were killed and an important habitat was damaged or threatened by the encroaching oil. Eventually more than 1100 miles of shoreline was impacted. Much of the commercial fishing season was cancelled and there is considerable speculation about future damage to the fishery. The event was widely acknowledged as this country's worst environmental disaster.

The impact of the oil spill on the emotional well being of area residents was unknown. Change was inevitable, the predictability of life was disrupted for most who live or work in the area. Normal employment patterns were disrupted as many community members were drawn into the spill related work force where "normal" work hours were 12 hours a day, seven days a week. Some workers were absented from their families for weeks at a time as clean up workers were housed in dormitory ships near the spill.

The Exxon Corporation, owner of the tanker, assumed responsibility for the spill and mounted a massive clean-up effort that cost the company over two billion dollars and employed thousands of workers during the summer of 1989. Exxon also set up claims offices and began processing claims from fishermen and others who were economically impacted by the spill.

In addition to the influx of oil spill workers, a host of other groups and individuals converged on Valdez, including: the mass media, Exxon bureaucrats, security guards, representatives of state and federal agencies, bird and otter rescue groups, scientists, environmentalists, tourists, street vendors, the unemployed and the unemployable. This rapid population influx disrupted normal social patterns as the population of Valdez swelled from 3500 to an estimated 7000 in a matter of weeks. Along with this rapid population influx came a variety of social ills: a fourfold increase in crime and consequent increase in fear for personal safety; a critical housing shortage that lead to all manner of unusual living arrangements; traffic congestion; long lines at the post office, stores, and restaurants. City services were overwhelmed, for example areas of the city literally stank as the sewage treatment system was unable to meet demand. Cordova was spared much of the population influx because it is not connected by road with the rest of the state. Cordova, however, because it is primarily a fishing community is more economically dependent on the Sound than Valdez.

Media coverage of the spill and clean up effort was intense and video images of dead or dying wildlife, oil blackened sea and shoreline as well as the high impact, labor-intensive invasion of the Sound were a constant reminder to residents that they were suffering a catastrophic event. Researchers have discovered that people in our society base their impressions about disaster behavior mainly on mass media accounts. Even where individuals have been through a disaster and have experienced what actually happened, they tend to discount their experience as atypical. (Gist, p. 22).

The Exxon Valdez oil spill and its aftermath were unique events: never had this country suffered a spill of such magnitude; never had such a massive spill occured in an area so remote and environmentally sensitive; never had there been so large, intensive or diverse a convergence on an area as the result of a human failure disaster.

Disasters involving human casuality, dislocation and property destruction can have severe long-term psychological consequences such as shock, anxiety, sleep disturbances and impaired interpersonal relationships, but even in the absence of severe human stressors such as upheaval or massive loss of life, any upset in the normal state that cannot be overcome through usual methods of problem solving will cause stress and, consequently, stress related problems. The immediate and long term impact of the oil spill on the mental health of area residents was unknown. In order to gain insight into the human impact of the event a methodological inquiry was necessary.

Study Objectives

The central objective of this study was to understand the impact of the spill and its aftermath in human terms.

A second objective of the study was to gain some understanding of the spill's impact, if any, on any subgroups of the population for the purpose of mental health service planning and delivery.

The final objective of the study was to identify possible mediators that helped reduce stressfull symptomatology. If we can learn more about how people coped with this accident, we may be able to help future victims of technological mishaps.

Hypotheses

In order to accomplish the study objectives it was necessary to generate a number of hypotheses. Because of the unique nature of the event, and, hence, the difficulty in being able to make predictions on the basis of outcomes from similiar research, there was a great deal of conjecture in the formulation of these hypotheses.

The primary research hypothesis was that the oil spill and its aftermath constituted an extreme stressor for most area residents that could cause emotional problems in most people. This was operationalized as a score of 12 or more on the Reaction Index by more than 50% of the study population.

It was hypothesized that Cordova, which is more dependent on the Sound than Valdez due to fishing and related industries, would experience a higher incidence, intensity and duration of stress symptomatology than would Valdez whose economic base consists primarily of the Alyeska Pipeline Terminal.

It was hypothesized that the incidence of depressive symptomatology as measured by the Center for Epidemiologic Studies Depression Scale (CES-D Scale), would increase for both communities as a result of spill related stress and a positive correlation as well as a cause and effect relationship would exist between Reaction Index scores and CES-D scores.

Because people under increased stress sometimes increase their alcohol consumption and/or use of illicit drugs, it was hypothesized that drug and alcohol use would increase and this increase would be related to higher Reaction Index scores.

Subgroup Hypotheses

The desire to explore the relationship between Reaction Index scores and subgroup membership led to the formulation of the following subgroup hypotheses.

According to Kilizanek and Drabek (1979), the elderly, because they have had to master a greater amount of adversity in their lifetime, are less likely to perceive significant long-term negative consequences of disaster; therefore, it was hypothesized that older persons, as a group, would be less symptomatic than younger persons.

Research by Holahan (1978) indicates that while men are inclined to see their physical environment objectively and in nonsocial terms, women, on the other hand tend to view the environment in more personalized terms; therefore, it was hypothesized that women, as a group, would be more symptomatic than men.

Because of their cultural history and subsistence use of the environment, it was hypothesized that Native Alaskans would experience more symptomatology than members of other racial groups.

It was hypothesized that persons who have lived in Alaska for long periods would experience the spill as more of a loss and would, consequently, be more symptomatic than persons who had not lived in the state as long.

Because the spill represented a direct threat to their livelihood, it was hypothesized that fishermen, as a group, would be more symptomatic than any other occupational group.

Mediating Hypotheses

It was hypothesized that persons who enjoyed greater social support would be less symptomatic than persons with lesser social support.

It was hypothesized that income earned as a direct result of the spill would be a mediating factor and there would be a direct relationship between increased net income as a direct result of the spill and decreasing stress symptomatology.

Literature Review

Psychological Stress

According to Frederick (Laub, 1985, p. 110)

> Within the last few decades it has become clear that a broad spectrum of measurable effects of psychological stress could become manifest in humans at all age levels. A special component of this phenomenon, namely, psychic trauma, was probably first recognized per se, in the early 1940's. This has developed into a significant condition called Post-Traumatic Stress Disorder (PTSD) which was officially listed for the first time in the third edition of the Diagnostic and Statistical Manual (DSM III) of the American Psychiatric Association (1980)...it has long been suspected that these disturbances might have both acute or long term effects. The specific range of stressors which could evok such disturbances has been recognized only within the last couple of decades. In addition to the existence of a recognizable stressor which would be likely to evoke symptoms of distress in the majority of persons, typical symptoms include reexperiencing the traumatic situation; a difficulty in experiencing normal feeling, that is, an emotional anesthesia or reduction in being involved with the world around oneself; and an avoidance of situations that symbolize or represent the event.

Technological Disaster

According to Baum (1983, p. 120), "We have created a vast technological environment to improve the quality of our lives, but this network of power generating, production, and waste disposal systems can and does malfunction. Some of these malfunctions may be called technological disasters." Beigel (1985, p. 144) is more direct in assessing the cause of human-induced disasters which he characterizes as acts of omission that tend to result from attempts to either save money, resources or time.

Baum (1983, p. 120) contrasts victimization by technological mishap, which he maintains involves a perceived loss of control over something that was once perceived as controllable, with natural disaster which involves a perceived lack of control over something that was never perceived as controllable. He concludes therefore that technological mishaps may generate greater post-accident uncertainty than natural disasters. "While natural disaster may also pose some chronic problems, we feel that the combination of factors underlying technological disaster is more likely to cause long-term uncertainty and consequent psychological effects than are natural disasters."

According to Beigel (1985, pp. 143-150), victims of disasters of omission may never go through recognizable stages of recovery because victims may not recognize themselves as such. "Without evidence of a disaster, the potential for resolution that occurs with most natural disasters is missing. In a sense the victims are stuck in the initial phase of a disaster, shock, anger, depression, etc."

Beigel maintains that victims of acts of omission are perceived as causing new problems:

> For example, it was pointed out that while victims of an asbestos problem were waiting for the red tape to clear, mar" residents of the larger community began to blame those same victims for complaining to the federal government about the problem. It was a "blaming the messenger for the message" phenomenon. The more the victims voiced their concern, the more severe was the blot on the community. For those with a vested interest in a community with a good name, the image of the problem (caused by the victims) was seen as worse than the problem itself.

The nuclear power plant accident at Three Mile Island has been ascribed as the most studied accident in America. Hartsough (Laub, 1985, p. 10), characterized Three Mile Island as a bench mark in disaster effects research.

> Because the accident was ominously threatening and drew world-wide attention, but did not cause injury or death, or result in community destruction, the effects on the mental health of the surrounding population became identified as the major impact of the accident. Psychological stress became the major variable of study.

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Methodology

This was an exploratory study designed to gain insight into the psychological impact on area residents of the Exxon Valdez oil spill for the purpose of mental health assessment and intervention planning.

Description of the Subjects and Sample Selection

The subjects were all adult members of the communities of Valdez and Cordova. Subjects were selected using a computer generated simple random sample (SRS) of registered voters. Sample selection was conducted by an independant commercial computer firm. This sampling frame encompassed approximately two thirds of the adult population of each community. One hundred fifteen randomly selected residents in each community were mailed an invitation to participate along with a copy of the first instrument and an offer of a $25 payment to respondents who completed and returned all three instruments mailed to them over a one year period (see appendix A). The offer of a cash payment was utilized to increase response and minimize respondent bias.

Description of the Research Design

A bifurcated longitudinal panel format was used to record depressive and stress symptomatology using standardized measuring instruments. In order to measure change over time, respondents were mailed a series of three similiar self report survey instruments over a one year period. The first survey was conducted in the second month after the spill, the second in the eighth month, and the final survey in the twelfth month post spill. An accurate recording of stressful symptomatology required a timely assessment. According to Yates (Gist, p. 183), "When initial data are collected 6 months or even 1 year after a disaster, valuable information critical to an analysis of processes expected to change over time - is lost." Slow start-up time also forces the researcher to rely more exclusively on retrospective, self report data that is likely to be less reliable.

Even though the initial instrument was in the field within two months of the spill, one month would have been preferable and the one month target date would have been met if the start up time had not been delayed while the sponsoring agency awaited requested funding from the State Department of Mental Health and Developmental Disabilities that was not forthcoming. Limited resources also dictated a self report mail survey format rather than personal interviews.

Two follow up requests were mailed to initial subjects who failed to respond and two more follow up requests were made to respondents who failed to return the 2nd or 3rd survey instruments. Only respondents who returned all three completed instruments were included in the study.

Code numbers were used to protect confidentiality and the anonymity of respondents was guaranteed.

Description of the Research Instruments

A criticism of past disaster studies is the failure to use standardized measuring devices. All three survey instruments used in this study relied on standardized instruments, including: A perceived social support scale; The Center for Epidemiologic Studies Depression Scale (CES-D scale), and the Frederick Reaction Index.

Social support is known to be a mediating factor in the stress-health relationship (Cohen, 1985); furthermore, Wethington and Kesslar (1986) reported that perceived social support appears to be more important than received support. In order to determine the role of perceived social support as a mediating factor in stress reactions of study subjects, a six item perceived social support scale was adapted from the 12 item Interpersonal Support Evaluation List (ISEL) and included in the survey (see appendix B).

The 26 item Center for Epidemiologic Studies Depression Scale (CES-D Scale) (see appendix C) was developed to be appropriate for use in studies of the epidemiology of depressive symtomatology in the general population. The scale was designed to reflect current state. Radloff and Locke (Weissman, 1986, p. 185) found that high CES-D scores were significantly related to life events. The scale was included in this study to be examined as either a dependent or independent variable in oil spill symptomatology.

The 20 item Frederick Reaction Index (Copyright 1988 by Calvin Frederick - used with permission) (See appendix D) was designed to determine the level of stress in a subject group that has been exposed to an extreme stressor.

Of the many standardized instruments considered, the Reaction Index was selected as the most appropriate for the measurment of stress reaction to the Exxon Valdez oil spill. Reaction Index scores constitute the dependent variable for this study. According to Soloman (Gist, p. 312), "Post-Traumatic Stress Disorder (PTSD) is the mental illness of greatest relevance to the experience of disaster." According to Frederick (appendix E) the degree of Post-Traumatic Stress Disorder has been determined from Reaction Index Scores with a correlation of .95 with established cases of PTSD from a variety of stressors.

A caveat - Post-Traumatic Stress Disorder is a mental disorder that requires a clinical diagnosis, nevertheless, Reaction Index scores are indicative of a degree of stress that would be constant with that diagnosis.

In addition to the three standardized scales, each of the three survey instruments requested vaious demographic and socio-economic information that included: age, sex, race, marital status, education, number of years in Alaska, occupation, annual income, oil spill income, and number of children living at home. The 2nd and 3rd instruments included a four item scale designed to determine increased medical problems and help seeking behaviors (see appendix F) and a question about increased use of drugs or alcohol. All three instruments provided space for and encouraged comments from respondents.

Delimitations of the Study

It is unclear whether the stresses created from the response to a disaster are significantly different than those generated by the disaster itself. In this study there was no attempt to distinguish between psychological sequelae of the spill and the aftermath; spill induced stress is conceptualized as including response generated stress.

This study is limited to the spills impact on adults. This is a most unfortunate limitation that was imposed by the sampling technique, Children have often been the overlooked victims of disasters and there is much anecdotal evidence that children suffered significantly as a result of the oil spill.

Limited resources forced a choice between replicating the study in a control group and studying two impacted communities.

As the oil spread many Alaska communities were affected, although this study involves only the communities of Valdez and Cordova, it is hoped that the results will be helpful in assessing psychological sequelae in other communities.

Definition of Terms

STRESS - an arousal reaction to a perceived threat.

In humans stress is thought to be the vestage of our 50,000 year old fight-flight reflex which is biologically geared to prepare us to fight or flee a threatening stimulus and to sustain our action during a brief period of exertion. Today activation can occur in non-biologically threatening events, the sources of which can be environmental, physical, interpersonal or psychological. Stress can be either acute or chronic and can cause adverse biological and psychological consequences (Womack).

According to Tierney (Gist, p. 11), a lack of agreement on what types of events to include under the disaster label is one of the roots of the ongoing debate on how disasters affect mental health. This study will use Berren's definition - **DISASTER** - "any event that stresses a society, a portion of that society, or even an individual family beyond the normal limits of daily living: (Gist, p. 44)

Results

The Samples

Of the 115 subjects solicited from each community, Cordova respondents returned 53 initial questionnaires for a response rate of 46%. Of the Valdez subjects solicited, 64 returned the initial questionnaire for a total response rate of 56%. The researchers were unable to discern any pattern of respondent bias from the initial survey returns.

Panel mortality for the Cordova sample was 19% as 43 of the initial 53 respondents returned all three completed instruments and were included in the study. No pattern of respondent mortality bias was discernable for Cordova.

In Valdez 50 of the initial respondents returned all three instruments for a panel mortality rate of 22%. In Valdez a disproportionate percentage of females was discernable in the final sample, 68% compared to 58% in the voter registration sampling frame (see figure 1). This discrepancy may be explained by the other anomaly that was discernable in the final Valdez sample - the respondent mortality rate for those initial respondents who identified themselves as employed in the oil industry (all male) was also found to be disproportionate. Of the 11 oil industry employees responding to the initial survey, only 5 went on to complete and return the second and third survey for a respondent mortality rate for oil industry employees of 120%; consequently, males as well as oil industry workers were under represented in the final Valdez panel.

Primary Hypotheses Testing

The primary research hypothesis - the oil spill and its aftermath constituted an extreme stressor for most area residents that could cause emotional problems in most people is upheld for both communities. Of the 43 Cordova respondents 36 or 83% reported symptoms consistent with the criteria for a diagnosis of PTSD. Of the Valdez sample 33 or 65% reported symptoms consistent with PTSD at some point in the study.

The hypothesis that Cordova would experience a higher incidence, intensity and duration of stress symptomatology than would Valdez is upheld (see figure 2). The incidence of stress symptomatology was actually slightly less in Cordova than in Valdez on the first survey, but, unlike Valdez, the incidence of stress symptomatology increased on the second survey. Although the incidence of stress symptomatology decreased in Cordova between the second and third survey by 9.3%, the incidence of stress symptomatology on the final survey reflects Cordova's stress index to be 14.19% higher than in Valdez. A comparison of the mean scores verifies Cordova's greater intensity and duration of stress symptomatology. Figure 2 demonstrates a steadily decreasing mean stress score for Valdez from the first through the third survey, mean scores in Valdez decreased from 15.6 to 10.8. In Cordova the mean score decreased by less than 2 points from the first to the third survey remaining more than 4 points higher on the third survey than the mean score on the Valdez third survey. Note the high standard deviations on all three surveys in both cities indicating a large degree of variability on Reaction Index scores.

Demographically, the registered voter population of Valdez and Cordova appears to be very similiar on a number of variables (see figure 3): both populations are well educated with more than 60% having a college degree; both enjoy high average incomes; both are overwhelmingly caucasian. It was apparent in the examination of data; however, that the samples were drawn from two vastly differing populations. The populations differ appreciably on the variable of occupation (see figure 4) and this may explain some of the differences in mean Reaction Index scores; however, even within the same occupation the populations were different when occupation was compared to Reaction Index scores (see figure 5). An analysis of variance found no statistically significant relationship between occupation and Reaction Index scores in either population and a t test for two independent groups between the variables of fishing and all other occupations was also not statistically significant. Consequently the rationale that Cordova would experience more symptomatology than Valdez because of its dependence on fishing and related industries has not been verified by the findings.

Respondent comments were reviewed in order to determine the most frequently expressed respondent concerns. In Valdez the most frequently expressed concern (N=11) was convergence related, i.e., crime, transients, crowds, and traffic that all increased as a result of the spill. Concern about the negative impact of the spill on the environment (N=5) was the second most frequently expressed comment. In Cordova concern about the negative impact of the spill on the environment (N=10) and social disruption caused by perceived greed or jealousy as a result of spill related income

(N=10) were the most frequent comments. Concern about the future of the fishery (N=7) was Cordova's second most frequent comment.

A statistically significant relationship was found to exist between stress and depressive symptomatology as indicated by correlation of Reaction Index and CES-D scores on all three surveys in Valdez and on the first and third surveys in Cordova (see figure 6). Further investigation by regression analysis found a cause and effect relationship to exist (see figures 7 & 8). As stress symptomatology increased there was a corresponding increase in depressive symptomatology.

Three respondents in Cordova and one in Valdez indicated their alcohol consumption and/or illicit drug use increased since the oil spill. This resulted in too few respondents to test the hypothesis that a cause and effect relationship existed between increased substance use and Reaction Index scores.

Subgroup Hypotheses

Possibly as a result of too small a sample but, more probably due to the large amount of variability in stress scores across discrete categories, no relevant statistically significant relationships at a .095 level of confidence were found to exist between Reaction Index scores as the dependent variable and subgroup membership as the independent variable, with the following exception: In Valdez there was a statistically significant positive correlation between years in Alaska and Reaction Index scores on all three surveys. Further investigation by regression analysis, however, failed to find a statistically significant cause and effect relationship between the variables. No significant correlation between years in Alaska and Reaction Index scores was found in the Cordova sample on any of the three surveys.

There were too few Native Alaskan respondents to test the hypothesis that Natives would experience more symptomatology than members of other racial groups.

The hypotheses that younger persons, women and fishermen would be more symptomatic than corresponding groups is rejected by the findings. Other variables were investigated for relationship with stress scores, including marital status, number of children living at home, annual income, occupation, increased help seeking behavior, and increased medical problems. None of these variables were found to be related to Reaction Index scores a .095 level of confidence.

Mediating Hypotheses

The hypothesis that persons who enjoyed greater social support would be less symptomatic than persons with lesser social support is partially upheld for Valdez. Statistically significant correlations between Perceived Social Support scores and Reaction Index scores were found on the second and third surveys from Valdez. A regression analysis showed a statistically significant relationship existed (see figure 9). There was no statistically significant correlation between these variables in Cordova but in Valdez persons with high Perceived Social Support tended to score lower on the Reaction Index.

The hypothesis that income earned as a direct result of the spill would lessen stress symptomatology is rejected. No statistically significant correlation was found in Valdez. A significant negative correlation between the variables was found in Cordova, but regression analysis failed to establish a statistically significant casual relationship (see figures 10 & 11), even though the respondents earning the most money from the oil spill also had the highest mean score on the Reaction Index by a considerable margin.

Summary, Conclusions and Recommendations

Summary

A one year, three phase study was conducted by the Valdez Counseling Center in order to determine the psychological impact of the Exxon Valdez oil spill on residents of Valdez and Cordova. Stress reactions to the spill, as measured by the Frederick Reaction Index, upheld the primary research hypothesis that the oil spill was an extreme stressor that could cause emotional problems for most area residents. Cordova was found to have a higher incidence, intensity, and duration of stress as a result of the spill than was experienced in Valdez.

Evidence of delayed and cyclical stress reactions was found as well as a cause and effect relationship between stress and the incidence and severity of depression.

Perceived Social Support was found to be a mediating factor in Valdez but not Cordova. In spite of certain demographic similarities, Cordova was noted to represent a very different population than Valdez.

Investigation of subgroups found little relationship between group membership and Reaction Index scores due to a high level of variability in individual stress reactions to the oil spill and its aftermath.

Conclusions

A technological disaster of the scope of the Exxon Valdez oil spill that does not result in human casuality or dislocation but does disrupt normal social and occupational patterns may result in emotional problems for most area residents. In the case of the Exxon Valdez oil spill stress symptomatology was greater on an individual basis than was evident in any subgroup of the study populations indicating the individual nature of each persons relationship with their environment as well as the importance of protection of the environment to the maintenance of good mental health for the majority of it's human occupants.

Individual perceptions and coping abilities vary greatly. In the case of the Exxon Valdez oil spill, most of the residents of Valdez and Cordova experienced emotional problems as a result of the spill, yet only 10% of the respondents sought professional help for any marital or emotional problem during the first year after the spill. This is consistent with other studies of help seeking behaviors (Bosmajian, 1985) and illustrates the need for innovative, community based treatment strategies as well as additional evidence for an increased role for prevention of technological mishaps.

In spite of their relative geographic proximity and some demographic similiarities, Valdez and Cordova represent very dissimiliar populations and each community was uniquely impacted by the oil spill. In Valdez the greatest harm may have resulted from society's response to the oil spill, the tremendous convergence that totally disrupted the community and robbed the residents of the ability to predict events in their lives with any degree of accuracy that is so important in minimizing stress. As one resident commented, "The fact that the town is so crowded and

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the crowds milling around - waiting in lines, etc. is what causes me the most stress. I am afraid for my childrens' safety now - also I feel like our town has been invaded and violated."

Cordova was spared much of the human invasion, but none of the social or emotional disruption caused by the spill. A Cordova respondent commented, "The oil spill claims precedure is very stressful. Watching close family/friends reap benefits of oil (cleanup) work is also stressful. Life in Cordova is not as sweet as it was."

Recommendations

If the psychological impact on area residents of the Three Mile Island nuclear power plant disaster is the most studied event in history, the psychological impact of the wreck of the T/V Exxon Valdez on area residents may be the least studied event in this nations history. Further study is needed. At the end of 12 months 44% of the Cordova and 30% of the Valdez respondents were still experiencing significant trauma as a result of the oil spill.

Efforts to understand the impact of the oil spill on the emotional well being of the people of Alaska have been minimal. The spiller, the state and the federal government need to recognize that otters were not the highest species of animal to suffer as a result of the Exxon Valdez oil spill. Resources should also be directed toward understanding and ameliorating the negative psychological impact of the spill on the people who live there.

BIBLIOGRAPHY

Baum, Andrew; Fleming, R.; Singer, Jerome E. "Coping With Victimization by Technological Disaster." Journal of Social Issues, 39(2), 1983, pp. 117-138.

Baum, Andrew; Schaeffer, Marc A.; Lake, L. Raymond; et. al. "Psychological and Endocrinonological Correlates of Chronic Stress at Three Mile Island." Perspectives on Behavioral Medicine, 2, pp. 201-217.

Beigel, Allan and Berren, Michael R. "Human-Induced Disaster." Psychiatric Annals, 15(3), 1985, pp. 143-150.

Bosmajian, C. Perry and Mattson, Robert E. "A Controlled Study of Variables Related To Counseling Center Use." Journal Of Counseling Psychology, 27(5), 1980, pp. 510-519.

Cohen, Sheldon and Wills, Thomas. "Stress, Social Support, and the Buffering Hypothesis." Psychological Bullstin, 98(2), 1985, pp. 310-357.

Davidson, Laura M.; Baum, Andrew; and Collins, David L. "Stress and Control-Related Problems at Three Mile Island." Journal of Applied Social Psychology, 12(5), 1982, pp. 349-359.

Diagnostic and Statistical Manual of Mental Disorders. (DSM-III-R). Third Edition, Revised, Washington D.C.: American Psychiatric Association, 1987.

Edelstein, Michael R. Contaminated Communities. The Social and Psychological Impact of Residential Toxic Exposure. Boulder and London: Westview Press, 1988.

Fleming, India and Baum, Andrew. "The Role of Prevention in Technological Catastrophe." Prevention in Human Services, 4, 1985.

Fleming, Raymond; Baum, Andrew; et. al. "Mediating Influences of Social Support On Stress At Three Mile Island." Journal of Human Stress. September, 1982, pp. 14-22.

Frederick, Calvin J. "Children Traumatized by Catastrophic Situations." Post-Traumatic Stress Disorder in Children, Eth, S. and Pynoos, R.S. (eds.), Washington D.C.: American Psychiatric Press, Inc., 1986.

Frederick, Calvin J. "Psychic Trauma In Victims of Crime and Terrorism." Cataclysms, Crises and Catastrophes: Psychology in Action-Master Lecture Series, Vandenbos, G.R. and Bryant, B. K. (eds.), American Psychological Assn., 1987.

Gatchen, Robert J.; Schaeffer, Marc A.; and Baum, Andrew. "A Psychophysiological Field Study of Stress at Three Mile Island." Psychophysiology, 22(2).

Gist, Richard and Lubin, Bernard (eds.). Psychosocial Aspects of Disaster. New York: John Wiley & Sons, 1989.

Holahan, Charles J. Environment and Behavior. New York and London: Plenum Press, 1978.

Kaniasty, Krysztof Z., Cohen, et. al. Violence: Psychological Reactions and Consequences. Working Paper #1, NIMH Grant No. RO1 MH 41579, 1985.

Langdon, J. Ray and Parker, Allen H. Psychiatric Aspects of the March 27, 1964 Earthquake. A paper presented at the meeting of the American Psychiatric Assn., Los Angeles, May 1964.

Laub, Jerri and Murphy, S.A. Perspectives on Disaster Recovery. Norwalk, Conn.: Appleton-Century-Crofts, 1985.

Taylor, A.J.W. Disasters and Disaster Stress. New York: AMS Press, Inc., 1989.

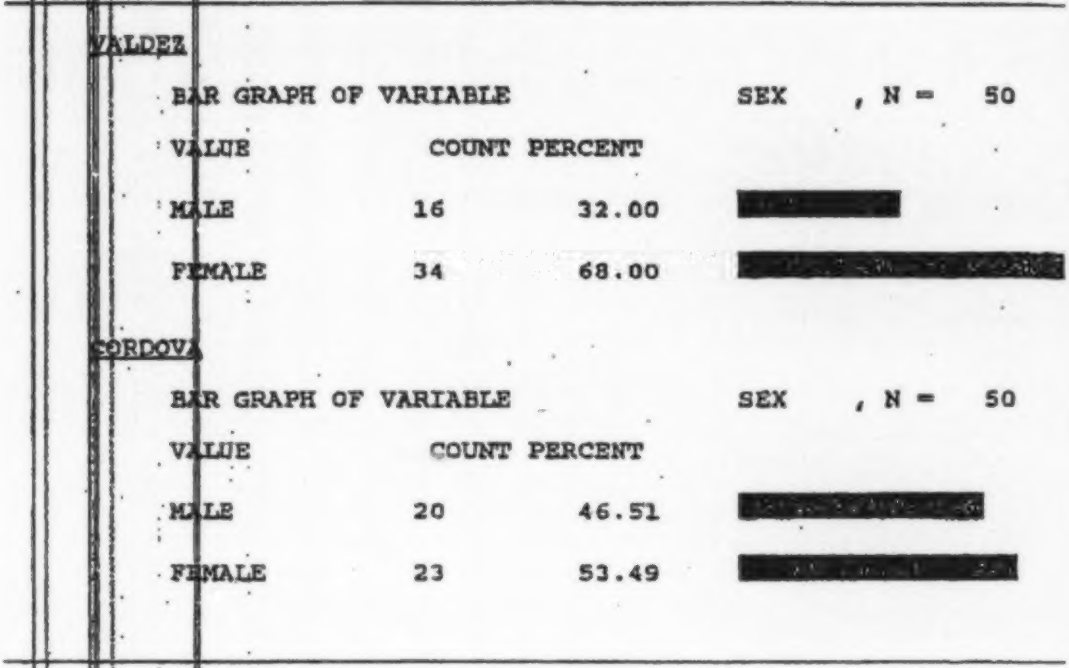
Weissman, Myrna M., et. al. Community Surveys of Psychiatric Disorders. New Brunswick, New Jersey: Rutgers University Press, 1986.

Womack, William M. A Comprehensive Approach To Treatment Strategies for Stress Management. Unpublished Paper.

Wethington, Elaine and Kessler, Ronald C. "Perceived Support, Received Support, and Adjustment To Stressful Life Events." Journal of Health and Social Behavior, 27, 1986, pp. 78-89.

Figure 1

Sex



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VALDEZ

    BAR GRAPH OF VARIABLE                    SEX      , N =    50
    VALUE             COUNT PERCENT
    MALE             16          32.00
    FEMALE           34          68.00

CORDOVA

    BAR GRAPH OF VARIABLE                    SEX      , N =    50
    VALUE             COUNT PERCENT
    MALE             20          46.51
    FEMALE           23          53.49
```

Figure 2
FREDERICK REACTION INDEX

CORDOVA N = 43

SURVEY #1

	SCORE	COUNT	PERCENT
NO PTSD	0 - 11	22	51.16
MILD PTSD	12 - 24	12	27.91
MODERATE PTSD	25 - 39	5	11.63
SEVERE PTSD	40 - 59	4	9.30

Mean = 16.7
SD = 14.1

SURVEY #2

	SCORE	COUNT	PERCENT
NO PTSD	0 - 11	20	46.51
MILD PTSD	12 - 24	13	30.23
MODERATE PTSD	25 - 39	9	20.93
SEVERE PTSD	40 - 59	1	2.33

Mean = 15.44
SD = 11.60

SURVEY #3

	SCORE	COUNT	PERCENT
NO PTSD	0 - 11	24	55.81
MILD PTSD	12 - 24	12	27.91
MODERATE PTSD	25 - 39	5	11.63
SEVERE PTSD	40 - 59	2	4.65

Mean = 14.93
SD = 12.28

VALDEZ

SURVEY #1

	SCORE	COUNT	PERCENT
NO PTSD	0 - 11	25	50.00
MILD PTSD	12 - 24	16	32.00
MODERATE PTSD	25 - 39	5	10.00
SEVERE PTSD	40 - 59	4	8.00

Mean = 15.340
SD = 13.6

SURVEY #2

	SCORE	COUNT	PERCENT
NO PTSD	0 - 11	29	58.00
MILD PTSD	12 - 24	13	26.00
MODERATE PTSD	25 - 39	6	12.00
SEVERE PTSD	40 - 59	1	2.00
VERY SEVERE	60 +	1	2.00

Mean = 13.8
SD = 12.05

SURVEY #3

	SCORE	COUNT	PERCENT
NO PTSD	0 - 11	35	70.00
MILD PTSD	12 - 24	10	20.00
MODERATE PTSD	25 - 39	3	6.00
SEVERE PTSD	40 - 59	2	4.00

Mean = 10.760
SD = 11.242

Figure 3

Sample Demographics

	Valdez	Cordova
Mean Age	41.5	36.9
SD	11.4	8.03
Race		
Caucasian	96%	97%
Education		
High School	38%	35%
2 yr. College	36%	35%
4 yr. College	14%	14%
Graduate Degree	14%	14%
Years in Alaska		
Mean	16.5	13.7
SD	7.6	7.6
Annual Income		
Mean	$60,933.00	$63,200.00
Marital Status		
Married	68%	70%

Figure 4

Occupation

```
BAR GRAPH OF VARIABLE        OCCUP      , N =     50   VALDEZ

    VALUE            COUNT PERCENT
    1.000              2           4.00
    2.000              7          14.00
    3.000              6          12.00
    4.000              5          10.00
    5.000              3           6.00
    6.000              8          16.00
    7.000              3           6.00
    8.000             16          32.00

BAR GRAPH OF VARIABLE        OCCUP      , N =     43   CORDOVA

    VALUE            COUNT PERCENT
    1.000              6          13.95
    2.000              2           4.65
    3.000              1           2.33
    5.000             14          32.56
    6.000              4           9.30
    7.000              4           9.30
    8.000             12          27.91
```

KEY:

1. Federal Government
2. State Government
3. Local Government
4. Oil Industry
5. Fishing Industry
6. Education Service
7. Health Service
8. Other

Figure 5

Comparisons Test of Reaction Index Scores and Occupation

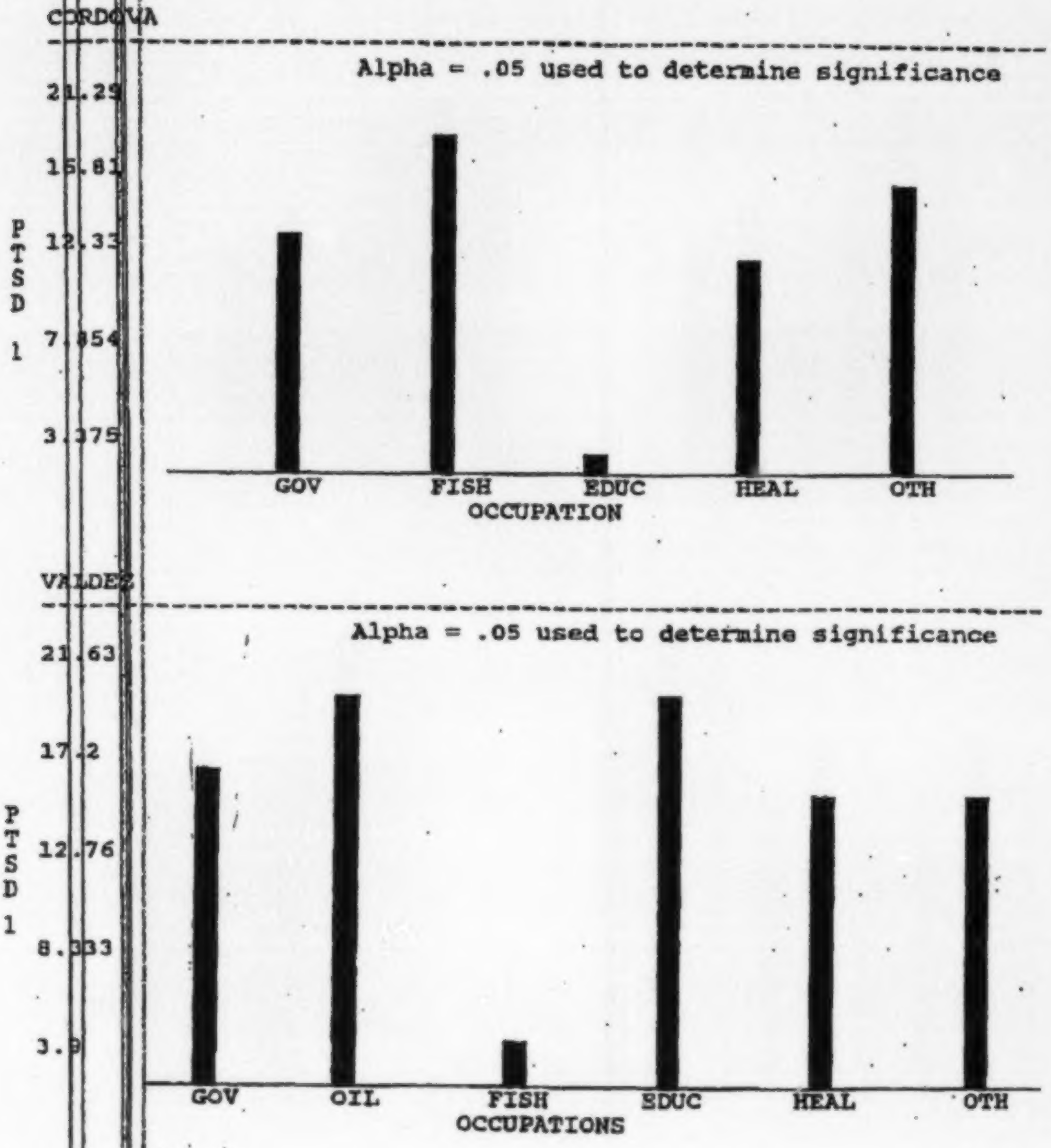


Figure 6

Scale Mean Scores

```
TOTAL OBSERVATIONS:          50  VALDEZ


                PSS1      PSS2      PSS3      CESD1      CESD2

# OF CASES        50        50        50         50         50
MINIMUM        6.000     6.000     1.000      0.000      0.000
MAXIMUM       18.000    18.000    18.000     25.000     48.000
MEAN          15.260    15.360    15.140      6.480     10.160
STANDARD DEV   2.481     3.135     3.326      6.494     10.473

               CESD3     PTSD1     PTSD2      PTSD3

# OF CASES        50        50        50         50
MINIMUM        0.000     0.000     0.000      0.000
MAXIMUM       24.000    51.000    57.000     51.000
MEAN           8.580    15.640    13.180     10.760
STANDARD DEV   7.451    13.161    12.705     11.242



TOTAL OBSERVATIONS:          43 CORDOVA


                PSS1      PSS2      PSS3      CESD1      CESD2

# OF CASES        43        43        43         43         43
MINIMUM        8.000     9.000    11.000      0.000      0.000
MAXIMUM       18.000    18.000    18.000     44.000     31.000
MEAN          15.093    15.326    15.233      9.023      8.884
STANDARD DEV   2.918     3.220     2.635     10.143      6.780

               CESD3     PTSD1     PTSD2      PTSD3

# OF CASES        43        43        43         43
MINIMUM        0.000     0.000     0.000      0.000
MAXIMUM       34.000    49.000    47.000     43.000
MEAN           9.326    16.721    15.442     14.930
STANDARD DEV   7.574    14.141    11.506     12.281
```

Figura 7

ANOVA Reaction Index/Depression
Valdez

VALDEZ

```
DEP VAR:   PTSD1       N:       50   MULTIPLE R:   .438  SQUARED MULTIPLE R:   .192
ADJUSTED SQUARED MULTIPLE R:   .175      STANDARD ERROR OF ESTIMATE:          11.952

   VARIABLE     COEFFICIENT      STD ERROR      STD COEF TOLERANCE     T    P(2 TAIL)

  CONSTANT             9.884         2.400         0.000      .       4.118    0.000
     CESD1             0.888         0.263         0.438    1.000     3.379    0.001

                            ANALYSIS OF VARIANCE

    SOURCE    SUM-OF-SQUARES    DF  MEAN-SQUARE     F-RATIO         P

  REGRESSION       1630.586      1     1630.586      11.414        0.001
    RESIDUAL       6856.934     48      142.853


DEP VAR:   PTSD2       N:       50   MULTIPLE R:   .685  SQUARED MULTIPLE R:   .469
ADJUSTED SQUARED MULTIPLE R:   .458      STANDARD ERROR OF ESTIMATE:           9.355

   VARIABLE     COEFFICIENT      STD ERROR      STD COEF TOLERANCE     T    P(2 TAIL)

  CONSTANT             4.741         1.852         0.000      .       2.559    0.014
     CESD2             0.831         0.128         0.685    1.000     6.510    0.000

                            ANALYSIS OF VARIANCE

    SOURCE    SUM-OF-SQUARES    DF  MEAN-SQUARE     F-RATIO         P

  REGRESSION       3708.527      1     3708.527      42.375        0.000
    RESIDUAL       4200.853     48       87.518
```

Figure 8

ANOVA Reaction Index/Depression
Cordova

CORDOVA

```
DEP VAR:   PTSD1      N:      43   MULTIPLE R:  .398  SQUARED MULTIPLE R:  .158
ADJUSTED SQUARED MULTIPLE R:  .138     STANDARD ERROR OF ESTIMATE:      13.132

  VARIABLE     COEFFICIENT     STD ERROR     STD COEF TOLERANCE     T    P(2 TAIL)

CONSTANT          11.719         2.694         0.000      .        4.349   0.000
   CESD1           0.554         0.200         0.398    1.000      2.775   0.008

                            ANALYSIS OF VARIANCE

   SOURCE   SUM-OF-SQUARES   DF  MEAN-SQUARE      F-RATIO        P

 REGRESSION       1327.793    1     1327.793        7.699      0.008
   RESIDUAL       7070.858   41      172.460

DEP VAR:   PTSD3      N:      43   MULTIPLE R:  .317  SQUARED MULTIPLE R:  .101
ADJUSTED SQUARED MULTIPLE R:  .079     STANDARD ERROR OF ESTIMATE:      11.787

  VARIABLE     COEFFICIENT     STD ERROR     STD COEF TOLERANCE     T    P(2 TAIL)

CONSTANT          10.131         2.872         0.000      .        3.528   0.001
   CESD3           0.515         0.240         0.317    1.000      2.143   0.038

                            ANALYSIS OF VARIANCE

   SOURCE   SUM-OF-SQUARES   DF  MEAN-SQUARE      F-RATIO        P

 REGRESSION        638.132    1      638.132        4.593      0.038
   RESIDUAL       5696.659   41      138.943
```

Figure 9

ANOVA Perceived Social Support/Depression
Valdez

```
DEP VAR:    PSS2      N:      50   MULTIPLE R:  .284  SQUARED MULTIPLE R:  .081
ADJUSTED SQUARED MULTIPLE R:  .062      STANDARD ERROR OF ESTIMATE:          3.037

  VARIABLE     COEFFICIENT    STD ERROR     STD COEF TOLERANCE     T     P(2 TAIL)

CONSTANT           16.224        0.601         0.000      .      26.980    0.000
   CESD2           -0.085        0.041        -0.284    1.000    -2.052    0.046

                            ANALYSIS OF VARIANCE

   SOURCE    SUM-OF-SQUARES   DF   MEAN-SQUARE      F-RATIO        P

 REGRESSION        38.837      1       38.837        4.211       0.046
   RESIDUAL       442.683     48        9.223
```

```
DEP VAR:    PSS3      N:      50   MULTIPLE R:  .292  SQUARED MULTIPLE R:  .086
ADJUSTED SQUARED MULTIPLE R:  .066      STANDARD ERROR OF ESTIMATE:          3.213

  VARIABLE     COEFFICIENT    STD ERROR     STD COEF TOLERANCE     T     P(2 TAIL)

CONSTANT           16.260        0.697         0.000      .      23.324    0.000
   CESD3           -0.131        0.062        -0.292    1.000    -2.118    0.039

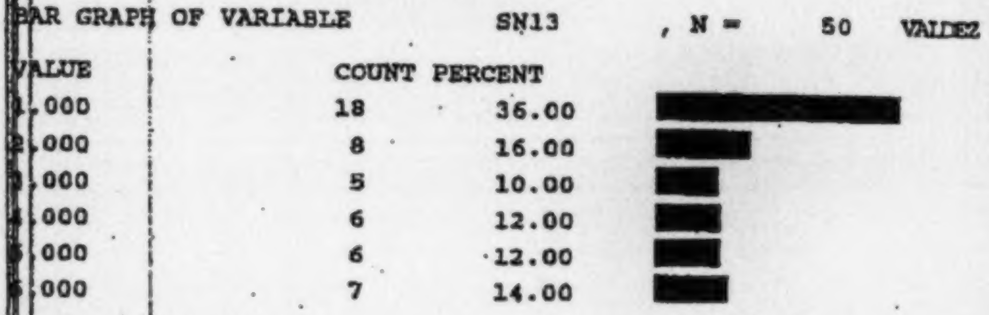
                            ANALYSIS OF VARIANCE

   SOURCE    SUM-OF-SQUARES   DF   MEAN-SQUARE      F-RATIO        P

 REGRESSION        46.345      1       46.345        4.488       0.039
   RESIDUAL       495.675     48       10.327
```

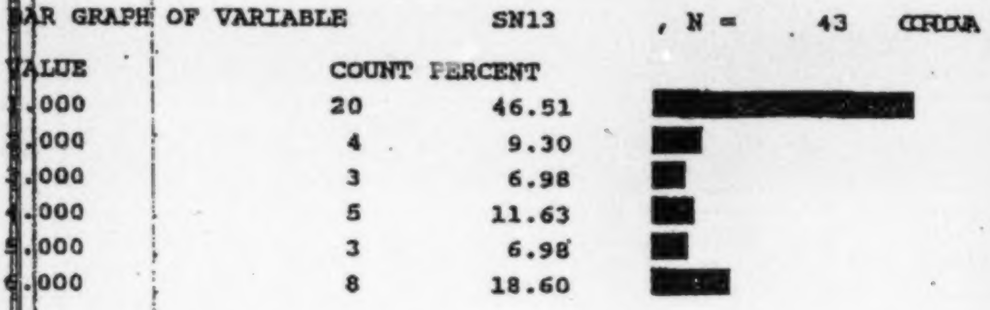
Figure 10

Oil Spill Net Earnings



```
BAR GRAPH OF VARIABLE          SN13      , N =     50   VALDEZ

VALUE                    COUNT PERCENT
1.000                     18      36.00
2.000                      8      16.00
3.000                      5      10.00
4.000                      6      12.00
5.000                      6      12.00
6.000                      7      14.00
```



```
BAR GRAPH OF VARIABLE          SN13      , N =     43   CORDOVA

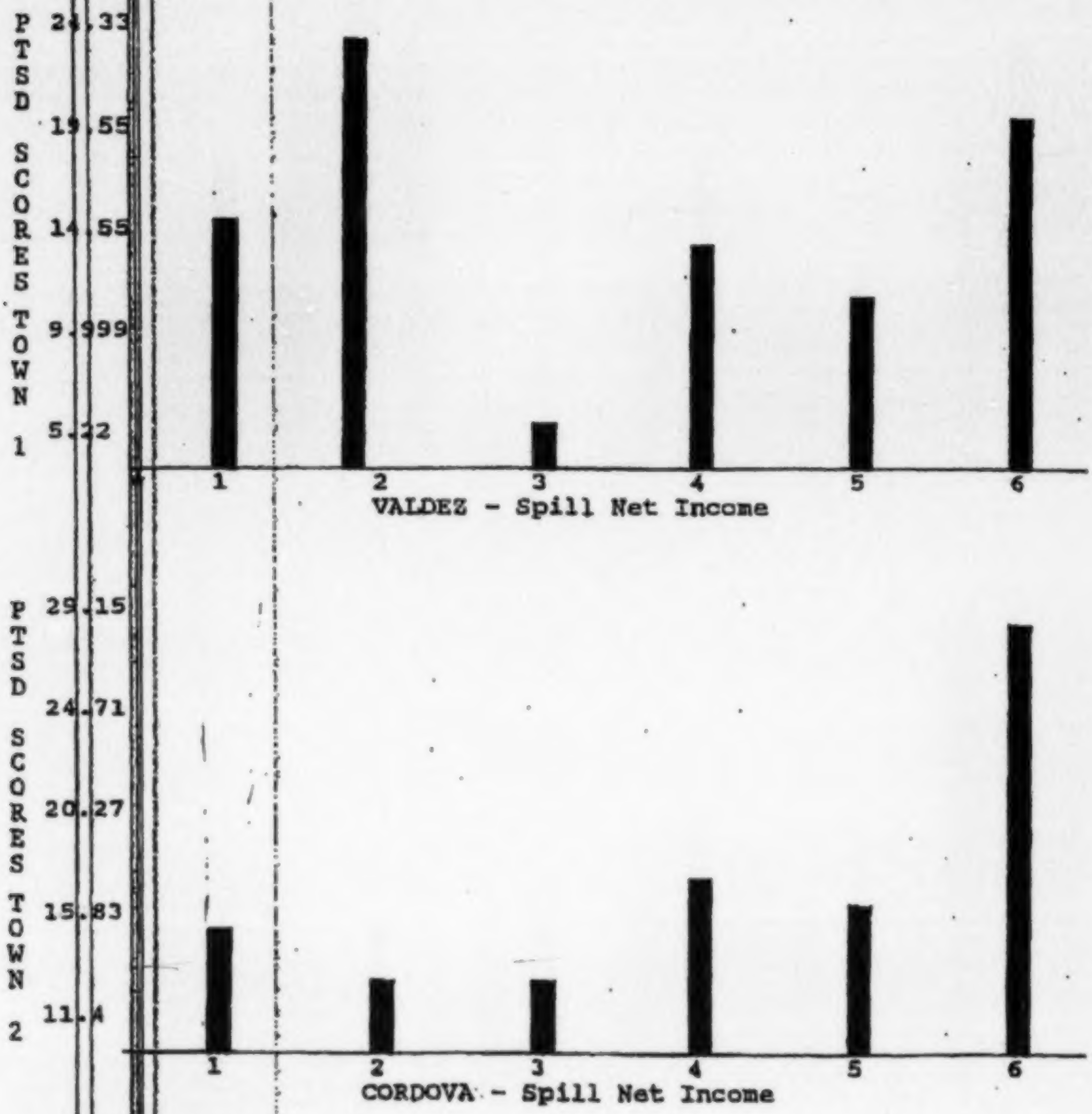
VALUE                    COUNT PERCENT
1.000                     20      46.51
2.000                      4       9.30
3.000                      3       6.98
4.000                      5      11.63
5.000                      3       6.98
6.000                      8      18.60
```

KEY:

1. $0
2. $500 - $5,000
3. $5,001 - $10,000
4. $10,001 - $25,000
5. $25,001 - $50,000
6. $50,001 +

Figure 11

Comparisons Test of Reaction Index Scores and Spill Net Earnings



*See Key Figure 10

Appendix A

CITY OF VALDEZ, ALASKA
GATEWAY TO THE INTERIOR

May 15, 1989

Dear Prince William Sound Resident:

You have been chosen by random selection technique from the voter registration list as a candidate for participation in an area mental health needs assessment.

We are offering $25.00 to participants who complete and return the enclosed simple survey as well as two (2) other brief surveys that will be mailed to participants during the next ten (10) months.

We guarantee anonymity and confidentiality of your responses. Code numbers are being used and no one will be able to identify your response. We are only interested in a general assessment of the population not individual symptoms.

Your participation in this study is entirely voluntary. We encourage your participation and the $25.00 payment will only be paid to participants who return all three completed surveys, but the decision to begin the study or to drop-out at anytime, for any reason, is strictly yours.

This study is being conducted by the Valdez Counseling Center in cooperation with the Cordova Mental Health Center.

The Valdez Counseling Center will happily address any questions or concerns you may have regarding the study.

To become a participant simply complete the enclosed questionnaire seal the questionnaire in the enclosed stamped, addressed envelope and mail it no later than May 27, 1989.

Thank you for your time and consideration.

Sincerely,

Richard G. Cook, MSW
Study Coordinator

Rose Fong Bixby, MSW, ACSW
Study Coordinator

VALDEZ COUNSELING CENTER P.O. BOX 1050 VALDEZ, ALASKA 99686 (907) 835-2838

Appendix B

PERCIEVED SOCIAL SUPPORT SCALE

These questions are about other people in your life. For each statement, please mark an X in the box that best describes you. Answers should be: definitely (true/false) or probably (true/false).

	DEF True	PROB True	PROB False	DEF False
1. There are several people that I trust to help solve my problems.	____	____	____	____
2. There is no one that I feel comfortable talking to about intimate personal problems.	____	____	____	____
3. There really is no one who can give me an objective view of how I'm handling my problems.	____	____	____	____
4. If I were sick and needed someone to take me to the doctor, I would have trouble finding someone. Is this...	____	____	____	____
5. If I needed a place to stay for a week because of an emergency I could easily find someone who would put me up.	____	____	____	____
6. I feel that there is no one I can share my most private worries and fears with.	____	____	____	____

Appendix C

CENTER FOR EPIDEMIOLOGIC STUDIES DEPRESSION SCALE

Now, please mark an X in the box with the statement which best describes how often you felt or behaved this way – DURING THE PAST WEEK.

		Rarely or None of the Time (Less than 1 Day)	Some or Little of the Time (1-2 Days)	Occasionally or Moderate Amt. of Time (3-4 Days)	Most All of the Time (5-7 Days)
7.	I was bothered by things that usually don't bother me.	______	______	______	______
8.	I did not feel like eating; my appetite was poor.	______	______	______	______
9.	I felt that I could not shake off the blues even with help from my family or friends.	______	______	______	______
10.	I felt that I was just as good as other people.	______	______	______	______
11.	I had trouble keeping my mind on what I was doing.	______	______	______	______
12.	I was depressed.	______	______	______	______
13.	I felt that everything I did was an effort.	______	______	______	______
14.	I felt hopeful about the future.	______	______	______	______
15.	I thought my life had been a failure.	______	______	______	______
16.	I felt fearful.	______	______	______	______
17.	My sleep was restless.	______	______	______	______
18.	I was happy.	______	______	______	______
19.	I talked less than usual.	______	______	______	______

20. I felt lonely. ______ ______ ______ ______

21. People were unfriendly. ______ ______ ______ ______

22. I enjoyed life. ______ ______ ______ ______

23. I had crying spells. ______ ______ ______ ______

24. I felt sad. ______ ______ ______ ______

25. I felt that people disliked me. ______ ______ ______ ______

26. I could not "get going". ______ ______ ______ ______

Appendix D

FREDERICK REACTION INDEX SCALE
(Copyright 1988 - used with permission)

The following questions concern your reaction to the March 24, 1989, grounding of the tanker Exxon Valdez and consequent oil spill. We are interested in ascertaining your feelings. **WITHIN THE LAST MONTH.**

		None of the Time (0)	A Little of Time (1x in 10 -14 days)	Some of the Time (1x in 5 -10 days)	Much of the Time (1x in 2 -5 days)	Most of theTime (more than 3 days/wk)
27.	I believe my exposure to the oil spill was an extreme stressor that could cause emotional problems in most people.	____	____	____	____	____
28.	Fears of personal experiences with the oil spill continue in my mind.	____	____	____	____	____
29.	I re-experience disturbing scenes about the oil spill physically or emotionally.	____	____	____	____	____
30.	Uncomfortable thoughts about my experiences in the oil spill seem to invade my mind in spite of my efforts to keep them out.	____	____	____	____	____
31.	Dreams about the oil spill experience keep coming back.	____	____	____	____	____
32.	I see or think of something that makes me feel as if my oil spill experiences are about to happen again.	____	____	____	____	____
33.	I keep an interest in activities that were important before the oil spill such as sports or playing cards with a group, reading, visiting friends.	____	____	____	____	____
[illegible]	Fears about the oil spill have left me numb and emotionally unfeeling.	____	____	____	_	

5. I am now more detached and less involved with other people than I was before the oil spill. _____ _____ _____ _____ _____

36. I express emotions and feelings as freely as I did before the oil spill. _____ _____ _____ _____ _____

37. I am jumpy, edgy, and more easily startled than before the oil spill. _____ _____ _____ _____ _____

38. I sleep well. _____ _____ _____ _____ _____

39. I feel bad or guilty that I didn't do more to try to prevent what happened or went through less than others. _____ _____ _____ _____ _____

0. I remember things as well as I did before it happened. _____ _____ _____ _____ _____

41. My concentration is as good as it was before. _____ _____ _____ _____ _____

42. I tend to avoid activities which might make me remember my experiences related to the oil spill. _____ _____ _____ _____ _____

43. When something resembles the oil spill or reminds me of the oil spill, feelings of distress increase. _____ _____ _____ _____ _____

44. Feelings of distress about the oil spill occur. _____ _____ _____ _____ _____

45. I am relaxed and without tension when I think of the oil spill. _____ _____ _____ _____ _____

6. It is as easy for me to make decisions as it was before the oil spill. _____ _____ _____ _____ _____

Appendix E

REACTION INDEX (Form B) ADULT

Score		Percent of time	Daily/Weekly Approximations
0	None	Zero	Zero
1	Little	Less than 15%	Once in 10 - 14 days
2	Some	15 - 30%	Once in 5 - 10 days
3	Much	30 - 50%	Once in 2 - 5 days
4	Most	More than 50%	More than 3 days per week

Items 7,10,12,14,15,19,20 are scored in reverse order, i.e. 4, 3, 2, 1, 0; all others are scored as listed 0, 1, 2, 3, 4.

Degrees of Post Traumatic Stress Disorder (PTSD) from the REACTION INDEX

RAW SCORE	DEGREE OF DISORDER
Less than 12	Doubtful
12 - 24	Mild
25 - 39	Moderate
40 - 59	Severe
More than 60	Very Severe

Scoring should not be listed so that the subject can read the numbersnor any terms relating to Degree of Disorder. This helps to preclude any *halo* effect or implied interpretation by the subject.

Instructions should include providing the subject with information relating to percent of time feelings occurred within the last month, preferably within a month after the traumatic event.

Only items 1 through 20 are scored and contribute to the degree of stress listed above. Other items are informational and assist in determining type of disturbance, e.g. acute, chronic or delayed.

Correlation is .95 with established cases of PTSD from a variety of stressors.

REACTION INDEX SCALE DEVELOPED BY
DR. CALVIN J. FREDERICK
Copyright © 1988 by Calvin J. Frederick

Appendix F

MEDICAL PROBLEM/HELP SEEKING BEHAVIOR SCALE

Please check appropriate letter/s to these questions:

During what period/s have you been in a hospital?

___ a) past month
___ b) three months
___ c) six months
___ d) past year
___ e) more than a year
___ f) never

Within what period/s did you last consult a doctor?

___ a) past month
___ b) three months
___ c) six months
___ d) past year
___ e) more than a year
___ f) never

Within what period/s have you received a prescription for any medication?

___ a) past month
___ b) three months
___ c) six months
___ d) past year
___ e) more than a year
___ f) never

Have you seen anyone (clergyman, physician, mental health worker) for marital or emotional problems?

___ a) past month
___ b) three months
___ c) six months
___ d) past year
___ e) more than a year
___ f) never

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SER 1509

TRADITION LOSS AS SECONDARY DISASTER: LONG-TERM CULTURAL IMPACTS OF THE EXXON VALDEZ OIL SPILL

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Department of Sociology and Anthropology, University of South Alabama

This article presents a qualitative analysis of the cultural impacts of the Exxon Valdez oil spill of March 24, 1989. The focus of the article is on Alaska Natives in Cordova, Alaska. The analysis uses a conceptual framework contrasting community worldviews of the Dominant Social Paradigm (DSP) and the Natural Resource Community (NRC). Data reveal incipient cultural impacts from the spill that can evolve into tradition loss. These include decline of sharing and social support networks, decline in subsistence activities, and disruption of communal control of local natural resources. It is recommended that proactive incorporation of culturally appropriate responses to disasters become a priority of multinational corporations and their regulatory agencies.

> So, how do you like our country—Alaska?
> —Eyak Village Elder, Cordova, Alaska

The study of the social impacts of disasters has received much attention in recent years. Out of this research has come the recognition that disasters can have enduring impacts on

This article is a revised version of a paper presented at the 1992 meeting of the Southern Sociological Society, in New Orleans, LA, 1992. Funds for this research were provided by grants from the National Science Foundation (DDP-9101093) and the Natural Hazards Research and Application Information Center, University of Colorado (Boulder). This research also was supported by resources provided by the Coastal Research and Development Institute, University of South Alabama, the Social Science Research Center, and the Mississippi Agricultural and Forestry Experiment Station (Project #MIS-4315; Duane A. Gill project leader), Mississippi State University, and the Fisheries Art Collective, Santa Cruz, California. Special thanks are extended to Bob Shipp, Brad Davis, Patience Faulkner, Marilyn Marsanskis, and Dana Linderer for their respective contributions. J. Steve Picou and Duane A. Gill are extended special thanks for their editorial suggestions and scholarly support. Data for this research were collected by the research team of J. Steve Picou, Christopher L. Dyer, and Duane A. Gill.

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EXHIBIT 10

human communities (Baum et al. 1982, 1983; Bogard 1989; Couch and Kroll-Smith 1985, 1991; Edelstein 1988; Gill and Picou 1989, 1991; Kroll-Smith and Couch 1989, 1990; Omohundro 1982; Picou et al. Forthcoming; Ridington 1982; Shirvastava 1987). These impacts can include mental health outcomes and social network disruptions that persist long after the event and have the potential to alter the traditional character of an affected community (Freudenberg and Jones 1991). Erickson (1976) identified the enduring social impacts that arise from disasters as "secondary disasters." One aspect of "secondary disasters" that has been relatively overlooked are those impacts that are explicitly cultural, rather than social, in nature (Curtis 1992; Ridington 1982).

This article examines the cultural impacts of the Exxon Valdez oil spill of March 1989 on the Natural Resource Community (NRC) of Cordova, Alaska. The oil spill is considered a technological disaster, having potential long-term impacts on NRCs in the affected area. The affected area included western Prince William Sound (PWS) and communities out to Kodiak Island. Cordova was not directly oiled by the spill, but was affected due to its reliance on commercial fishing and subsistence. An NRC is defined as a population of individuals living within a bounded area whose primary existence depends on the utilization of renewable natural resources (Dyer et al. 1992). A case is made that culture and, ultimately, tradition loss are outcomes of technological disaster, and that such impacts have not been identified or delineated from more apparent social impacts. Understanding cultural impacts is crucial to mitigation efforts following disasters. Cultural understanding is particularly important given the expansion of first-world technology into third-world settings, which may increase the potential for technological disaster (Bogard 1989; Shirvastava 1987).

Although the communities of Prince William Sound are within the polity of the United States, they remain culturally unique in their utilization of natural resources (Dyer et al. 1992). Emphasis on sustainable resource utilization patterns, sharing of subsistence resources, and communal protection and enhancement of local natural resources are traditional to Native villages and fishing communities in Prince William Sound. The last 20 years have seen Alaska's reliance on renewable (subsistence) resources fused to a dependence on the oil industry (Kruse 1991).

Cultural dependence, arising from a subsistence tradition, prevails for both Native and non-Native groups that utilize natural resources. Picou et al. (Forthcoming) documented that "cultural values unique to natural resource community membership may influence the longitudinal pattern observed for disruption and stress" (p. ?). Kruse (1991) noted that exposure to cash income is not sufficient to alter patterns of subsistence use. In fact, the "psychic income" (Neal 1971) generated from such cultural activity outweighs the cash income lost participating in the subsistence culture option (Kruse 1991).

Differences in natural resource use and attitudes/perceptions of environment have a cultural basis. Alaska NRC residents follow a different tradition of resource use than residents of Dominant Social Paradigm (DSP) communities of the continental United States. Explicating such differences provides a better understanding of the potential cultural impacts of a technological disaster like the Exxon Valdez oil spill.

This article presents perceptions of the Exxon Valdez oil spill and its impact on culture and traditions. Perceptions of individuals in key occupational roles, Native elders, and those following a subsistence tradition are presented. These perceptions are contrasted with historical and oral history information to describe the process of accelerated cultural change and potential tradition loss represented by the Exxon Valdez oil spill.

CULTURE, TRADITION, AND SOCIAL BEHAVIOR

It has been proposed that an NRC is a culturally distinct entity, with core traditions linked to natural resource utilization (Dyer et al. 1992). Culture is a synchronic phenomena, and it is socially realized as the transmission of learned information between individuals. In an NRC, this is exemplified by learned social behaviors of commercial and subsistence fishing, hunting, and gathering. Social transmission of this cultural information across generations results in traditions. Traditions are culturally adaptive options that allow for social and biological reproduction. Traditions, as selected options, entail an investment in livelihood, both economic and social. This investment creates a resistance to social and cultural change that would threaten the basis of livelihood—natural resources. Those traditions protecting the resource base are highly adaptive and resistant to change. These "core traditions" are the essence of transgenerational community, and provide for stability of community through time (Figure 1).

Dependence on natural resources limits the occupational roles of community members and can intensify the process of cultural assimilation for new members. Assimilation effectively

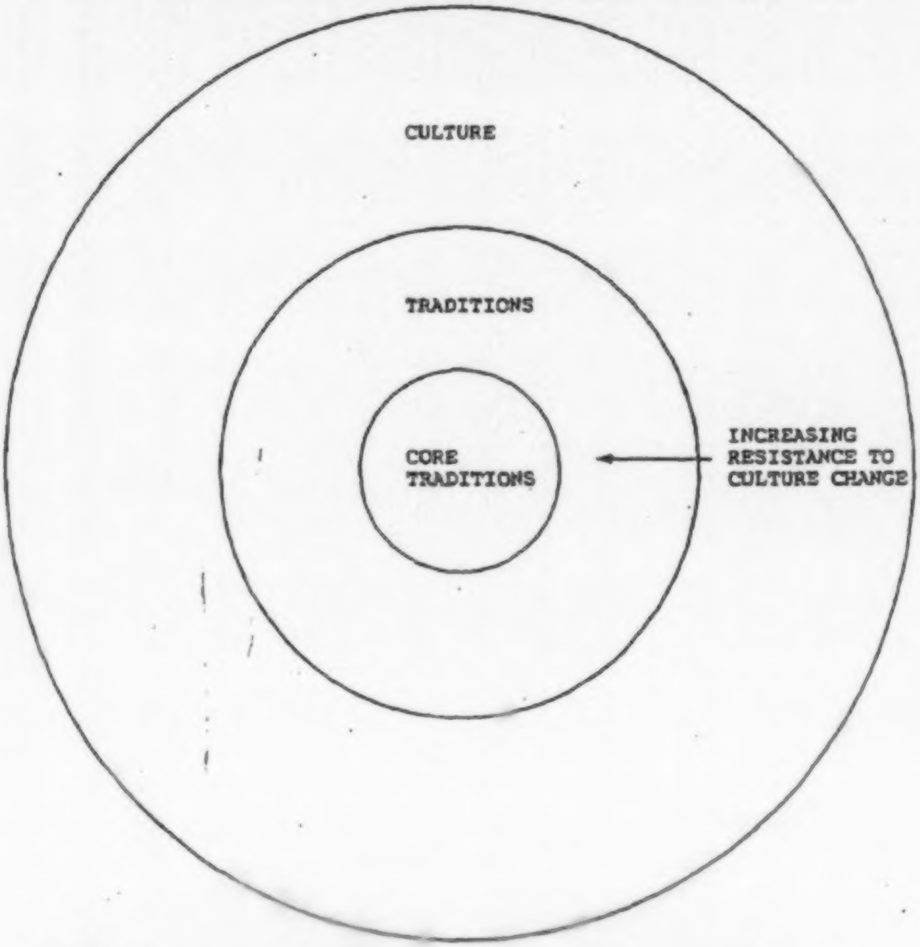
CULTURE
TRADITIONS
CORE TRADITIONS
INCREASING RESISTANCE TO CULTURE CHANGE

FIGURE 1. Relationship between culture, traditions, and core traditions.

disintegrates the boundaries of metaphysical dominion between humans and their environment. An effective state of environmental awareness for community residents is generated in its place. The occupational roles of resource extraction define NRC residents as extensions of their environment. Alaskan Natives most explicitly achieve this state:

> The environment is not for the Tlingit, simply the land and sea with natural resources to be exploited. It is, as we shall see, much more a community of living beings, where the lines which we draw between man and beast or between the animate and the inanimate are blurred or do not exist. (De Laguna 1972, p. 211)

The identified human-nature relationship existing in NRCs can be linked conceptually to the ecological-symbolic approach (Kroll-Smith and Couch 1991). This approach recognizes the existence of culturally based responses to environmental disruptions. Its basic tenets are: "(1) people exist in exchange relationships with their built, modified, and biophysical environments" and "(2) disruptions in the ordered relationship between individuals, groups, and communities, and their built, modified, and natural environments are labeled and responded to as hazards and disasters" (Kroll-Smith and Couch 1991, p. 361).

Practical and symbolic association with natural resources becomes a part of residents' patterned activities. An appropriate example of an ecological-symbolic connection in Cordova is the Iceworm festival. This winter event (February) is Cordova's answer to the Chinese New Year and Fourth of July combined. It brings together out-of-town relatives and those unable to celebrate the Fourth of July because of fishing activities. The focal attraction is a dragon-like representation of an Iceworm, which is paraded down the main street to the cheers of onlookers. Design of the Iceworm, a representation of a local marine polychaete, varies from year to year, but it symbolizes the relationship between the occupational community and the marine environment. This example of symbolic-ecological expression has persisted as tradition through several generations of Cordovans, providing a reification of community and family during the harsh Alaskan winter.

CULTURE EXTINCTION AS DIACHRONIC DISASTER

Although disasters, in their immediate form, provide rapid potential for tradition loss or cultural extinction (Kroll-Smith and Couch 1991), other factors arising from tradition conflict have occurred as "diachronic" (historical) disaster. This inverse cultural perspective on disaster allows us to appreciate the cultural extinction that has plagued Native American populations for centuries. That such events may be prolonged does not detract from their disastrous impacts, with those impacted being recognizably "victimized" (Bodley 1991).

There is a degree of cultural continuity between the NRCs of contemporary Alaska and those impacted Native American communities, which have suffered from the European pattern of technology induced dominance over the last several centuries. A variety of cultural indicators can identify a more prolonged disaster scenario for many Native American communities. For example, loss of linguistic diversity is an indicator of culture genocide, and about half of Native American languages spoken north of the Rio Grande are now extinct (McNickle 1962). Cultural and biological extinction coincide, and declines in North American Native populations following contact generally reach 75% (Dodyns 1966; Ewers 1973; McNickle 1962; Schlesier 1976). Complete "extinction" of Indian cultures, such as the Delaware Nation (Mooney 1911), Illinois (Blasingham 1956), Erie (White 1978), and others, follows the systematic expansion of European culture across the North American continent.

Congressional actions, such as the Indian Removal Act of 1830, the Dawes Act of 1887 promoting assimilation, and a resolution to eliminate established reservations for some tribes, are further examples (Spicer 1982). Presently, the Alaska Native Claims Settlement Act (ANCSA) of 1972 threatens native culture by eliminating Native communities' control over local resources (Flanders 1989).

PARADIGMS OF COMMUNITY IN CONFLICT

In Prince William Sound, the NRC has come in conflict with the established paradigm of utilization that drives the production economy. This production economy is fostered by a strong anthropocentric tradition in Western culture that emphasizes humans' separation from nature, as if the human species was immune from ecological constraints. The Eurochristian ideal of dominance has been accelerated by a reliance on machines, science, and technological capabilities. This high-production economy must absorb natural resources to keep its technological engine running. When such a worldview comes in contact with an NRC worldview, conflict is inevitable. The foundation of conflict is the Dominant Social Paradigm (DSP) worldview (Catton and Dunlap 1980). Its characteristics are:

1. People are fundamentally different from all other creatures on earth over which they have domination.
2. People are masters of their destiny; they can choose their goals and learn to do whatever is necessary to achieve them.
3. The world is vast, and thus provides unlimited opportunities for humans.
4. The history of humanity is one of progress, for every problem there is a solution, and thus progress need never cease.

The DSP creates a worldview that cultural change, as represented by technological change, is equated with "progress" (i.e., is perceived as intrinsically good) (Bodley 1991). This change is promoted by nonrenewable (industrial) resource development. The potential for technological disasters and natural resource destruction from such development presents hazards and risks for communities (Bogard 1989; Couch and Kroll-Smith 1991; Douglas and Wildavsky 1982). The potential cultural consequences from these types of impacts can lead to social and psychological pathology that can destroy an NRC community (Shkilnyk 1985). As Curtis (1992) remarked: "With the passage of new generations, the cultural identity of severely impacted communities or tribes may be lost and the process of cultural extinction complete" (p. 68).

The DSP community relies on nonrenewable natural resources. It is this reliance that creates the potential for technological disaster. On the other end of the spectrum, the NRC relies on renewable natural resources. Culture, traditions, and social behavior are structured around this reliance. Yet, it is this very reliance that makes the NRC extremely fragile in the face of technological disaster. The hazards and risks involved carry the potential of cultural extinction, which is "an irreversible risk that prompts strong risk-aversion strategies and behaviors that must be understood in their cultural context" (Curtis 1992, p. 68). The outcomes of a technological disaster can be better comprehended by contrasting the characteristics of the DSP community with the NRC. NRC characteristics are as follows:

1. Residents of NRCs are strongly linked to their resource base by traditions that integrate them into the natural order.
2. To the extent that cultural activities may destroy renewable natural resources, NRC residents practice folk management of resources to maintain their sustainability.
3. Because natural resources are utilized and renewed within bounded areas, they are viewed as limited and limiting in the variety of opportunities they provide their human stewards.
4. Progress is resisted to the extent that it threatens the sustainability of core traditions and the natural resource base on which they are structured.

Interactional characteristics of an NRC foster social networks based on kinship and cooperative social ties. Although impersonal social contracts predominate between residents and outside organizations, they are not prominent within the community. Extended networks of family and worker relationships (e.g., fishing crews) allow for intense cooperative interaction in the occupational roles of natural resource extraction.

By comparison, a DSP community relies heavily on social contracts both within and without the community. A social contract can be defined as "a voluntary and mutual agreement to engage in purposefully limited cooperative endeavor" (Hillery 1977, p. 52). Emphasis on "social contract" versus "social relationship" can limit the degree of traditional stewardship expressed toward other components of environment (e.g., natural resources). Thus, a symbolic "ecology" consciousness (Kroll-Smith and Couch 1991), which results in an environmental awareness vis-á-vis natural resource utilization, is absent in the DSP. This detachment from resource and environment allows for unchecked utilization (i.e., high short-term productivity).

In an NRC, personal knowledge of all or most residents is a characteristic flowing from cooperative social ties. This follows from Mead's (1979) definition of a village as a "bounded group of people who know each other . . . " (p. 3). Indeed, most of the more than 3 billion village residents in the world, representing the most persistent form of human organization, could be classified as some variant of the NRC model.

One could argue that a model of environmental community already has been generated. Milbrath (1984) proposed that a valid dichotomy exists between the traditional momentum driving the DSP and the perspective of contemporary environmentalism. This perspective has been labeled the "New Environmental Paradigm" (NEP) (Catton and Dunlap 1980; Dunlap and Van Liere 1978; Pirages and Ehrlich 1974). The NEP represents a partial shift toward the NRC paradigm, although it does not entail a total rejection of DSP values. Instead, it proposes a compromise position, including "subdued production and consumption, conservation of resources, protection of the environment, and the basic values of compassion, justice, and quality of life" (Milbrath 1984, p. 14).

Environmentalists place high value on "nature" and empathy toward "other species, other peoples, and other generations" (Milbrath 1984, p. 21). Humans must "adapt" to growth limits. This adaptation is realized through conservation of natural resources. However, the environmentalist perspective does not necessarily shift the basic pattern of resource utilization of its proponents. One can be environmentally active by saving the whales, but can still drive an expensive gas guzzler and contribute tons of waste to a landfill throughout a lifetime.

Environmental awareness springs from a direct, intimate reliance on the surrounding environment. Adaptation in an NRC comes from extraction of immediately available natural resources. Environmental awareness is adaptive in an NRC, in that it promotes sustainability of both lifestyle and resources.

To promote sustainability of the NEP perspective, environmentalists compete with an already established paradigm of community, the DSP. The DSP largely determines the political economy of the wider society. To effect change, NEP proponents must work from within this political economy. As such, they become institutionalized as a special interest group. As Yankelovich (1981) noted, "within system" groups in DSP society rarely achieve fundamental shifts in paradigms of resource utilization. What is achieved is a dialogue between DSP and NEP supporters, which further detracts from the intent of environmental activism. As Cotgrove (1982) noted, "the protagonists face each other in a spirit of exasperation, talking past each other with mutual incomprehension. It is a dialogue of the blind talking to the deaf" (p. 33). Cotgrove (1982) argued that this lack of dialogue is due to differences in cultural perspective. I would argue that the DSP and NEP worldviews do not represent fundamental cultural differences and are not culturally different, but rather represent the range of perspectives within American monoculture regarding resource use. However, a definite cultural difference does exist when contrasting the DSP perspective with that of the NRC.

The NEP represents a shift toward values and philosophies of the NRC. This shift is only partial, because it has not yet linked the moral economy necessary to achieve environmental awareness on the level of community with the political reality of the controlling DSP. This only can occur as a slow evolutionary process (Boulding 1978; Naroll 1983) and can be stalled, or even reversed, by trends in the political economy of the DSP. In fact, recent reversals in perspectives on resource use represent a backlash that threatens existing achievements of the environmental movement (Ruben 1992).

METHODOLOGY

The Exxon Valdez oil spill occurred on March 24, 1989. The ecosystem of Prince William Sound and the surrounding area out to Kodiak Island was impacted severely. Oiled beaches, dead sea birds and mammals, disrupted fisheries, and exterminated benthic communities (crabs, starfish, urchins) were ecological consequences of the disaster. Disruption of subsistence activities, commercial fishing, and the invasion of local communities by outsiders were immediate and ongoing outcomes.

Data gathered for this article were collected from August, 1989, through August, 1991, during the summer fishing seasons in Cordova. Alaskan Natives, individuals occupying key occupational roles, and those intimately involved with, and impacted by, the oil spill and its aftermath were interviewed. Collective perceptions and individual recollections were gathered and analyzed, with a focus on social and cultural change. These were supplemented by historical records, newspaper articles, and published research of other social scientists.

Informants were identified in the Native community through a social networking technique. This was necessary because Natives are not distributed randomly in Cordova, and comprise only 20% of the resident population of approximately 2,500. Occupational role informants were identified by their participation in specific occupational populations, and key informants by their social status as community leaders. Taped formal interviews, informal conversations, and written documents were the source of quotes presented in this article.

From this process, general topics were identified that relate to the four matched characteristics of natural resource communities. These are discussed within the historical framework of the oil spill event, and the nature of cultural disruption is addressed.

CHARACTERISTICS OF CULTURAL CHANGE

Identified processors of cultural change and tradition loss are structured around proposed NRC characteristics. Each characteristic is presented, followed by individual recollections and collective perceptions gathered from key informants.

Residents of NRCs are linked strongly to their resource base by traditions that integrate them into the natural order.

Fishing, subsistence, and activities supporting these traditions provide the primary means of cultural existence. Anything threatening the resource can thus threaten the very core of community survival.

> Fishing is the only game in town here. Cordova . . . is like a goldfish bowl because of [its] reliance on fishing. The problem is, if you put something in a goldfish bowl, it's easy to kill the goldfish. They have nowhere to go. (Cordova resident)

Besides commercial fishing, reliance on subsistence supports both Natives and non-Natives in activities that link residents to cycles of nature. Subsistence hunting and gathering are culturally significant activities that bring residents together in a variety of cooperative ways. Cooperation is engendered through working together and sharing of subsistence resources within the household unit, and with others who are unable or incapable of hunting or gathering (Stratton 1989). The recognition of harvesting cycles of cultural significance can outweigh or supplement any cash income. The following is a non-Native's comment on how an oil spill threatens subsistence lifestyle.

> Living in a place like this ties you into a cyclic view of life because your daily work is tied directly from where your food and water and survival comes from. You have to be tuned into cycles of nature. For Natives, a lot of their daily work is getting food and I don't want to say that it's better than the way other people live. It's just when you have an oil spill maybe you and I can get by fine. I don't *have* to go fishing. Pay me some money and I'll go find something else. But if you live in some of these villages, and you're not used to using money so much to get your food, and all your culture is completely interwoven with the natural system—an oil spill is real trouble. (Cordova resident)

> Down through the ages we have come to understand nature's comings and goings. We are attuned to her subconsciously. There is no way around nature. We do not try to conquer nature. We live by her rules and act accordingly. Our instinct to survive keeps time with her seasons. When nature's time for fish arrive, we fish; when she says hunt, we hunt. When she says, "It's berry picking time," we pick berries joyously. (Active 1992, p. 2)

The oil spill severely disrupted the natural order, impacting subsistence activities and modifying perceptions of the resource (Dyer et al. 1992). Patterns of sharing and cooperation broke down during the oil spill cleanup, and those that came back after working on the spill cleanup had problems adjusting to a loss of cultural subsistence cycles in Cordova and other communities (Fall 1990). Outlying villages like Tatitlek and Chenega Bay were more severely impacted. These villages were oiled directly, and immediate loss of subsistence resources has led to severe cultural dysfunction.

> In Tatitlek, a brother of a local resident always brought in a seal to be shared by the village. He would land in his sea-

> plane and leave the seal on the beach for them to pick up. We flew over to Tatitlek about a week after he dropped off the seal last summer (1989). It was still on the beach where he had left it—rotting. Everyone was so drunk because of the spill crisis they hadn't even bothered with it. (Cordova resident)

The loss of subsistence resources causes breakdowns in cultural patterns of resource use and cooperative work, as well as domestic violence, severe alcoholism, and other forms of social dysfunction. Shortly after the rotting seal episode, a 12 year old in the same community was killed by a self-inflicted shotgun wound to the head. This resulted in a "ban" on alcohol use, but drug abuse and domestic problems, including sexual abuse of minors, are still a legacy of the oil spill in some Native villages.

Activities in the NRCs of Prince William Sound traditionally have been directed at conservation and stewardship of natural resources. As the second characteristic states: *To the extent cultural activities may destroy renewable natural resources, NRC residents' folk manage resources to maintain their sustainability.*

For years, Cordovans have been folk managers of their natural resources. The Prince William Sound Aquaculture Corporation was instituted by fishermen, and fishermen donated their labor to build the first hatcheries. When the oil spill occurred, fishermen from Cordova answered the call to protect their home. Within hours, fishermen volunteers were out on the Sound trying to prevent the oil from spreading.

> When we heard of the spill, I put a call out to fishermen in the co-op, and anyone else in town to help out. The response was immediate. They didn't have to be persuaded. They were helping save their home. They had built those hatcheries with their own hands—stone by stone. Within two hours, I had forty guys heading out with their crews to try and stop the oil. (Cordova resident)

Fishermen and subsistence users base their livelihood on use of natural resources. The spill cleanup took many fishermen out of their cultural routines and into a foreign activity that gave inflated benefits. This "money spill" did not benefit everyone, for there were those whose limited, traditional occupational roles did not include boat ownership or commercial crew membership.

The third characteristic is: *Because natural resources are utilized and renewed within bounded areas, they are viewed as limited and limiting in the variety of opportunities they provide their human stewards.*

The occupational roles of fishermen and subsistence hunter-gatherers link Cordovans to natural resources as stewards. Stewardship gives a sense of proprietorship that is culturally encouraged.

> Cordova is my home. When most people from the lower forty-eight talk about home, they mean their house, or maybe their town. When I say home, I mean that rock over there, that tree up on the hill. Those are all part of my home. Home is this place. With all its water, and trees, and land. When the oil spill occurred, it wasn't just the case of oil spilling on some water or beaches. It was violating our home. All of Prince William Sound—that's where we live. And we have to take care of it. (Alaskan Native, Cordova)

> We do not define ourselves by how much money we make, how much money we consume, how much we owe, how much we can change nature or how well we compete with our peers. We define ourselves to ourselves by how well we cooperate with each other, how we avoid competition, how we live in harmony with nature and how well we adapt ourselves to it. (Active 1992, p. 2)

Those who protect their home, labor as stewards, and bring in resources to their families and community gain self-worth and prestige from doing so. The fisherman or subsistence-user's success is linked to community success. Prestige amounts to privilege of access to the resource and is a form of "ownership" (Fried 1967). Referring to the distribution of resources flowing from a primary producer (owner) to the wider community, Fried (1967) commented that "ownership . . . really means that the man who fulfills the social requirements of 'owner' is the one to whom prestige will accrue as the distribution proceeds" (p. 66). From this, Ingold (1988) predicted that the concepts of ownership would be most elaborate, and the pursuit of prestige most compelling, in the societies where people were most likely to be chronically reliant on products that others have labored to obtain, and whose procurement was backed by strong positive inducements.

Prestige was lost in the spill cleanup, and the identification of those who most benefited as "Exxon Whores" (Spillionaires) is a reflection of this. In response to the question, "Have you noted any changes in the community of Cordova, in general, since the spill?", one resident commented:

> Friends have become enemies. [There is] name calling against those associated with Exxon. [People] avoid stores, stay home and hide, feel burdens, and there are more strangers. (Cordova resident)

In the oil spill cleanup, people who labor to extract natural resources were experiencing an activity for which they gained no traditional prestige, but an inordinate amount of cash compensation. Working outside this occupational role created an anomalous status and identity for individuals. As one resident remarked: "Our proper work is fishing." Due to irregular hiring and contracting procedures, some residents received lucrative work contracts, whereas others did not. Of those that did, some had little prior prestige in the community as fishermen (i.e., they were not "highliners") (Palsson and Durrenburger 1982).

Sudden wealth created anomalous relationships between previous friends, neighbors, and working partners. The emphasis on "social contract" rather than "social relationship" fostered during the cleanup activities resulted in the permanent loss of many personal ties between residents.

> I've known "x" for years, and he was never worth very much as a fisherman. He was a good neighbor, and we used to help each other out when something needed fixing, or some work on the boat needed an extra hand. But since he made that money on the spill, he doesn't even talk to me anymore. They're building a new house even in Whiteshed, and I guess they'll be moving out all together. (Cordova resident)

An important cultural activity that has experienced accelerated deterioration since the spill is sharing (Fall 1990). Sharing is an important cultural adaptation for maintaining social relationships. Sharing ensures a distribution of resources in a seasonally harsh environment, and strengthens and reaffirms established social relationships. Sharing of subsistence resources was common between households in Cordova prior to 1989 (Stratton 1989), and a strong tradition in years past:

> It seems like everything was so cheap in those days. Fifty dollars worth of groceries would fill this place. Now fifty dollars worth you can't even see it. There was no tax to pay. When the fishermen went out to the flats they didn't have to pay for the groceries. The canneries furnished them coal and groceries, gas. Now they won't even give you one gallon of gas. That's the way the fishermen were. They furnished everything for them. (Eyak Village elder, Cordova)

> There's a whole lot of differences in the time that I was here. You didn't have to know anybody. Everybody did everything for each other. Now you go to do it for yourself. You don't depend on anybody no more. . . . If you got hungry, there was those that would help you until you got a job. They'd know if you weren't working and it was friendly. You don't see that anymore. Of course, I still like the place. I wouldn't trade it for any other place around. I've been all over up in Alaska and Cordova is still a friendly city. (Eyak Village elder, Cordova)

Cooperative "helping" networks in both the Native and non-Native community have been weakened since the spill. Cultural values of sharing have been lost for some.

> Before the spill, we (fishermen's wives) used to get together and help each other out with childcare, and just support each other. We would get together and visit—have tea, or drink a bit. It was nice when your husbands were out fishing. After the spill, it just seemed like everybody was too busy trying to make money, or find out what was going on. Nobody felt like getting together to just socialize. Some of our husbands were making real good money, but others weren't doing so good. It made it hard to talk to each other. And we just never really have gotten back together. Some of us just don't talk to each other at all anymore. (Fisherman's wife, Cordova)

Limits on sharing of subsistence resources have been a major concern for Natives. Elderly and homebound Natives traditionally relied on younger relatives to bring them subsistence foods. When the oil spill hit, instead of engaging in subsistence, many younger Natives worked on cleanup crews. When they came back, they had been changed by their experiences. Some had been traumatized by the environmental destruction they saw, whereas others suffered from the harsh authoritative treatment received from work supervisors.

> Most Native workers are pretty straightforward. If they have a problem they go to their supervisor to deal with it. On the cleanup, if you had a problem, and you couldn't deal with it personally, you were basically told to go away. When you internalized it, by the time you came to town you had a lot of pent up frustration. You acted out your frustrations in a negative way. You were harmful to yourself and the people around you. (Alaska Native)

In such a scenario, the breakdown of traditions of sharing and subsistence use was acknowledged by key informants.

The fourth noted characteristic of the NRC is perhaps the most telling in terms of culture change: *Progress is resisted to the extent it threatens the sustainability of core traditions and the natural resource base on which they are structured.*

The idea of "progress" in Prince William Sound has been the dominion of the oil companies since the pipeline was first proposed. Cordovan fishermen and residents voted unanimously to oppose the construction of the pipeline, and a scenario describing an oil spill was given in testimony by a fisherman in Senate hearings in 1971 (Committee on Merchant Marine and Fisheries 1971). The spill was described as being much smaller, but the location—Bligh Reef—was well predicted. Ricki Ott, a local fisherman and marine toxicologist, predicted a major spill would occur less than 24 hours before the actual event.

The major contention for fishermen has been what is the impact of the spill on our fisheries? The 1990 season was a banner harvest, yet fish returning to the Sound that year would have been unaffected by the spill. Exxon sponsored a full-page ad, referred to as "Sound Progress" in the local Cordova newspaper that summer, speaking of the fish runs. As one fisherman remarked: "It made it sound as if oil was fish fertilizer." However, 1991 was the worst fishing season on record since 1960. In some cases, fish runs did not materialize at all, or were very poor. Many fish that did show up were stunted and underweight. Fishermen commented that they looked like Dolly Vardens (trout) rather than "Pinks" (pink salmon) or "Dogs" (chum salmon). The failure of the fish runs could have been due to ecological factors, but the fact remains that these runs of fish were the ones that would be predicted to be "Exxon's Fish."

Cultural impacts from the "Sound Progress" arose from the "money spill" of 1989–1990 and the simultaneous disruption of the fishery runs and a collapse of the market for fish. Instead of getting an anticipated $.24 a pound for pink salmon, or even a minimal $.15–$.20 needed to break even, fishermen received $.09–$.12 a pound, depending on the quality of the fish. It was ironic that the cans used to pack the salmon were, with the exception of Copper River king salmon, worth more than the fish. Fishermen who bought new boats or houses, or who otherwise overextended themselves economically, found they were facing economic ruin.

> The fishing runs have been bad—no terrible—this year, and a lot of fishermen are going to go under. I have a friend from Seattle, he buys up boat contracts (forecloses). I haven't seen him up here in 13 years, but he has only been here a couple of days and has already foreclosed on 17 boats. The fishermen are being sunk with their own boats. (Alaskan Native)

> Even though fishing has always been a gamble as far as financial stability, now a greater factor has entered in to where our future has to be closely guarded. Meaning that we will have to save our money for future years of oil-tainted fishing and no compensation!!! (Cordova resident)

Given such strains, some of the predicted overflow of problems must be dealt with by the therapeutic community. However, assuming that this "community" also is enculturated with the values of the NRC, they must cope with their own personal loss, and cannot be as effective as they might be in the event of a natural disaster.

> People who worked on the spill are still having problems. The social service people are good at their jobs. When a social service person comes in from the outside, they're either in love with the place, or gone in 6 weeks. And when they fall in love with this place it's a love affair like something you wouldn't believe. These people were damaged by the spill, just like everybody else. They tried to cope, their

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> work load went up, but it was like the hurt helping the hurt. It was very difficult for them. And we would not accept at all a stranger coming in from Fairbanks, or Juneau, or Nome, to be our social worker, and sit there and say: "Yes, I know how you feel." No, you don't know how I feel, because you were not here. You did not go through the scare, the trauma, the fright, the financial disaster. There was nothing a social worker from anywhere else can say to help us. We have got to heal from within. (Alaskan Native)

CONCLUSIONS

The Exxon Valdez oil spill was a technological disaster in a region with a traditional lifestyle distinct from the growth-driven DSP model of the continental United States. Reliance on renewable natural resources, emphasis on "sustainability" rather than "progress," and a heightened environmental awareness are cultural practices that conflict with the DSP paradigm. The spill resulted in the modification of cultural practices and perceptions of environment. Cultural changes included loss of subsistence practices, breakdown of sharing networks, and disruption of communal control of natural resources (Dyer et al. 1992; Fall 1990). Preliminary indications are that some of these cultural changes may become permanent, particularly in villages most heavily impacted by the oil, such as Chenega Bay and Tatitlik. Disruptions in Cordova are probably not as severe as in these communities.

Tradition loss as secondary disaster may be conceptualized as "cultural chaos." Secondary disasters in NRCs interfere with the ability of cultural problem-solving mechanisms to function. Because the impact on environment and resources is irreversible, either in the magnitude of supply of resources, or in the complete loss of resources such as shellfish in certain heavily oiled areas (Fall 1990), there is no way to "re-order" the symbolic-ecological relationship that has been destroyed. Cultural chaos can result, where the rules for normal behavior do not apply, and neither do the rules for coping with unexpected problems—the cultural "emergency system" (Corlin 1975). Cultural chaos is a diachronic outcome of social chaos, which has been defined as the unexpected disruption of an anticipated and culturally defined sequence of events (Aronsson 1989).

These can occur from technological or natural disasters, or from a breakdown of social or interpersonal relations (e.g., disruption of sharing networks). Technological disasters can create cultural chaos in an NRC if they do not allow for the restoration of culturally defined sequences of natural resource utilization and culturally prescribed interpersonal relations.

The study of technological disasters must include an awareness of the potential for cultural disruption—for loss of traditions in communities whose existence is threatened by pollution and loss of natural resource sustainability. In Cordova, Alaska, the core traditions being threatened are those of subsistence, resource sharing, commercial fishing, and communal control (sustainability) of local natural resource cycles. When DSP technology is imposed in culturally different environments, we must be sensitive to those differences in calculating the potential outcomes of technological disaster. What can we learn from such disasters? The community of Cordova, and surrounding Native villages, teach us that perhaps sustainability of cultural strategies of resource use is more important than immediate profits and high productivity. A quote from a Cordova resident refers to this problem:

> Those are the very problems we're faced with today and with our oil economy, how fast can we use the oil, who is making the money, and what will the generations in the future have? In analogy, there is a plot of ground, a garden, and on that land we maybe could feed a thousand people if we use fertilizer and make it enormously productive, but not for very long. In twenty years the land would be dead and the ground would be poisoned or washed away. Today we're trading our topsoil for VCRs. And we claim we're just feeding the world, but you can't. You can only do that for a short time. If your goal is, as that of indigenous people, to survive the long term, then you make sure that your effort is not compromising the environment you live in.

Recognizing cultural differences between populations subjected to the potential for technological disaster must become a priority of industrial states and corporations. Cultural integrity is particularly threatened when natural resources are impacted by a disaster event, with cultural chaos an ultimate outcome.

Preventing or mitigating cultural chaos entails a valuation of the human and social "capital" that drives NRC productivity. Such "capital" includes skills, knowledge, social networks, and means of natural resource utilization (Freudenberg and Gramling 1992). As the destruction of natural resources proceeds, a failure to provide for maintenance of anthropogenic elements of production capacity can result in a loss of communal cohesion. Preservation of communal cohesion in the face of technological change and accompanying disaster potential has been realized elsewhere (Wybrow 1986). The challenge for residents and communities of Prince William Sound is to communicate the cultural value of a lifestyle to the DSP extraction brokers. Only by codifying this cultural integrity can it be sustained, and can culturally appropriate solutions to disaster threats be realized.

REFERENCES

Active, John. 1992. "Spirituality Defines Subsistence." *The Cordova Times*. April 8, 78(15):2.

Aronsson, I. L. 1989. *Chaos and Social Order.* Research Proposal, Uppsala: Department of Cultural Anthropology.

Baum, Andrew, Raymond Fleming, and J. E. Singer. 1982. "Stress at Three Mile Island: Applying Psychological Impact Analysis." Pp. 217–248 in *Applied Social Psychology Annual,* edited by L. Bickman. Beverly Hills, CA: Sage.

——. 1983. "Coping with Victimization by Technological Disaster." *Journal of Social Issues* 39(2):117–138.

Blasingham, Emily. 1956. Pp. 412–417 in *The Depopulation of the Illinois Indians,* Vol. 15, edited by Bruce G. Trigger. Washington, DC: Smithsonian Institution.

Bodley, John H. 1991. *Victims of Progress.* Menlo Park, CA: Benjamin/Cummings.

Bogard, William. 1989. *The Bhopal Tragedy.* Boulder, CO: Westview Press.

Catton, W. R., Jr. and R. E. Dunlap. 1980. "A New Ecological Paradigm for Post-Exuberant Sociology." *The American Behavioral Scientist* 24:15–47.

Corlin, C. 1975. "The Nation in Your Mind. Continuity and Change Among Tibetan Refugees in Nepal." Doctoral dissertation, Gothenburg: Department of Social Anthropology.

Cotgrove, S. F. 1982. *Catastrophe or Cornucopia: The Environment, Politics and the Future.* Chichester, NY: Wiley.

Couch, Stephen R. and J. Stephen Kroll-Smith. Eds. 1991. *Communi-*

ties at Risk: Collective Responses to Technological Hazards. New York: Peter Lang.

——. 1985. "The Chronic Technical Disaster: Toward a Social Scientific Perspective." *Social Science Quarterly* 66:564–575.

Curtis, Sue Ann. 1992. "Cultural Relativism and Risk-Assessment Strategies for Federal Projects." *Human Organization.* Spring 51(1):65–70.

De Laguna, F. 1972. *Under Mount Saint Elias: The History and Culture of the Yakutat Tlingit. Smithsonian Contributions to Anthropology,* Vol. 7. Washington, DC: Smithsonian Institution Press.

——. 1971. *Committee on Merchant Marine and Fisheries, Testimony of Cordova District Fishermen of the Impact of the Proposed Trans-Alaska Pipeline Upon Merchant Shipping and Alaskan Environment.* Report of Proceedings Before Subcommittee on Fisheries and Wildlife Conservation, Nov. 17, 1971. Washington, DC: Hoover Reporting Company, Inc.

Dodyns, Henry F. 1966. "An Appraisal of Techniques with a New Hemispheric Estimate." *Current Anthropology* 7:395–416.

Douglas, M. and A. Wildavsky. 1982. *Risk and Culture.* Berkeley, CA: University of California Press.

Dunlap, R. E. and K. Van Liere. 1978. "The New Environmental Paradigm." *The Journal of Environmental Education* 9(4):10–19.

Dyer, Christopher L., Duane A. Gill, and J. Steven Picou. 1992. "Social Disruption and the Valdez Oil Spill: Alaskan Natives in a Natural Resource Community." *Sociological Spectrum* 12:105–126.

Edelstein, Michael R. 1988. *Contaminated Communities: The Social and Psychological Impacts of Residential Toxic Exposure.* Boulder, CO: Westview Press.

Erickson, Kai T. 1976. *Everything in Its Path: Destruction of Community in the Buffalo Creek Flood.* New York: Simon and Schuster.

Ewers, John C. 1973. "The Influence of Epidemics on the Indian Populations and Cultures of Texas." *Plains Anthropologist* 18:104–115.

Fall, James A. 1990. *Subsistence After the Spill: Uses of Fish and Wildlife in Alaska Native Villages and the Exxon Valdez Oil Spill.* Paper presented at the 89th Annual Meeting of the American Anthropological Association, New Orleans, LA.

Flanders, Nicholas E. 1989. "The Alaska Native Corporation as Conglomerate: The Problem of Profitability." *Human Organization* 48(4):299–312.

Freudenberg, William R. and Robert Gramling. 1992. "Community Impacts of Technological Change: Toward a Longitudinal Perspective." *Social Forces* 70(4):937–955.

Freudenberg, William R. and Timothy R. Jones. 1991. "Attitudes and Stress in the Presence of a Technological Risk: A Test of the Supreme Court Hypothesis." *Social Forces* 69(4):1143–1168.

Fried, M. 1967. *The Evolution of Political Society.* New York: Random House.

Gill, Duane A. and J. Steven Picou. 1989. "Toxic Waste Disposal Sites as Technological Disasters." Pp. 81–97 in *Psychological Effects of Hazardous Toxic Waste Disposal on Communities,* edited by D. L. Peck. Springfield, IL: Charles C. Thomas.

—. 1991. "The Social Psychological Impacts of a Technological Accident: Collective Stress and Perceived Health Risks." *Journal of Hazardous Materials* 27(1):77–89.

Ingold, Peter. 1988. *Hunters and Gatherers.* Oxford; New York: Berg; St. Martin's Press.

Kroll-Smith, J. Stephen and Stephen R. Couch. 1989. "Some Thoughts on Natural Disasters: Technological Hazards and Social Change." *Environment, Technology, and Society* 56:2–4.

—. 1991. "What Is a Disaster? An Ecological Symbolic Approach to Resolving the Definitional Debate." *International Journal of Mass Emergencies and Disasters* 9(3):355–366.

—. 1990. *The Real Disaster Is Above Ground: A Mine Fire and Social Conflict.* Lexington, KY: University Press of Kentucky.

Kruse, John A. 1991. "Alaska Inupiat Subsistence and Wage Employment Patterns: Understanding Individual Choice." *Human Organization* Winter 50(4):317–326.

McNickle, D'Arey. 1962. *The Indian Tribes of the United States, Ethnic and Cultural Survival.* London: Oxford University Press.

Mead, Margaret. 1979. "On the Viability of Villages." Pp. 1-35 in *Village Viability in Contemporary Society,* edited by Priscilla Copeland Reininng and Barbara Lenkerd. Stanford, CA: Stanford University Press.

Milbrath, Lester W. 1984. *Environmentalists: Vanguard for a New Society.* Albany: SUNY Press.

Mooney, James. 1911. *Passing of the Delaware Nation.* Cedar Rapids, IA: Torch Press.

Neal, R. 1971. "Monetization, Commercialization, Market Orientation and Market Orientation and Market Dependence." Pp. 25–29 in *Studies in Economic Anthropology,* edited by G. Dalton. Garden City, NY: Natural History Press.

Omohundro, John T. 1982. "The Impacts of an Oil Spill." *Human Organization* 41(1):17–25.

Palsson, Gisli and Paul Durrenburger. 1982. "To Dream of Fish: The Causes of Icelandic Skippers' Fishing Success." *Journal of Anthropological Research* 38:227–242.

Picou, J. Stephen, Duane A. Gill, Christopher L. Dyer, and Evans W. Curry. Forthcoming. "Disruption and Stress in an Alaskan Fishing Community: Initial and Continuing Impacts of the Valdez Oil Spill." *Industrial Crisis Quarterly.*

Pirages, D. and P. Ehrlich. 1974. *Ark II: Social Response to Environmental Imperatives.* San Francisco: W. H. Freeman Press.

Ridington, Robin. 1982. "When Poison Gas Comes Down Like a Fog: A Native Community's Response to Cultural Disaster." *Human Organization* 41(1):36–42.

Ruben, Barbara. 1992. "Root Rot." *Environmental Action* 24(1):25–30.

Schlesier, Karl H. 1976. "Epidemics and Indian Middlemen: Rethinking the Wars of the Iroquois, 1609-1653." *Ethnohistory* 23:129–145.

Shirvastava, Paul. 1987. *Bhopal: An Anatomy of a Crisis.* Cambridge, MA: Harper and Row.

Shkilnyk, Anastasia M. 1985. *A Poison Stronger than Love: The Destruction of the Ojibwa Community.* New Haven, CT: Yale University Press.

Specking, Keith. 1977. Address Before the Cordova Fisheries Institute. April 2. Cordova Fisheries Institute, Cordova, Alaska.

Spicer, Edward H. 1982. *The American Indians.* London: The Belknap Press.

White, Marlan E. 1978. "Erie." Pp. 412–417 in *Handbook of North American Indians,* edited by Bruce G. Trigger. Washington, DC: Smithsonian Institution.

Wybrow, Peter. 1986. "Comparative Responses and Experiences to Migration Due to Oil Development in Scotland." Pp. 53-73 in *ISER Conference Papers #1.* St. Johns, Newfoundland: Institute of Social and Economic Research, Memorial University of Newfoundland.

Yankebulch, D. 1981. "New Rules in American Life: Searching for Self-fulfillment in a World Turned Upside Down." *Psychology Today.*

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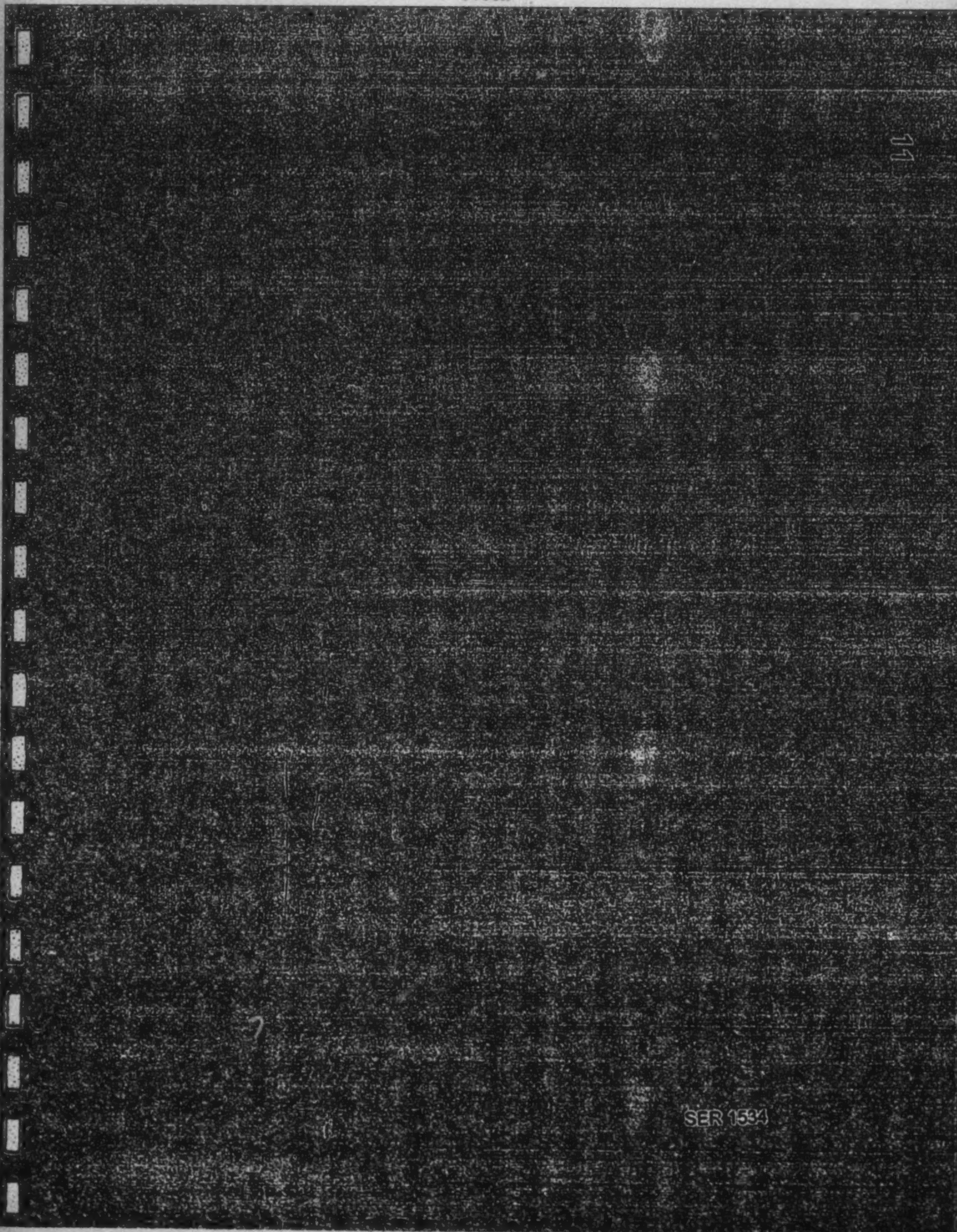


PARTIAL RELEASE

FOR AND IN CONSIDERATION of the sum of TWELVE THOUSAND SEVEN HUNDRED THIRTY SIX + no/100 Dollars ($ 12,736.00) paid to the undersigned, receipt of which is hereby acknowledged, and intending to be legally bound hereby, the undersigned ABSOLUTELY AND IRREVOCABLY RELEASES and DISCHARGES, Exxon Shipping Company, Exxon Corporation, Alyeska Pipeline Service Company, their employees and agents, the M. V. EXXON VALDEZ, its officers and crew, and the Trans-Alaska Pipeline Liability Fund from all claims, demands and causes of action of every kind and character, for damages which have been or will be sustained by the undersigned, whether now known or unknown, with respect to LOSS OF EARNINGS SUFFERED AS A SAC ROE HERRING PERMIT HOLDER BECAUSE OF THE CANCELLATION OF THE 1989 PRINCE WILLIAM SOUND SAC ROE HERRING FISHING SEASON WHICH SAID LOSS CAME as a result of the incident involving the EXXON VALDEZ on March 24, 1989 or as a result of any oil containment or clean-up procedures which followed. The undersigned expressly excepts and reserves all claims, demands and causes of action of every kind and character, other than that released by this Partial Release, resulting from the incident involving the EXXON VALDEZ or as a result of any oil containment or clean-up procedures which followed.

EXHIBIT 11

The sum stated above is accepted by the undersigned in full settlement of the claim described above. The undersigned understands that this sum was agreed upon as a compromise settlement and is not an admission of liability by any party. In consideration of the payment stated above the undersigned assigns to Exxon Shipping Company any claim which the undersigned may have in respect to the claim described above against any person, corporation or governmental agency, including those named above, and any liability fund that may be available for the payment of damage claims.

Executed this 10 day of May, 19 89.

Witness:

Arne O. Berg

Signature

ARNE O BERG

Printed Name

P.O. Box 2526

Address

SEWARD Ak 99664

(907) 224 3229

Phone Number

12

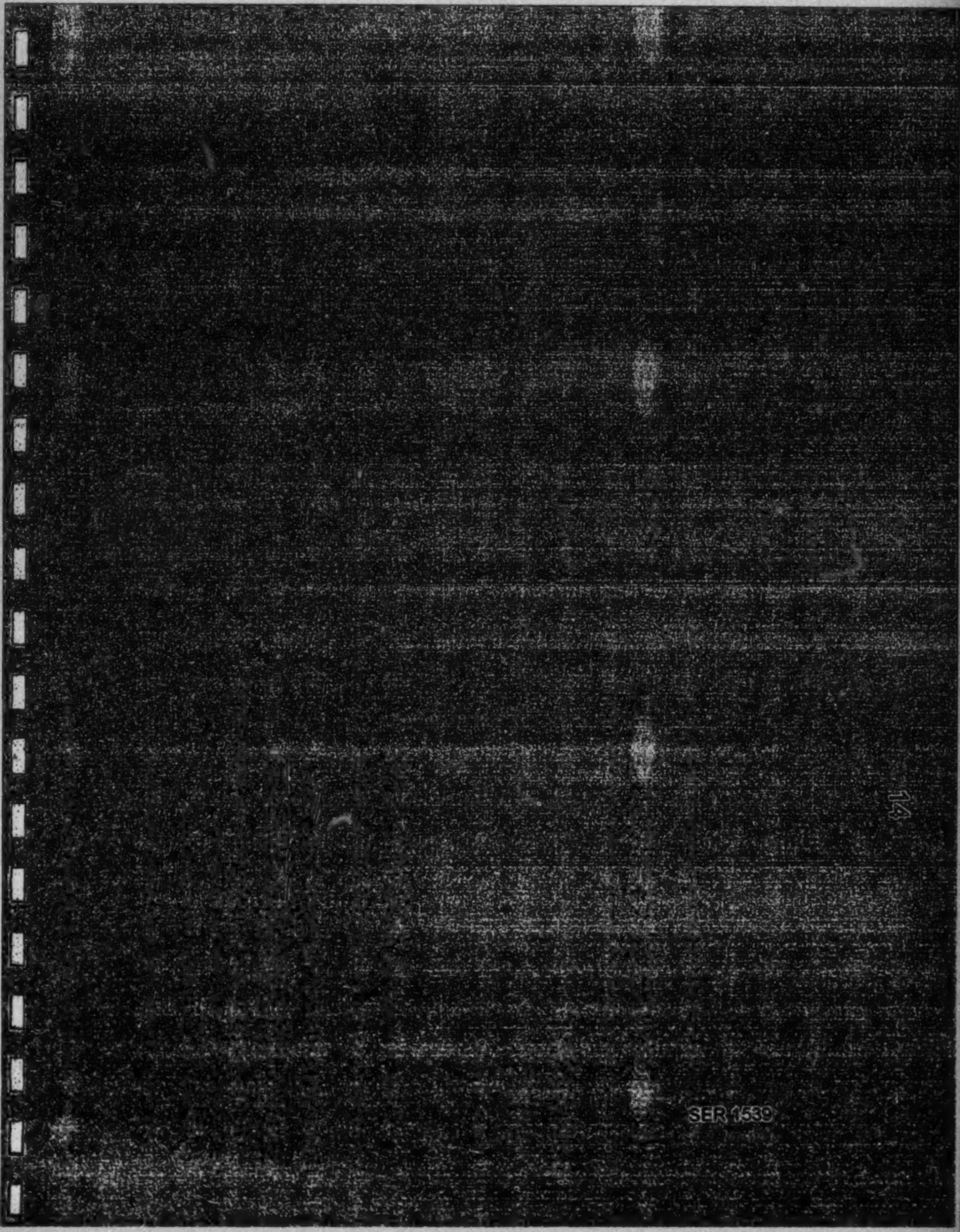
SER 1537

Table 1

FINAL PERCENT SHARES

	Attorney	Tentative Final Percent Shares Of Alveska Settlement	Final Percent Shares Other Recoveries
All Alaskan Seafoods	Ashburn	22.5449%	30.3439%
Allied Processing	Faegre	0.3555%	0.4785%
Bailey d/b/a The Smokehouse	Brown	0.5934%	0.7987%
Cook Inlet Processors	Weidner	22.4711%	0.0000%
Copper River Fishermen's Cooperative	Jameson	7.4277%	9.9972%
D&G Enterprises	Faegre	0.1308%	0.1761%
Eagle Fisheries	Ashburn	7.9967%	10.7630%
Ellis M. dba Trans-Ocean Enter.	Ashburn	0.1086%	0.1462%
Erickson dba Hidden Bay Seafoods	Ashburn	0.2124%	0.2859%
Estate of E.H. Bendikson/ Mister B	Helsell	0.1992%	0.2681%
Ginn, G.	Gerry	0.0159%	0.0215%
Hames dba Cold Water Harvesters	Gerry	0.0389%	0.0524%
Keener Packing Co.	Faegre	2.0701%	2.7862%
Kodiak Salmon Packers	Jamin	5.3591%	7.2130%
Kopecky dba Great Alaska Seafood Co.	Brown	0.0190%	0.0256%
Latta, D.	Jameson	0.0407%	0.0548%
M.S.P. Corporation	Gerry	0.0942%	0.1268%
McLean dba Prime Ak Seafoods	Gerry	0.0986%	0.1328%
Nautilus Marine Enterprises Inc.	Weidner	6.5330%	0.0000%
Northland Fisheries, Inc.	Coe	0.4042%	0.5440%
Odyssey Enterprises	Young	0.8579%	1.1546%
Pan Pacific Seafoods	Bennett	1.4095%	1.8971%
Queen Fisheries Inc. dba E. Point Seafoods	Helsell	2.0136%	2.7101%
Samet - I Seafoods	Jameson	0.1906%	0.2566%
Schilling P. dba Alaska Gourmet	Jameson	0.1626%	0.2189%
Sea Captain's Choice, Inc.	Peterson	0.3534%	0.4757%
Sea Hawk Seafoods	Ashburn	10.3349%	13.9101%
Seafood Sales	Young	0.7740%	1.0417%
Sea-Nik Foods/ Marutsubo-Suisan	Faegre	0.4608%	0.6203%
Seasonal Seafoods	Faegre	0.5831%	0.7849%
Smith, S. dba Virgin Bay Kelp Co.	Ashburn	0.1255%	0.1689%
Taylor, G. dba Taylor Aquatic Enter.	Ashburn	0.3354%	0.4515%
Western Alaska Fisheries Inc.	Hall	4.5779%	6.1615%
Woodbine Alaska Fish Co.	Faegre	1.1067%	1.4895%
Total		100.0000%	95.5560%

EXHIBIT 12


14
SER 1539

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	No. A89-0095-CV (HRH) (Consolidated)

SPECIAL VERDICT
FOR PHASE II-A OF TRIAL

EXHIBIT 14

Salmon / 1989

Interrogatory No. 1: For the areas listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in 1989? You should answer separately for each area listed.

Answer:

Prince William Sound:	Yes	✓	No	
Upper Cook Inlet:	Yes	✓	No	
Kodiak:	Yes	✓	No	
Chignik:	Yes	✓	No	
Balboa-Stepovak:	Yes	✓	No	

Interrogatory No. 2: For each area for which your answer to Interrogatory No. 1 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of salmon in that area in 1989 that was caused by the oil spill?

Answer:

Prince William Sound:	$ 7,689,714.
Upper Cook Inlet:	$ 45,905,758.
Kodiak:	$ 43,042,724.
Chignik:	$ 5,052,400.
Balboa-Stepovak:	$ -0-

Setnetters' Catch / 1989

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of increased harvests of salmon by set net fishermen in Upper Cook Inlet in 1989?

Answer: Yes ✓ No ____

Interrogatory No. 4: If your answer to Interrogatory No. 3 is "yes", please state how many additional salmon were caught by set net fishermen in Upper Cook Inlet in 1989 as a result of the oil spill.

Answer: 3,242,254

Pink Salmon / Prince William Sound Area / 1990-95

Interrogatory No. 5: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of pink salmon by plaintiffs in the Prince William Sound area? You should answer separately for each year listed.

Answer:

1990:	Yes		No	✓
1991:	Yes		No	✓
1992:	Yes	✓	No	
1993:	Yes	✓	No	
1994:	Yes		No	✓
1995:	Yes		No	✓

Interrogatory No. 6: For each year for which your answer to Interrogatory No. 5 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of pink salmon in that year?

Answer:

1990:	$ 0
1991:	$ 0
1992:	$ 11,277,125.53
1993:	$ 11,111,200.00
1994:	$ 0
1995:	$ 0

Sockeye Salmon / Upper Cook Inlet Area / 1994-95

Interrogatory No. 7: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Upper Cook Inlet area in 1994? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Upper Cook Inlet area in 1994, then your answer to this interrogatory should be "no".)

Answer: Yes ______ No ✓

Interrogatory No. 8: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Upper Cook Inlet area in 1995? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Upper Cook Inlet area in 1995, then your answer to this interrogatory should be "no".)

Answer: Yes ______ No ✓

Interrogatory No. 9: For each year for which your answer to Interrogatory Nos. 7 and 8 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction in their harvest of sockeye (red) salmon in Upper Cook Inlet in that year?

Answer: 1994: $ 0

1995: $ 0

Sockeye Salmon / Kodiak Area / 1994-95

Interrogatory No. 10: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Kodiak area in 1994? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Kodiak area in 1994, then your answer to this interrogatory should be "no".)

Answer: Yes ______ No ✓

Interrogatory No. 11: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of salmon by plaintiffs in the Kodiak area in 1995? (If you find that the State's management of the sockeye fishery is a superseding cause, as defined in Instruction No. 23, of reduced harvests of salmon in the Kodiak area in 1995, then your answer to this interrogatory should be "no".)

Answer: Yes ______ No ✓

Interrogatory No. 12: For each year for which your answer to Interrogatory Nos. 10 and 11 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of sockeye (red) salmon in the Kodiak area in that year that was caused by the oil spill?

Answer: 1994: $ 0

1995: $ 0

Herring / 1989

Interrogatory No. 13: For the areas listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of herring by plaintiffs in 1989? You should answer separately for each area listed.

Answer:

Prince William Sound: Yes ✓ No ____

Lower Cook Inlet: Yes ✓ No ____

Kodiak: Yes ✓ No ____

Interrogatory No. 14: For each area for which your answer to Interrogatory No. 13 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of herring in that area in 1989?

Answer:

Prince William Sound: $ 15,872,720.

Lower Cook Inlet: $ 188,400.

Kodiak: $ 585,480.

Herring / Prince William Sound Area / 1993-94

Interrogatory No. 15: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of reduced harvests of herring by plaintiffs in the Prince William Sound area? You should answer separately for each year listed.

Answer:

1993: Yes ✓ No ____

1994: Yes ____ No ✓

Interrogatory No. 16: For each year for which your answer to Interrogatory No. 15 is "yes", what sum of money will reasonably compensate plaintiffs for the reduction of their harvest of herring in that year?

Answer:

1993: $ 7,021,593.

1994: $ 0

Salmon Prices / 1989

Interrogatory No. 17: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1989 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink:	Yes	✓	No	
Sockeye (Red):	Yes	✓	No	
Chum:	Yes	✓	No	
King (Chinook):	Yes	✓	No	

Interrogatory No. 18: For each salmon species for which your answer to Interrogatory No. 17 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1989?

Answer:

Pink:	$ 28,807,647.59
Sockeye (Red):	$ 67,594,619.28
Chum:	$ 22,620,650.91
King (Chinook):	$ 672,504.91

Salmon Prices / 1990

Interrogatory No. 19: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1990 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink: Yes ______ No ✓

Sockeye (Red): Yes ______ No ✓

Chum: Yes ______ No ✓

King (Chinook): Yes ______ No ✓

Interrogatory No. 20: For each salmon species for which your answer to Interrogatory No. 19 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1990?

Answer:

Pink: $ 0

Sockeye (Red): $ 0

Chum: $ 0

King (Chinook): $ 0

Salmon Prices / 1991

Interrogatory No. 21: For each salmon species listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in prices paid in 1991 for salmon of that species caught by plaintiffs? You should answer separately for each salmon species.

Answer:

Pink: Yes ______ No ✓
Sockeye (Red): Yes ______ No ✓
Chum: Yes ______ No ✓
King (Chinook): Yes ______ No ✓

Interrogatory No. 22: For each salmon species for which your answer to Interrogatory No. 21 is "yes", what sum of money will reasonably compensate plaintiffs for the decline in prices paid for salmon of that species caught by plaintiffs in 1991?

Answer:

Pink: $ 0
Sockeye (Red): $ 0
Chum: $ 0
King (Chinook): $ 0

Herring Prices

Interrogatory No. 23: For the years listed below, do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of the decline in prices paid for herring caught by plaintiffs?

Answer:

1989:	Yes	✓	No	
1990:	Yes		No	✓
1991:	Yes		No	✓

Interrogatory No. 24: For each year for which your answer to Interrogatory No. 23 is "yes", what sum of money will reasonably compensate the plaintiffs for the decline in prices paid for herring caught by plaintiffs in that year?

Answer:

Prince William Sound:	1989:	$ 5,831,429.61
	1990:	$ 0
	1991:	$ 0
Cook Inlet:	1989:	$ 2,683,913.23
	1990:	$ 0
	1991:	$ 0
Kodiak:	1989:	$ 1,454,617.16
	1990:	$ 0
	1991:	$ 0
Chignik:	1989:	$ 0

Value of Fishing Permits

Interrogatory No. 25: Do you unanimously find from a preponderance of the evidence that the oil spill was a legal cause of a decline in the value of plaintiffs' limited entry fishing permits?

Answer: Yes ✓ No ____

Interrogatory No. 26: If your answer to Interrogatory No. 25 is "yes", what sum of money will reasonably compensate plaintiffs for any decline in value of plaintiffs' limited entry fishing permits?

Answer: $9,375,242.

DONE at Anchorage, Alaska, this ____ day of July, 1994.

____
Presiding Juror

SER 1553

FILED

JUL 26 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By ________________ Deputy

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Lead and Liaison Counsel for All Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:)
THE EXXON VALDEZ)

Case No. A89-095 (HRH)
(Consolidated)

This Document Relates to
All Cases

AMENDED STIPULATION REGARDING IMPACTS FOR PHASE III[1]

This stipulation is entered into solely for purposes of the Phase III federal jury

---

[1] Nothing in this Stipulation shall be construed as a waiver of certain plaintiffs' right to be remanded to state court. Plaintiffs do not by this Stipulation submit to the jurisdiction of the federal court. Nor is anything in this stipulation to be deemed as a waiver by defendants of any defense of law or fact to any claim referenced herein or a consent to assertion of a barred or non-cognizable claim.

EXHIBIT 15

5634

trial, and for no other purpose. The parties agree that this stipulation shall not be used for any other purpose. This stipulation supersedes and replaces "Stipulation Regarding Impacts For Phase III" dated July 18, 1994. Subject to the foregoing, Sections I, II, III and IV of this stipulation may be read to the jury at the commencement of Phase III. Section V shall not be read to the jury.

I. The following Phase IIB claims for actual damages were resolved:

1. A class consisting of Alaska Natives made claims that their subsistence harvests were reduced as a result of the *Exxon Valdez* oil spill. Exxon has agreed to pay $20 million to the class on these claims.

II. The following claims for actual damages will be resolved in Phase IV proceedings:

1. Commercial fishermen in fisheries affected by the oil spill were unable to fish certain fisheries as a result of the *Exxon Valdez* Oil Spill, including pot shrimp, trawl shrimp, dungeness crab, brown king crab, tanner crab, king crab, halibut, sablefish, miscellaneous fin fish, miscellaneous shellfish, miscellaneous groundfish, smelt, scallops, and bait herring. Commercial fishermen participating in these fisheries contend their damages are $24,764,000. Defendants admit that there was some loss in each of these fisheries but contend that the actual damages were lower.

2. Commercial fishermen in the Lower Cook Inlet salmon seine and set net fisheries sustained losses due to closures as a result of the oil spill. Commercial fishermen

in these areas contend that these damages for 1989 amount to $787,000. Defendants admit that there was some loss in each of these fisheries but contend that the actual damages were lower.

3. Commercial fishermen in fisheries affected by the oil spill contend that they have sustained losses because the prices at which their fishing vessels sold have been reduced as a result of the spill. Defendants deny that the *Exxon Valdez* Oil Spill caused a drop in the price of vessels sold and contend that the actual damages, if any, were less than the amount claimed.

4. Certain commercial fishermen from fisheries affected by the oil spill who sold their fishing permits after September 1993 contend that the prices at which their fishing permits have sold have been reduced as a result of the spill. Defendants deny that the *Exxon Valdez* Oil Spill caused a drop in the price of these permits, and contend that the actual damages were less than the amount claimed.

5. Landowners (including certain Native Corporations), who own shoreside lands in the oiled areas of Prince William Sound, Kenai Peninsula and Kodiak contend that oiling of those lands by the *Exxon Valdez* Oil Spill resulted in damage of at least $130,000,000. Defendants assert that many of the lands involved were never oiled by oil from the *Exxon Valdez*. As to lands which were oiled, defendants admit that they are responsible for damages, if any, caused by the oil, but defendants contend that such lands have been, for the most part, cleaned up, and that any residual damages are temporary.

6. The Cook Inlet Aquaculture Association, Kodiak Regional Aquaculture

Association, and Prince William Sound Aquaculture Corporation contend they sustained losses due to a reduction of the price paid for fish actually harvested in 1989, and state that these damages are $18,860,000. Defendants contend that the hatcheries' damages, if any, were less than the amount claimed.

III. The following claims for actual damages are to be resolved in the Alaska State courts:

1. The municipalities of Kodiak Island Borough, Larsen Bay, Old Harbor, Ouzinkie, Port Lions, and Cordova, contend that they have sustained losses due to the *Exxon Valdez* Oil Spill and state the damages they have suffered at issue in the present trial are $ 8,784,567. Defendants contend that the damages suffered were less than $75,000.

2. Other municipalities including Seward, Valdez, Kenai, Kenai Peninsula Borough, Homer, Lake and Peninsula Borough, Chignik, Akhiok, City of Kodiak, and Whittier contend that they have sustained losses in an amount which is, at a minimum, equivalent to those municipalities presently in trial (in paragraph 1 above). Defendants deny that these municipalities were damaged by the *Exxon Valdez* Oil Spill or contend that the damages suffered, if any, were lower.

2. The Native Corporations of English Bay, Port Graham, Chenega, Chugach, Eyak, and Tatitlek contend that they have sustained losses from the oiling of their land due to the *Exxon Valdez* Oil Spill and state the damages they have suffered are $ 110,898,000. Defendants contend that lands far back from the shoreline and other lands that were not touched by oil were not damaged at all, and contend that the damage attributable to oiled

lands amounts to about $1,500,000.

3. The Native Corporations of English Bay, Port Graham, Chenega, and Chugach, contend that they have sustained losses to archeological sites on their lands due to the *Exxon Valdez* Oil Spill and state the damages they have suffered are $35,571,000. Defendants deny that archeological sites were damaged by the *Exxon Valdez* Oil Spill.

4. Certain commercial fishermen in fisheries affected by the oil spill have claims in state court for losses they claim for the depressed sales price of their permits and vessels. The Exxon defendants dispute these claims.

5. The Native Corporations of Chugach and Port Graham own and operate seafood processing operations that were impacted by the *Exxon Valdez* Oil Spill. Exxon paid these processors $9,515,000 in settlement of their claims.

6. Certain commercial fish processors claimed that they were damaged as a result of the *Exxon Valdez* Oil Spill. Exxon paid these processors $113,500,000 in settlement of their claims.

IV. Members of Punitive Damage Class:

1. Each and every claimant entitled to recover damages from defendants for damage resulting from the *Exxon Valdez* Oil Spill is a member of the punitive damage class and is a plaintiff in this action for purposes of this Phase III. No other jury will award punitive damages to these plaintiffs in any other lawsuit.

V. Phase III Evidence

1. This paragraph shall not be read to the jury. No evidence of damages claimed by the plaintiffs or claimants identified in Parts I through IV hereof shall be offered or admissible in the trial of Phase III; rather the entire Phase III record as to the fact or amount of such damages shall consist of this stipulation and the Phase II record and verdicts. Nothing in this stipulation is intended or shall operate to limit argument or to preclude plaintiffs or defendants from introducing appropriate cross-examination or rebuttal evidence or questioning.

So Stipulated: Dated: 26 July 1994

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FILED
JUL 27 1994
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _______ Deputy

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 27 day of July 1994.

UNITED STATE DISTRICT JUDGE
The Honorable H. Russel Holland

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cc: [illegible]
[illegible]
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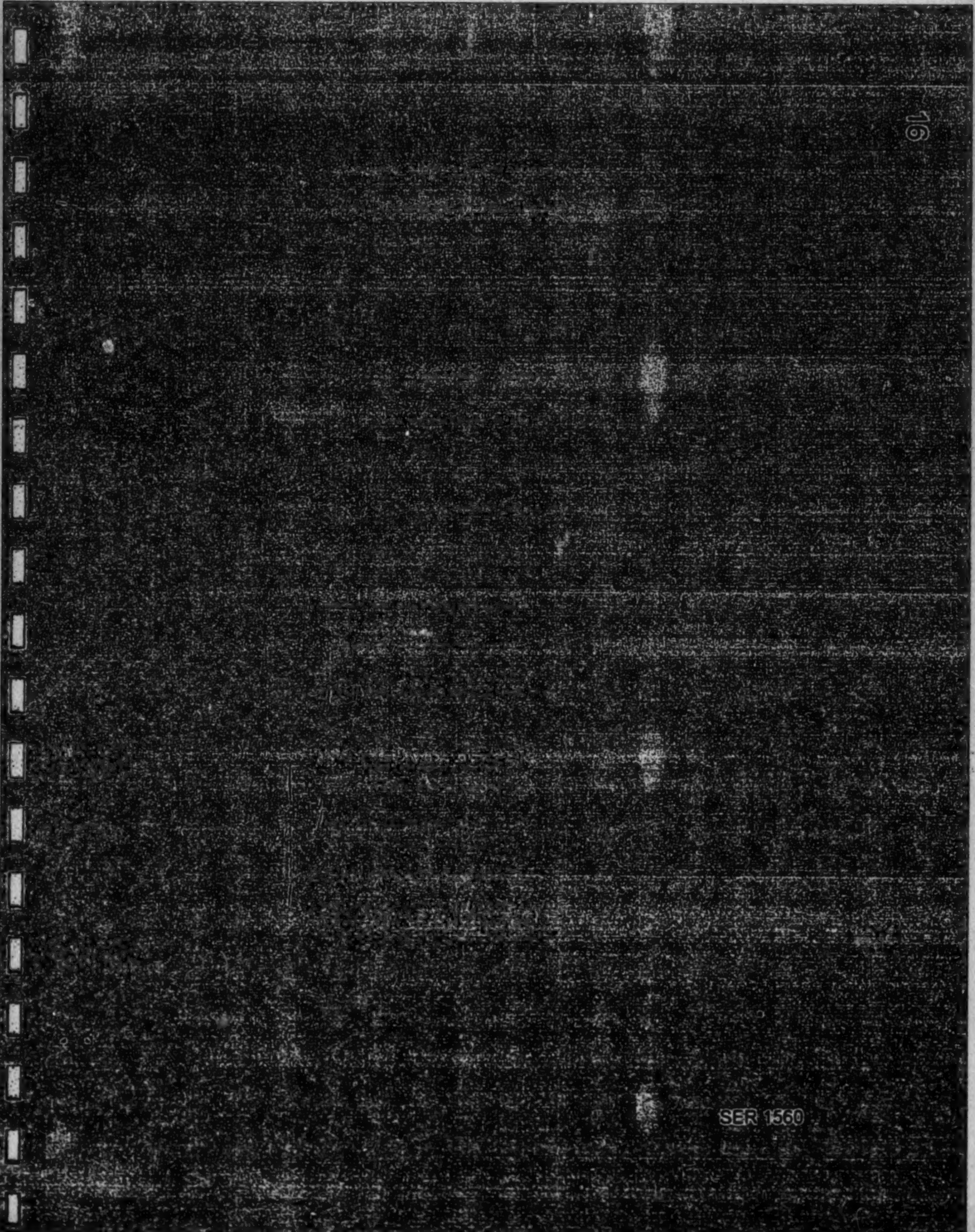
16

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 96-36038
97-35036
(Consolidated)

In Re: THE EXXON VALDEZ

ICICLE SEAFOODS, INC., et al.,

Plaintiffs-Appellants,

EXXON CORPORATION; EXXON SHIPPING CO.,

Defendants-Appellants,

v.

GRANT BAKER, et al., as representatives of the Mandatory Punitive Damages Class,

Plaintiffs-Appellees.

ICICLE SEAFOODS, INC., et al.,

Plaintiffs-Appellants,

v.

ALASKA SPORTFISHING ASS'N, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska

APPELLANTS' JOINT EXCERPTS OF THE RECORD

Volume II of IV
ER263-ER552

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EXHIBIT 16

1996
Settlement Agreement

Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company, on their own behalf and on behalf of and for the benefit of each of those companies' past and present directors, officers, employees and agents, and the T/V EXXON VALDEZ, its officers and crew (collectively "Exxon"), and Icicle Seafoods, Inc.; Astoria Warehousing, Inc.; Peter Pan Seafoods, Inc.; Peninsula Salmon, Inc.; Seven Seas Corporation; Stellar Seafoods, Inc.; Ocean Beauty Seafoods, Inc.; Washington Fish and Oyster Company; Ocean Beauty Alaska, Inc.; Portland Fish Group, Inc.; Wards Cove Packing Company; Alaska Boat Company; ADF, Inc.; Trident Seafoods Corporation; North Pacific Processors, Inc.; and North Coast Seafood Processors, Inc. and their subsidiaries and affiliates (collectively "Claimants"), do hereby enter into this Settlement Agreement ("Agreement"), dated as of January 11, 1996.

I. Intent.

So that all those who may read and be called upon to interpret or apply this Agreement may understand the intent of the parties in entering into it, Exxon and Claimants state the following:

A. On March 23-24, 1989, the T/V EXXON VALDEZ went aground on Bligh Reef, and as a result certain of its cargo tanks ruptured and approximately 11 million gallons of crude oil were released into Prince William Sound (the "oil spill").

Exh 3 Page 1

B. Certain of Claimants have asserted claims against Exxon and other entities, including the Alyeska Pipeline Service Company ("Alyeska"), to recover losses they assert they suffered due to the oil spill, and due to various events and activities related to the oil spill, including certain alleged representations made prior to, during, and after the oil spill, and the activities of various persons and entities in preparing for and conducting the clean-up of the oil spill.

C. Certain of Claimants seek compensatory and equitable relief from Exxon, Alyeska, and others under all available common law, maritime, and statutory theories, including theories of negligence, strict liability, fraud, ultra-hazardous activity, public and private nuisance, and others, in Icicle Seafoods et al. v. Exxon Shipping Company, et al. which was originally filed under Cause No. 3AN-94-3121 in Alaska State Court, and was later removed to and is now pending under Cause No. 94-208-CV (HRH) in the United States District Court, District of Alaska. (collectively the "Action")

D. Exxon maintains that it is not liable for the relief Claimants seek but nevertheless recognizes that because of legal uncertainties, it might suffer an adverse judgment if Claimants continue the Action.

E. Claimants maintain that they are entitled to recover damages and other relief because of the oil spill, but they acknowledge that there is a financial risk and inherent uncertainty attendant upon pursuing their complex claims through litigation.

F. By entering into this Agreement Claimants and Exxon intend to compromise and settle all presently existing claims, whether asserted or not asserted and whether known or unknown, for actual damages and all other claims whatsoever, if any, arising out of the grounding of the EXXON VALDEZ.

G. Exxon wishes to limit to the full extent possible its potential liability to Claimants, including potential liability because of Exxon Pipeline Company's ownership interest in Alyeska Pipeline Service Company. Accordingly, this Agreement with Claimants, establishes a procedure to resolve completely any and all claims in any way relating to the oil spill that Claimants may have against the three named Exxon entities.

H. Claimants wish to secure promptly a sum of money adequate to compromise reasonably and in good faith all of the theories of relief they have asserted or could have asserted against Exxon and all others, for any and all oil spill related claims.

THEREFORE, in pursuit of the foregoing purposes, and in consideration of the payment Exxon will make, and the mutual covenants and warranties that follow, Exxon and Claimants agree:

II. Exxon Payment

A. As consideration for this Agreement, Exxon agrees to pay Claimants the sum of $6,000,000 within ten business days of the date of completed execution of this Agreement. The payment shall be made by wire transfer to First Interstate Bank of Washington, Seattle Main Branch, First Interstate Center, 999 Third Avenue, Seattle, WA 98104, ABA Routing No. 125000286 for further credit to the account of Byrnes & Keller, Trust Account No. 001982735.

B. Claimants agree by their acceptance of the above payment to be legally bound by all the terms of this Agreement, and to be bound as well under all the other warranties and covenants contained in this Agreement. The undersigned Claimants will divide the payment among themselves, and they hereby acknowledge that whatever amount they determine to allocate to each of them shall constitute good and satisfactory consideration for the undertakings of each.

III. Dismissal of The Action

Claimants agree that within ten (10) business days of receipt of Exxon's payment referred to in paragraph II.A., Claimants and all defendants will dismiss without prejudice and without costs or fees to any party, all claims raised or which could have been raised against each other and all parties from the Action.

IV. Claimants' Covenants and Representations

Exceptwith respect to any rights or obligations created by this agreement, in any oil spill (as defined herein) litigation in which Claimants become involved, Claimants and Exxon covenant not to execute against each other on any judgment or award of compensatory or equitable relief, or for attorneys' fees and costs, in any way relating to the oil spill.

V. Assignment of Claims

In further consideration of the payment, the Claimants hereby assign irrevocably to Exxon Corporation all rights, causes of action and claims, known and unknown, for monetary or equitable relief, which any of the Claimants have against any other person or entity other than Exxon, public or private, and that arise from the oil spill. This assignment is made without warranty of any kind, express or implied, other than warranties set forth in Paragraph VII.

VI. Not a Release

This Agreement is not to be construed as a release of any parties to litigation relating to the oil spill.

Exh 3 Page 5

Notwithstanding any other provision of this Agreement, nothing in this Agreement shall waive, reduce, diminish or in any manner limit Claimants' status as members of the mandatory punitive damage class, their rights as members of said class, or their right to participate in the distribution of any final award of punitive damages to said class.

VII. Warranties

A. Claimants warrant that, other than to the extent set forth in the April 13, 1990 Partial Release and Assignment and the January 8, 1991 Settlement Agreement, they have not assigned to any entity or person any of their rights to recovery against Alyeska or Exxon for oil spill-related losses or claims.

B. Claimants and Exxon warrant that each person and entity that is a party to this Agreement is properly authorized to enter this Agreement.

Exh 3 Page 6

VIII. No Assertion of Invalidity/Severability

Neither Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company nor any of the undersigned Claimants shall assert or contend in any judicial or non-judicial context that this Agreement or any part of this Agreement is in any way invalid, unenforceable, or unreasonable. In the event any provision or portion of this Agreement is held or adjudicated to be invalid or unenforceable, all other provisions shall remain in full force and effect and the parties shall be bound thereby, and no party may contend that there has been a failure, in whole or in part, of the consideration for which they bargained.

IX. Informed Consent

Claimants have read and fully understand this Agreement and execute it after full and free opportunity for consultation with independent counsel and other advisors of their choice.

X. Choice of Law

This Agreement and any issues or disputes arising from it shall be governed by the laws of the State of Alaska.

XI. If an action is instituted for breach of this Agreement or any of its terms, or for breach of any warranty or any representation herein, the prevailing party shall be entitled to receive its costs of suit plus reasonable attorneys' fees in addition to any other relief.

DATED: Jan 11, 1996

EXXON CORPORATION

By:
John R. Rebman
Assistant General Counsel

DATED: 1-11-96

EXXON PIPELINE COMPANY

By:
Otto R. Harrison
President

DATED: JANUARY 11, 1996

EXXON SHIPPING COMPANY,
now SEARIVER MARITIME
FINANCIAL HOLDINGS, INC.

By:
S.B.L. Penrose
Vice President

DATED: 1/16/96

ICICLE SEAFOODS, INC., and its
subsidiaries and affiliates

By:
Steven G. Numata
Its Executive Vice President
and Chief Financial Officer

DATED: 1/16/96

PETER PAN SEAFOODS, INC.,
and its subsidiaries and
affiliates (excluding NICHIRO
CORPORATION and its subsidiaries
other than Peter Pan Seafoods, Inc.,
its subsidiaries, Peninsula Salmon,
Inc., Seven Seas Corporation, and
Stellar Seafoods, Inc.)

By: ______________________
William G. Saletic
Its President

DATED: 1/16/96

PENINSULA SALMON,
INC.

By: ______________________
William G. Saletic
Its President

DATED: 1/16/96

SEVEN SEAS CORPORATION

By: ______________________
William G. Saletic
Its President

DATED: 1/16/96

STELLAR SEAFOODS, INC.

By: ______________________
William G. Saletic
Its President

DATED: 1-15-96

OCEAN BEAUTY SEAFOODS, INC., and its subsidiaries and affiliates (excluding SEALASKA CORPORATION and its subsidiaries other than Ocean Beauty Seafoods, Inc., and its subsidiaries), and as successor in interest to Washington Fish & Oyster Co.

By: ______________________
~~Bill Terhar~~ RICHARD DENMARK
Its Executive Vice President
~~and Chief Operations Officer~~

DATED: 1-16-96

ADF, Inc. dba Aleutian Dragon Fisheries, and its subsidiaries and affiliates

By: ______________________
Brad Resnick
Its President

DATED: 1-15-96

TRIDENT SEAFOODS CORPORATION, and its subsidiaries and affiliates

By: Steve Okerland
Steve Okerland
Its Vice President - Finance

DATED: 1-15-96

NORTH PACIFIC PROCESSORS, INC., and its subsidiaries and affiliates (excluding Marubeni corporation and its subsidiaries other than North Pacific Processors, Inc., and its subsidiaries)

By: ____________________
James J. Kudwa
Its Vice President and Secretary

DATED: 1-15-96

WARDS COVE PACKING COMPANY, and its subsidiaries and affiliates

By: ____________________
Alec W. Brindle
Its President

DATED: 1-15-96

ALASKA BOAT COMPANY

By: ____________________
Alec W. Brindle
Its President

DATED: 1-16-96

NORTH COAST SEAFOOD
PROCESSORS, INC., and its
subsidiaries and affiliates

By: Ernest Nagai
Ernest Nagai
Its Vice President

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[illegible] AM

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SER 1574

BOGLE&GATES

LAW OFFICES

RICHARD M. CLINTON

Two Union Square
601 Union Street
Seattle, Washington 98101-2346

Main Office: (206) 682-5151
Facsimile: (206) 621-2660
Direct Dial: (206) 621-1435

Anchorage
Bellevue
Olympia
Portland
Tacoma
Vancouver, B.C.
Washington, D.C.

22137/48519

January 13, 1995

VIA HAND DELIVERY

Michael Woerner, Esq.
Keller Rohrback
1201 Third Avenue
Suite 3200
Seattle, WA 98101-3052

Re: Exxon Valdez Oil Spill Litigation
-- Exxon Claims Payments to Cannery Workers

Dear Mike:

Pursuant to your request, we are enclosing a copy of the list of cannery worker claims payments through the Exxon claims program. As you can see, the list provides the name of the claimant, the social security number and the amount paid. Please give me a call if you have any questions.

Very truly yours,

BOGLE & GATES

Dick

Richard M. Clinton

Enclosure

EXHIBIT 17

EXXON VALDEZ OIL SPILL
CANNERY WORKER PAYMENTS

CLAIMANT NAME	SSN	AMOUNT PAID
ZOLLINGER, BRUCE H.	519783311	1,621.00
ZOLLINGER, SHARI L.	528456813	1,362.00
ZUMBADO, ROBERT	578150065	1,100.00
		10,787,886.34

CLAIMANT COUNT: 4,431

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EXHIBIT C
TO MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANTS WITH RESPECT TO JUDGMENT TO BE ENTERED ON THE PHASE III VERDICT

UNUSED EXXON CLAIMS PROGRAM PAYMENT CREDITS

PUNITIVE DAMAGE CLASS MEMBERS	UNUSED CREDITS
Lost Income Claims:	
CHIGNIK SALMON FISHERMEN	$ 19,749
KODIAK HERRING FISHERMEN	$ 712
KODIAK SALMON FISHERMEN	$ 498,372
PWS HERRING FISHERMEN	$ 228,139
PWS SALMON FISHERMEN	$ 332,131
UCI SALMON FISHERMEN	$ 1,020,611
PHASE IIA SUBTOTAL	$ 2,099,714
Lost Income Claims:	
LCI SALMON FISHERMEN	$ 1,922,346
PWS POT SHRIMP	$ 179,819
PWS SABLEFISH	$ 82,415
PWS TRAWL SHRIMP	$ 10,000
PHASE IV SUBTOTAL	$ 2,194,580

EXHIBIT 18

Lost Income Claims:	
AREA BUSINESSES	$ 82,081
CANNERY WORKERS	$ 192,651
MUNICIPALITIES	$ 100,000
NOT-FOR-PROFITS	$ 250,000
SEAFOOD BUYERS/BROKERS	$ 17,410
SEAFOOD PROCESSORS	$ 961,411
TENDERS & CREW	$ 1,159,517
OTHER CLAIMANTS	$ 14,148
OTHER CLAIMS SUBTOTAL	$ 2,777,218
Property Damage Claims:	
FISHERMEN	$ 1,000
TOTAL UNUSED EXXON CLAIMS PROGRAM CREDITS	$ 7,072,512

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SER 1580

OIL SPILL LITIGATION
WORK PRODUCT OF EXXON
Prepared for Counsel
Do Not Reproduce or Circulate
Do Not Place in Unprotected Files

EXXON COMPANY, U.S.A.
ALASKA OPERATIONS

MEMORANDUM

RECEIVED
APR 14 1993

To: Gary Dowling (without attachment-see cc list)
Otto Harrison (with BASIC REFERENCE MATERIALS notebook)
Judy Heidinger (" " " " ")
Jim Selna (" " " " ")
Mike Smith (" " " " ")
Jim Stevens (" " " " ")

From: W. Monte Taylor Monte

Date: March 20, 1992

Subject: EXXON'S RESPONSE TO COMMUNITY AND NATIVE NEEDS

Attached is my presumably "final draft" of the subject report on Community Liaison and related activities. Most of the information that Judy Heidinger and I thought might be useful or important has been found in our files, copied, and included as part of the report and references. The references have been divided into three categories, since it was considered impractical and unnecessary to make multiple copies of all backup materials. I also reserved some of the reference numbers in each category so that additional material can be added if necessary. Reference categories are summarized and explained below:

BASIC REFERENCE MATERIALS: Includes 80 references, numbered sequentially and distributed in a 3 inch notebook, with copies to each of the individuals indicated. The materials included in these references were either deemed important to understanding or clarification, contained quotes that might be useful, or consisted of only a few pages.

"A" (ACTIVITY REPORT) REFERENCES: These references are numbered sequentially with the suffix "A" and show the appropriate page numbers in the Community Liaison Activity Report (CLAR) that has previously been widely distributed. Extra copies of this report are available if you need one.

"B" (BACKUP) REFERENCES: These references are numbered sequentially with the suffix "B" and a backup copy is available in a special file called "Community Response File", currently located in my office in Houston.

I plan to return to Rockport on March 22, having essentially completed the Community Liaison Report, but will be in the Houston office on Thursday, March 26, prior to leaving for Anchorage on Friday, March 27. After returning from Anchorage on April 5, I will be available to return from Rockport on call to modify the report or for other needed work.

EXHIBIT 19

As requested, Judy Meidinger and I plan to work with the Oil Spill Health Task Force (OSHTF) to develop the agenda and presentation for the 1992 proposed village visits during the week of March 30, 1992. We will work with the technical subcommittee and attend the April 1 OSHTF meeting.

The trip to Anchorage will be an opportunity to search the files for additional reference material if necessary. Please advise me on March 26th in Houston; or the week of March 30th in Anchorage (care of Judy Meidinger), if you think of any reference material that we should attempt to find for you or add to the report.

I tried in this version to concentrate on back up materials, so most of the changes from the previous draft are either in response to your prior comments, or are additions after obtaining the appropriate reference materials. I have reserved reference numbers 328 to 348 for the presentation package and the final report on the 1992 Food Safety Visits. We will probably also want to add appropriate comments in the VILLAGE INFORMATION PROGRAMS section of the report after completion of that project in May or June.

Your suggestions, questions, and recommended changes can be made in the form of margin notes, returned with the report. It would also be helpful if you would indicate areas that look questionable, are confusing, etc. After receiving comments from everyone, I will make the necessary modifications and prepare a final report. Keep the "Basic Reference Materials" notebook if you wish. If the reference material changes, I will send you the revised information for incorporation into the notebook, along with the final report.

Please return your draft to Hattie Hollins, Jefferson Building, #928C. She will keep me informed in Rockport. My address and phone number, in case you need to contact me directly, or just want to come fishing, is listed below:

W. Monte Taylor
21 Pelican Drive
Rockport, TX. 78382
Ph. 512-729-2249

cc: Roger Leick (with BASIC REFERENCE MATERIALS notebook)

AFFIDMS.WMT

- incremental expenses associated with the initiation of important municipal projects which have had to be delayed due to municipal participation in spill mitigation activities;
- expenses to upgrade municipal services as required for spill mitigation only;
- costs of information projects designed to keep the community aware of spill related activities and mitigation measures; and
- municipal provision of equipment, facilities and services for spill mitigation programs and activities.

SUMMARY OF 1989 ADVANCES AND REIMBURSEMENTS (Reference 43) - In the implementation of the 1989 effort to advance funds and reimburse incremental expenses, including the advances made for the winter monitoring program discussed later, Exxon advanced a total of $4.4 million to the various boroughs, municipal governments, and native villages and corporations. We reimbursed an additional $4.1 million to the same groups, for total payments of $8.5 million. A summary table, showing the amounts advanced and reimbursed to each borough, city, village IRA council, and village corporation during 1989 by location is shown below. These totals only include the funds given directly to various governments and village corporations. They do not include costs paid to communities for services performed, license fees, taxes, etc. by Exxon or any of Exxon's contractors. Also excluded are funds for various community assistance projects, funds given to Chambers of Commerce, etc. It should also be noted that the amounts shown for the cities and villages on the Kenai Peninsula and on Kodiak Island do not include Exxon funds given to the boroughs that were passed through to the cities and villages.

CITY OR BOROUGH	ADVANCED	REIMBURSED	TOTAL
PRINCE WILLIAM SOUND AREA:			
City of Cordova	$163,400	$156,854	$320,255
City of Valdez	417,125	1,797,321	2,214,445
City of Whittier	26,500	314,647	341,145
KENAI PENINSULA:			
Kenai Peninsula Borough	$2,000,000	0	$2,000,000
City of Homer	70,000	260,469	330,469
City of Seldovia	95,668	27,773	123,441
City of Seward	95,000	75,758	170,758
KODIAK ISLAND:			
Kodiak Island Borough	$870,000	$491,690	$1,361,690
City of Kodiak	26,028	0	26,028

VILLAGE	ADVANCED	REIMBURSED	TOTAL
PRINCE WILLIAM SOUND AREA:			
Chenega	$98,500	$451,119	$549,619
Tatitlek	40,000	3,263	43,263
KENAI PENINSULA:			
English Bay	$50,000	0	$50,000
Port Graham	50,000	21,852	71,852
KODIAK ISLAND:			
Akhiok	$40,000	$14,124	$54,124
Karluk	40,000	0	40,000
Larsen Bay	70,000	122,159	192,159
Old Harbor	70,000	8,967	78,967
Ouzinkie	70,000	205,249	275,249
Port Lions	70,000	81,168	151,168
ALASKA PENINSULA:			
Chignik	$40,000	$2,181	$42,181
Perryville	40,000	0	40,000
TOTALS	$4,442,221	$4,034,591	$8,476,812

Concurrent with establishing reimbursement procedures for cities and villages, we offered assistance to the Native Regional Corporations and the Native Regional Associations in the impacted area. We entered into agreements with each group that requested assistance, advancing a total of $1.2 million and reimbursing an additional $0.5 million, for a total of $1.7 million during 1989. A summary table, showing the amounts advanced or reimbursed to each organization during 1989 is shown below:

REGIONAL NATIVE CORPORATION	ADVANCED	REIMBURSED	TOTAL
Chugach Alaska Corporation (CAC)	$500,000	$465,995	$965,995
REGIONAL NATIVE ASSOCIATION			
The North Pacific Rim (TNPR)	$400,000	$0	$400,000
Kodiak Area Native Association (KANA)	300,000	0	300,000
TOTALS	$1,200,000	$465,995	$1,665,995

The summary above does not include $107,610 paid under a separate agreement to Chugach Fisheries, Inc. (a subsidiary of CAC) for purchase and delivery of subsistence foods, discussed earlier. It should also be noted that Koniag, Inc., the regional corporation for Kodiak Island, said that they had not been significantly impacted, and therefore did not need financial assistance. They said that Exxon should proceed with any required cleanup, but they would like to be notified when we were working on Koniag's lands. They also requested that we give Koniag shareholders who desired to work an opportunity to do so when we were working on Koniag's lands.

ANALYSIS OF PAYMENT TIMING AND DISTRIBUTION - We attempted to make payments on a timely basis and to meet the needs of the various areas based on the actual impact. An indication that the distributions were timely is the fact that 49% of the total $10,142,811 advanced and reimbursed during 1989 was paid out before the first of July, just over three months after the spill. Other measures of our success in this effort are illustrated by the distribution of the funds between geographical areas and between Native and non-Native entities. The totals are summarized below in these two categories. Detailed monthly payments and graphs of this information are also available (Reference 44).

Native vs. non-Native		
Payments to Cities and Boroughs =	$6,888,235 -	67.9%
Payments to Native Villages and Organizations =	3,254,576 -	32.1%
	$10,142,811 -	100.0%

Geographic Distribution			
Prince William Sound Area	- Most Impact =	$4,834,724 -	47.7%
Kenai Peninsula Borough	- Less Impact =	2,746,521 -	27.1%
Kodiak Island/Alaska Penin	- Less Impact =	2,561,566 -	25.2%
		$10,142,811 -	100.0%

RESPONSE DURING THE WINTER OF 1989-90

WINTER MONITORING AND DISCRETIONARY CLEANUP - After the summer cleanup was concluded during the fall of 1989, some communities were concerned about the possibility of continuing impact on beaches important to their city or village. In response to those concerns, we established a winter monitoring and discretionary cleanup program with the 16 cities and villages in the impacted area. The purpose of this program was to let each community monitor the shoreline areas most important to them during the winter and to perform purely discretionary cleanup of those areas, if they desired to do so. Each community was encouraged to select nearby shoreline areas that would be safely accessible during good weather.

Agreements were entered into with each of the 16 cities and villages, and advances were made to cover the cost of the monitoring effort and to provide funds for discretionary cleanup (Reference 45). The program was initiated on October 1, 1989 and continued through the winter to March 31, 1990. The communities were asked to inspect each beach segment once every two weeks, but only if weather conditions were acceptable.

The advance payments to cities and villages for this program were $320,000 for monitoring plus $600,000 for discretionary cleanup. Reimbursements for workmen's compensation and insurance exceeded $80,000 bringing the total expense for the program to over $1 million **(See Reference 45)**. The individual amounts advanced and reimbursed to each city and village during 1989 are included in the tabular summary. The substantial cost of providing and delivering the appropriate storage facilities, cleanup supplies, protective gear, emergency supplies and survival gear to each of the cities and villages is not included in any of these cost figures. In selecting the equipment to be supplied, we gave a high priority to safety, due to the potential of someone getting inadvertently stranded in a somewhat remote locations. Fortunately, this did not occur to our knowledge.

The comments, photographs; and samples submitted by the cities and villages under this program were tabulated and compiled during the winter of 1989-90, and reviewed at the completion of the program. The overall percentage of survey reports indicating oil on the surveyed beaches dropped from a peak of 30% of the 76 reports received in November, 1989, to 12% of the 112 reports received in January, 1990. A detailed analysis of the 109 oil samples submitted by the communities also revealed that approximately 10% of the samples tested negative (ie. they were not from the EVOS). In particular, it was noted that all 4 samples submitted from the Alaska Peninsula, all from Perryville, tested negative. Summaries of each report received, a summary by beaches, a summary for each community, and the sample analysis data are shown in **Reference 35B**. The summary by community and a copy of the last daily report on this program is shown in **Reference 31A**.

It is also notable that even though we supplied the funds and equipment to perform cleanup work in each community, none of the involved communities apparently found it necessary to perform significant cleanup activities during that period. At the request of their attorneys, each of the Kodiak Island contracts included the requirement for the community to perform either 200 (Akhiok and Karluk) or 600 (Kodiak, Larsen Bay, Old Harbor, Ouzinkie, and Port Lions) hours of cleanup. This was not an Exxon requirement and the rationale for this was never explained. Presumably, this performance requirement was met, however Exxon made no attempt to control or monitor this activity **(Reference 36B)**. **(Reference 46 reserved)**.

STATE OF ALASKA PAYMENTS IN 1989 & 1990 - During 1989 and 1990, various administrative departments in the State of Alaska were also responding to requests by the impacted cities, villages, and Native groups. In turn, the State submitted invoices to Exxon for recovery of the amounts granted or reimbursed. The payments made by the State that exceeded $1,000 and were identifiable in our controllers records as going to various impacted cities, villages, and Native associations totaled $2,159,543.25 **(Reference 47)**.

Although Exxon directly reimbursed some of these invoices to the State, many were still in the analysis phase or were being held for future consideration or additional information at the time of the settlement. Some had been officially turned down. Nevertheless, as a result of the settlement, it can now be assumed that Exxon ultimately paid for all of these costs.

The descriptions include a wide variety of items, including law enforcement, oil spill office grants, day-care, local response, subsistence food purchase, subsistence food collection, human services, outreach support, emotional/social support, hospital grants, substance abuse, mental health, employee bonuses, fire prevention, hiring a psychologist, etc.

Some of the items would have been reimbursed directly by Exxon if we had been asked. Others would undoubtedly have been (or were) questioned with requests for additional documentation. Others were or would have been turned down because they dealt with undefined and inconclusive mental health issues. We felt that these issues should be handled by the historical and conventional funding sources that were in a better position and were presumably more qualified to evaluate the need. The largest item in the list, a $200,000 "emergency expenditure reimbursement" by ADEC to Cordova, was apparently a loan to the Prince William Sound Aquaculture Corporation (PWSAC). Although this was apparently only reimbursed by Exxon through the settlement, we gave substantial support to this group, including an electronic transfer of $1 million on April 4, 1989. We eventually advanced and reimbursed a total of $8,172,044 to PWSAC.

SUMMARY OF 1990 ADVANCES AND REIMBURSEMENTS **(Reference 48)** - The programs and agreements for reimbursements continued as long as necessary; however, the amount of money involved, the type of expenses incurred and the need for advances changed significantly during 1990. Since the nature of the cleanup and the number of people involved were considerably reduced, we were able to devote considerably more attention to trying to independently determine how we could help. We were particularly concerned about some of the smaller native villages. One example of the type of assistance we offered and provided is the program we called the "Oil Spill Delayed Tribal Obligations Assistance" (OSDTOA) program. This program was described in more detail under the Response to Native Issues section of this report, but the amounts advanced or reimbursed to each village are shown below.

We also had the objective in 1990 of attempting to settle the remaining reimbursement issues to the satisfaction of each recipient. With minor exceptions, we believe this was accomplished. In total, we advanced and reimbursed $552,984 to the cities, villages, regional corporations and regional associations during 1990. These expenses were largely offset by the refund of $409,043 by the Kenai Peninsula Borough in August of 1990. This represented the unspent portion, plus interest, of the $2,000,000 advance made in 1989. A summary table is shown below:

LOCATION	DESCRIPTION OF EXPENSE:	TOTAL COST
Akhiok Village	Advance for OSDTOA	$4,700
Chenega Village Corp.	Advance for License Fee	50,000
Chenega Village Corp.	Reimbursement	13,346
Chignik	Reimbursement for Insurance	9,333
City of Cordova	Reimbursements	14,037
Eyak Tribal Council (located in Cordova)	Advance for OSDTOA	5,700
English Bay Village	Advances for OSDTOA	6,480
English Bay Village	Support for Providers Conference	500
Karluk	Reimbursement for Insurance	8,967
Old Harbor Village	Advance & payments for OSDTOA	5,930
Ouzinkie Village	Reimbursement	2,350
Perryville	Reimbursement	3,948
Port Graham Village	Payments for OSDTOA	12,500
Port Lions	Advance & payments for OSDTOA	9,510
City of Seward	Reimbursements	131,576
Mt. Marathon Natives (located in Seward)	Advance for OSDTOA	4,795
Tatitlek Village	Reimbursements	48,762
City of Valdez	Reimbursements	85,202
City of Whittier	Reimbursements	18,028
ORGANIZATION		
CAC	Reimbursements	$289,616
KANA	Reimbursements	93,425
Koniag, Inc	Scholarship Program	2,000
TNPR	Reimbursements	73,329
	TOTAL EXPENDITURE	$552,984
REFUNDS		
Kenai Borough	Refund part of advance	($409,043)
City of Kodiak	Refund part of advance	(4,964)
	NET EXPENDITURE	$139,004

SUMMARY OF 1991 ADVANCES AND REIMBURSEMENTS (Reference 49) - By 1991, the need for advances or reimbursements had almost entirely disappeared. Nevertheless, we had a few remaining reimbursement issues. Excluding the Chenega Corporation Work/Services contract, which is discussed elsewhere, we settled the pertinent issues for a total of $260,972, or 76.4% of the total requested amount. The more important issues are described below and in the subsection on hospitals:

KODIAK AREA NATIVE ASSOCIATION (KANA) - KANA operates a clinic where any Alaskan Native, including those who live in the six outlying villages, can go for free health care. KANA claimed that the budget for this clinic was adversely impacted by the wages paid to Alaskan Natives. The problem occurred because Natives qualify for free health care whether they are employed or not, but the qualification for some of the third party reimbursements to the health care facility, such as medicaid for low income individuals, depends on the Natives income level. Since many of the Natives worked on the spill and had substantial incomes, the clinic was not able to obtain the reimbursement they had budgeted for, even though they still incurred some of the applicable costs. On April 22, 1991, Exxon paid KANA an additional agreed to amount of $22,638 for the claimed medical losses. We also reimbursed KANA an additional $22,628 for 1990 oil spill response expenses, for a total of $45,266.

CITY OF VALDEZ - A few issues that were not resolved with the City of Valdez in 1989 or 1990 became timely in 1991 for various reasons. The resolution of each of these issues to the satisfaction to the city are summarized below:

Nautilus Marine Lost Revenue - The city normally leases a warehouse to Nautilus Marine for their fish processing operation. The rental payment had varied from a low of $25,000 in 1982 to a high of $39,500 in 1988. In 1989, it was only $1195.62. The city claimed to have lost at least $40,000 in warehouse lease revenues. We reimbursed the $40,000 claimed loss on January 18, 1991.

Valdez Airport Terminal Carpeting - In August of 1989, Exxon agreed to reimburse up to $34,375 to replace the airport terminal carpeting because of the soiling and damage created by the traffic through the terminal during the cleanup. The city awarded a contract to replace the carpeting by mid-February, 1991. Exxon paid the $34,375 on January 18, 1991.

Animal Control Incinerator - On August 16, 1989 Exxon committed to pay 50% of the cost, up to $12,772.50, of a new animal control incinerator, based on the city's analysis of extra usage during the cleanup. Instead of replacing the unit, the city decided to repair the existing incinerator at a cost of $11,317.85. They asked us to pay the full cost of that repair, an alternative that had not been considered in our prior agreement. We sent them a check for the total repair cost of $11,317.85 on April 9, 1991.

CHENEGA BAY I.R.A. COUNCIL - During the first few months after the spill,

630sa

SUMMARY OF COMMUNITY INFORMATION

PORT LIONS

Exxon Company, U.S.A.
NRDA and Litigation Support Group
Houston, Texas

27301273420-5

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TAB 13
COMMUNITY PAYMENT SUMMARIES

This section contains information on community reimbursements contained in "Exxon's Response to Community and Native Needs." This section may contain part or all of the following:

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- Government-Native Reimbursement Summary-1990.
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- Payments to Boroughs, Cities, Villages, Native Regional Corporation and Native Regional Associations Vs. Time - Year 1989.
- Shoreline Monitoring Agreements.

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GOVERNMENT-NATIVE REIMBURSEMENT SUMMARY-1989

(Latest Update 1/19/92)

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Port Graham	Winter Agreement	8/01		10/04	[illegible]	[illegible]	90000	90000	-90000	Exxon Agreement–NoDoc	[illegible]	[illegible]	0
Port Graham	Omnibus Proposal	8/09	797000	8/22	0		0	0	797000	Disapproved by Ltr–8/22	NA	0	0
Port Graham	Corporation	VAR.	-2000	10/17	-2000	<1/90	0	-2000	0	Summarized small invoices	Yes	0	-2000
Port Graham	General	VAR.	8250	10/17	8250	<1/90	0	8250	0	Summarized small invoices	Yes	0	8250
Port Graham	Village Council	VAR.	10600	10/17	10600	<1/90	0	10600	0	Summarized small invoices	Yes	0	10600
Port Graham	Winter-[illegible]	11/30	[illegible]	11/20	[illegible]	11/20	0	[illegible]	0	Exxon Initiated Program	[illegible]	[illegible]	0
PORT GRAHAM	SUB TOTAL		[illegible]		71562		90000	71542	747000			[illegible]	17660
Port Lions		4/17	37500	4/28	37500	4/28	0	37500	0		Yes	0	37500
Port Lions		4/21	10750	5/03	10750	5/03	0	10750	0		Yes	0	10750
Port Lions	Reimbursement	7/01	18861	8/30	18861	[illegible]	0	18861	0		Yes	18861	0
Port Lions	Winter Agreement	8/01		8/30	70000	10/08	70000	70000	-70000	Exxon Agreement–NoDoc	Yes	70000	0
Port Lions	Winter-[illegible]	11/07	8867	11/10	8867	12/04	0	8867	0	Exxon Initiated Program	Yes	8867	0
PORT LIONS	SUB TOTAL		[illegible]		151100		70000	151100	-70000			[illegible]	[illegible]
Seldovia	Winter Agreement	8/01		8/14	70000	8/27	70000	70000	-70000	Exxon Agreement–NoDoc	Yes	70000	0
Seldovia	Equipment	8/01	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	NA	Equipment Office	NA	[illegible]	0
Seldovia	Spill Coord.+	8/04	112294	8/14	[illegible]	8/14	0	[illegible]	[illegible]	Letter dated 8/14/89	Yes	[illegible]	0
Seldovia	[illegible] Counsel.	8/04	24021	8/14	0		0	0	24021	Disapproved by Letter	NA	0	0
Seldovia	Spill Coord.Ofc.	[illegible]	78846	10/27	0		0	0	78846	Letter dated 10/27	NA	0	0
Seldovia	Education Prog.	[illegible]	[illegible]	[illegible]	0		0	0	[illegible]	Letter faxed to city	NA	0	0
Seldovia	Dock Tariff loss	12/18	[illegible]	[illegible]	0		0	0	[illegible]	Letter dated [illegible]	NA	0	0
SELDOVIA	SUB TOTAL		[illegible]		[illegible]		[illegible]	123441	[illegible]			123441	0

GOVERNMENT-NATIVE REIMBURSEMENT SUMMARY-1990

(Latest Update 1/9/92)

Page 2 of 8

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Ouzinkie	Patrol Car	2/20	3946	2/20	2300	2/20	0	2300	1646	Ltr 2/20—paid $50/day		2300	0
Perryville	Winter-Ice/Refund	1/11	2986	1/21	2986	1/22	0	2986	0		Yes	2986	0
Perryville	Winter-Ice/Refund	2/07	862	2/13	862	~2/15	0	862	0		Yes	862	0
PERRYVILLE	SUB TOTAL		3848		3848		0	3848	0			3848	0
Port Graham	OSDTO	4/01	21000	7/20	12000		0	0	9100	MOA signed 7/20/90			
Port Graham	OSDTO	8/13	9035	8/10	7801	8/10	0	7801	1234	Dns for MOA of 7/20/90	Yes	7801	0
Port Graham	OSDTO	8/04	5114	8/06	4819	8/11	0	4819	186	8/11 Ltr.—Ends MOA	Yes	4819	0
PORT GRAHAM	SUB TOTAL		35149		25000		0	12620	10420			12620	0
Port Lions	OSDTOA	7/16	0	7/16	9819	7/16	5000	8000	-9819	MOA—7/16/89—Dns—Ltr7/16	Yes	8000	0
Port Lions	OSDTOA	8/30	4819	8/30	4819	8/30	0	4819	0	7/16 MOA Dns. provided	Yes	4819	0
PORT LIONS	SUB TOTAL		4819		14638		5000	12819	-9819			12819	0
Seldovia	Workers Comp	8/01	6000	8/10	6000		0	0	0	8/21 Ltr—Offset—Comp/Equip	NA	NA	NA
Seldovia	Remarks	8/10—Above was for log boom project.									NA	NA	NA
Seldovia	Final Reimb.	9/07	Resolved all outstanding issues, including equipment.								NA	NA	NA
SELDOVIA	SUB TOTAL		6000		6000		0	0	0			0	0

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Updated 11/26/91

PAYMENTS TO BOROUGHS, CITIES, VILLAGES, NATIVE REGIONAL CORPORATIONS
AND NATIVE REGIONAL ASSOCIATIONS VS. TIME - YEAR 1989

LOCATION	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
CITIES AND BOROUGHS											
Cordova	0	0	100350	90769	69015	63400	0	16760	0	0	340294
Homer	0	0	0	10294	19148	70925	197700	32403	0	0	330470
Kenai Peninsula Borough	0	2000000	0	0	0	0	0	0	0	0	2000000
Kodiak (City)	0	0	0	0	0	0	26028	0	0	0	26028
Kodiak Island Borough	0	0	596603	38447	198822	0	437798	70000	0	0	1341690
Seldovia	0	0	0	0	0	0	123441	0	0	0	123441
Seward	0	0	0	0	25000	0	26895	103079	15785	0	170759
Valdez	0	0	240035	734441	0	164071	467714	251835	190579	143731	2214446
Whittier	0	0	12036	81831	70631	10283	71598	62038	22060	9930	341147
CITIES/BOROUGHS MO. TOTALS	0	2000000	949024	957802	362816	308679	1391174	536915	228344	153661	6888233
CITIES/BOROUGHS ACCUM.	0	2000000	2949024	3906826	4269442	4578121	5969295	6506210	6734576	6888235	

NATIVE ORGAN./LOCATIONS	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Akhiok	0	0	0	0	0	5157	0	40000	8967	0	54124
Chenega	0	0	115000	0	0	0	0	114077	8982	311560	549619
Chignik	0	0	0	0	687	1494	40000	0	0	0	42181
Chugach Alaska Corporation	0	0	0	507600	0	363639	0	0	71434	23323	965996
lish Bay	0	0	0	0	0	0	50000	0	0	0	50000
luk	0	0	0	0	0	0	0	40000	0	0	40000
Kodiak Area Native Assoc.	0	0	0	0	0	200000	0	0	0	100000	300000
Larsen Bay	0	0	0	0	40861	21344	11262	70000	12538	16173	192160
Old Harbor	0	0	0	0	0	0	0	70000	8967	0	78967
Ouzinkie	0	0	0	0	203776	0	0	70000	-4533	6005	275248
Perryville	0	0	0	0	0	0	0	40000	0	0	40000
Port Graham	0	0	0	0	0	0	0	50000	3992	17859	71851
Port Lions	0	37500	18750	0	0	15951	0	70000	0	8967	151168
Tatitlek	0	0	976	381	381	381	381	40381	381	0	63262
The North Pacific Rim	0	0	400000	0	0	0	0	0	0	0	400000
NATIVE MONTHLY TOTALS	0	37500	534726	507981	268485	608188	101625	608258	110468	483147	3254376
NATIVE ACCUMULATED TOTALS	0	37500	572226	1080207	1345892	1954080	2055705	2660961	2771429	3254576	
GRAND ACCUMULATED TOTALS	0	2037500	3521250	4987033	5615334	6532201	8025000	9167171	9506005	10142811	10142811

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SHORELINE MONITORING AGREEMENTS

(Latest Update 11/21/91)

LOCATION	AREA	DATE SIGNED	CONTRACT AMOUNT	ACTION TAKEN			INITIAL PAYMENT		WORKMANS COMPENSATION			TOTAL PAYMENT
				DATE OK'D	APPROVAL DATE	APPROVAL BY	DATE PAID	AMOUNT PAID	DATE REC'D	DATE PAID	AMOUNT PAID	
Akhiok	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	11/08	11/08	$8,967.09	$48,967.09
Chenega	PWS	10/10	$60,000	10/10	10/19	O.R.Harrison	0/19	$60,000	11/07	11/14	$3,922.00	$63,922.00
Chignik	Aleutian Chain	9/10	$40,000	9/10	9/11	H.W.Beathard	9/11	$40,000		3/90	$9,333.00	$49,333.00
English Bay	Kenai Peninsula	9/13	$50,000	9/13	9/27	C.B.Loggie	9/27	$50,000				$50,000.00
Homer	Kenai Peninsula	9/12	$70,000	9/12	9/12	O.R.Harrison	9/13	$70,000				$70,000.00
Karluk	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	1/90	4/90	$8,967.09	$48,967.09
Kodiak Bor.	Kodiak Island	9/17	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000				$70,000.00
Larsen Bay	Kodiak Island	9/23	$70,000	10/04	10/04	O.R.Harrison	0/05	$70,000	12/05	12/14	$8,967.09	$78,967.09
Old Harbor	Kodiak Island	9/18	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000	10/25	11/08	$8,967.09	$78,967.09
Ouzinkie	Kodiak Island	9/18	$70,000	10/04	10/04	O.R.Harrison	0/04	$70,000	10/30	11/03	$8,967.09	$78,967.09
Perryville	Aleutian Chain	9/27	$40,000	10/06	10/06	C.B.Loggie	0/05	$40,000	1/90	1/90	$3,848.00	$43,848.00
Port Graham	Kenai Peninsula	10/04	$50,000	10/06	10/06	C.B.Loggie	0/06	$50,000	11/06	11/28	$3,992.45	$53,992.45
Port Lions	Kodiak Island	9/30	$70,000	10/04	10/04	D. Carpenter	0/05	$70,000	11/07	12/05	$8,967.09	$78,967.09
Seldovia	Kenai Peninsula	9/14	$70,000	9/14	9/27	C.B.Loggie	9/27	$70,000	5/90	5/90	$9,350.00	$79,350.00
Seward	Kenai Peninsula	9/28	$70,000	9/28	9/28	C.B.Loggie	0/01	$70,000				$70,000.00
Tatitlek	PWS	9/28	$40,000	9/28	9/29	C.B.Loggie	0/01	$40,000				$40,000.00
TOTALS			$920,000					$920,000			$84,347.99	$1,004,347.99
AK. Aquaterra	PWS	9/22	$10,000	9/27	9/27	C.B.Loggie	0/01	$10,000			$0.00	$10,000.00

- 636sa

SEWARD

SUMMARY OF COMMUNITY INFORMATION

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OIL SPILL LITIGATION WORK PRODUCT
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GOVERNMENT-NATIVE REIMBURSEMENT SUMMARY-1990
(Latest update 1/9/92)

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LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCE	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Seward	Advance	7/04	25000	7/06	25000	7/06	25000	25000	0	7/10/90-Confirmed by Gifford	Yes	25000	0
Seward	Reimbursement	6/17	26686	8/02	26686	8/11	0	26686	0		Yes	26686	0
Seward	Outboard Motors	6/29	13000	10/06	13000	10/09	0	13000	0		Yes	13000	0
Seward	Police Dept	6/30	134400	8/13	0		0	0	134400	Returned for more info.	NA	0	0
Seward	Winter Agreement	8/01		8/28	70000	10/01	70000	70000	-70000	Exxon Agreement-HaDoe	Yes	70000	0
Seward	Reimbursement	8/25	8307	10/09	8307	10/16	0	8307	0		Yes	8307	0
Seward	Street Repair	10/02	12300	10/09	12300		0	NA	0	App for Reimb-see 8/90	NA	0	0
Seward		10/17	11772	10/17	11772	10/17	0	11772	0	Summarized small invoices	Yes	0	11772
Seward	Reimbursement	10/23	16448	11/02	15784	11/07	0	15784	664		Yes	15784	0
SEWARD	SUB TOTAL		246122		182850		95000	170786	65064			158779	11772
Tatitlek	Reimbursement	5/01	876	5/13	876	5/13	0	876	0		Yes	876	0
Tatitlek	Reimbursement	6/01	381	6/10	381	6/10	0	381	0		Yes	381	0
Tatitlek	Reimbursement	7/01	381	7/11	381	7/11	0	381	0		Yes	0	381
Tatitlek	Reimbursement	8/01	381	8/07	381	8/07	0	381	0		Yes	0	381
Tatitlek	Reimbursement	9/01	381	9/06	381	9/06	0	381	0		Yes	0	381
Tatitlek	Winter Agreement	8/01		9/28	40000	10/01	40000	40000	-40000	Exxon Agreement-HaDoe	Nyet	40000	0
Tatitlek	Reimbursement	10/02	381	10/10	381	10/10	0	381	0		Yes	0	381
Tatitlek	Reimbursement	11/01	381	11/08	381	11/08	0	381	0		Yes	0	381
TATITLEK	SUB TOTAL		3162		43543		40000	43543	-40000			41257	1905
THPR	No.Pac Rim	4/23	888041	4/29	400000	5/18	400000	400000	488041	Agreement-Doe	Yes	400000	
THPR	No.Pac Rim	7/14	2881264	7/26	0		0		2881264	Letter dated 7/26/90	NA	0	0
THPR	No.Pac Rim	8/27	862750	12/01	0		0		862750	Dean met w/THPR ~ 12/5	NA	0	0
THPR	SUB TOTAL		4632055		400000		400000	400000	4232055			400000	0

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GOVERNMENT-NATIVE REIMBURSEMENT SUMMARY-1990
(Latest update 4/9/92)

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LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Seward	Winter-[illegible]	1/10	To be billed at completion of program.							Ltr.dtd-1/19/90			
Seward	Reimb-Aug-Nov	3/08	37153	3/17	34653	3/17	0	34653	2500	Ltr dtd 3/17/90	Yes	34653	0
Seward	Reimb-Legis	4/26	25000	4/25	Wiley agreed to reimburse some past legislative costs.								
Seward	Patrol Car	5/15	18000	8/19	12000	8/21	12000	12000	6000	Ltr dtd 8/21/90-NoDen		12000	0
Seward	Waste Oil	8/16	18000	8/23	18000	8/27	0	18000	NA	Cost exceeded est.	Yes	18000	0
Seward	Reimb-O.J.F.,+	6/18	29542	9/07	29542	9/11	-26000	40065	0	Ltr dtd 9/10-Reimb-Adv	Nyd	29542	0
Seward	Reimb-M.A.M.,+	6/08	10523	9/07	10523	9/11	Included above		0	Ltr dtd 9/10-Reimb-Adv	Nyd	10523	0
Seward	Reimb-to 8/30	8/00	19514	9/10	12638	9/11	0	17622	1876	Ltr dtd 9/11-Reimb	Yes	17422	0
Seward	Wages from audit	8/23	4987	9/10	4717	9/11	Included above		210	Ltr dtd 9/11-Reimb	Yes	Included above	
Seward	Comm-Dep.Sch	8/30	933	9/10	933	9/11	Included above		0	Ltr dtd 9/11-Reimb	Yes	Included above	
Seward	Reimb-Sep/90	9/24	1650	12/12	1650	12/26	0	1650	0	Memo to Chas Mord-12/12	Yes	1650	0
Seward	Board Rep-10/89	6/22	7876	6/28	7876	6/28	0	7876	0	6/28Ltr-Settled 12.3K MOA	Yes	7876	0
SEWARD CITY	SUB TOTAL		190038		129442		-12000	131576	10366			131576	0
Mt.Marathon	OSDTOA-Mt.Marath	7/06	0	7/18	4796	7/06	4796	4796	-4796	MOA-7/18/90-Doe.			
Tatitlek	Reimb-1990 Tot	1/10	48762	4/23	48762	4/23	0	48762	0	Ltr dtd 4/25 from Dean	Yes	48762	
Tatitlek	OSDTOA	7/30	9760	7/30-Draft MOA sent to Sandra Selanoff									
TATITLEK	SUB TOTAL		58522		48762		0	48762	0			48762	0
THPR	Winter90-XOHPS	12/14	84523	2/24	48480	3/24	48420	48420	36103	Documentation Required		48420	0
THPR	Apr-Sep90-XOHP3	3/23	88825	8/06	88872	8/07	24909	24909	64508	Ltr Dtd 8/8/90-Doe			
THPR	Apr-Sep90-XOHP3			8/08-Ltr sent w/MOA for their consideration.									
THPR	Dec/Room XOHPS	7/11	48426	7/30-To Dean for analysis.									
TPHR	SUB TOTAL		231771		116682		73329	73329	70960			48420	0

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GOVERNMENT-NATIVE REIMBURSEMENT SUMMARY-1991

(Latest update 1/9/92)

Page 1 of 2

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Chenega Corp	Serv.ContractTotal	~1991	NA	~1991	969017	1991	NA	969017	NA	Invoices 1-19(No # 15)	Yes	0	969017
Chenega Corp	TecnLeaseFee	1/91	50000	~4/91	18500	4/17	18500	18500	31500		Yes	0	18500
Chenega Corp	LicFee-LandUse				10500	9/27		10500	NA		Yes	0	10500
Chenega Corp	LicFee-LandUse				18500	9/30		18500	NA		Yes	0	18500
CHENEGA COR	SUB TOTAL		50000		1016717		18500	1016717	31500			0	1015717
Chenega IRA	Landfill	6/10	20000	8/21	20000	10/29	0	20000	0	Ltr 8/21-req. signature		20000	0
CordovaCity	CDFU Reimburse.	5/9	41387	8/21	41387	9/5	0	41387	0	Ltr-Final Payment	Yes	41387	0
HomerCity	Harbor Fees				4392	7/12	0	4392	NA	HarborFeeLtrg-Settled	Yes	0	4392
KANA	Medical Exp	1990	37856	2/7	22639	4/22	0	22639	15020	4/11Ltr-Agreed to settle	Yes	22639	0
KANA	Response Costs	1990	70000	2/7	22628	4/22	0	22628	47372	for total of $45266.40.	Yes	22628	0
KANA	SUB TOTAL		107856		45267		0	45267	62392			45267	0
Kenai Bor.	TutkaHatchery	4/26	3000	4/29	3000	~8/1	0	3000	0	Boom deployed on 4/7-8/90		3000	0
Perryville	Work Comp Audit	4/22	3963	4/22	3963	4/22	0	3963	0	4/23-Ltr to Homestake	Yes	3963	0
PortGrahamCorp	AccessFees	NA	NA	4/29	2000	4/29	2000	2000	NA	RockyBay,WB,ChugachIs.	Yes	0	2000
SewardAmb	VolunteerAmbCorp	1/90	1530	1/12	1530	1/18	0	1530	0	1989 Summer Ambul.Serv.	Yes	1530	0
SewardHosp	Uncollectables	6/90	73317	2/12	54888	3/18	0	54888	18058	3/26 ltr-Release rec'd	Yes	54888	0
SEWARD OTH	SUB TOTAL		74847		56418		0	56418	18058			56418	0

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Updated 11/26/91

PAYMENTS TO BOROUGHS, CITIES, VILLAGES, NATIVE REGIONAL CORPORATIONS AND NATIVE REGIONAL ASSOCIATIONS VS. TIME - YEAR 1989

LOCATION	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
CITIES AND BOROUGHS											
Cordova	0	0	100330	90749	49015	63400	0	16760	0	0	320254
Homer	0	0	0	10294	19148	70925	197700	32403	0	0	330470
Kenai Peninsula Borough	0	2000000	0	0	0	0	0	0	0	0	2000000
Kodiak (City)	0	0	0	0	0	0	26028	0	0	0	26028
Kodiak Island Borough	0	0	596603	38467	198822	0	457798	70000	0	0	1361690
Seldovia	0	0	0	0	0	0	123441	0	0	0	123441
Seward	0	0	0	0	25000	0	26895	103079	15785	0	170759
Valdez	0	0	240035	736461	0	164071	487714	251855	190579	143731	2214446
Whittier	0	0	12056	81831	70631	10283	71598	62838	22000	9930	341167
CITIES/BOROUGHS MO. TOTALS	0	2000000	949024	957802	362616	308679	1391174	536915	228364	153661	6888235
CITIES/BOROUGHS ACCUM.	0	2000000	2949024	3906826	4269442	4578121	5969295	6506210	6734574	6888235	
NATIVE ORGAN./LOCATIONS	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Akhiok	0	0	0	0	0	5157	0	40000	8967	0	54124
Chenega	0	0	115000	0	0	0	0	114877	8922	310820	549619
Chignik	0	0	0	0	487	1694	40000	0	0	0	42181
Chugach Alaska Corporation	0	0	0	507600	0	363639	0	0	71434	23323	965996
ilish Bay	0	0	0	0	0	0	50000	0	0	0	50000
iuk	0	0	0	0	0	0	0	40000	0	0	40000
Kodiak Area Native Assoc.	0	0	0	0	0	200000	0	0	0	100000	300000
Larsen Bay	0	0	0	0	40841	21566	11262	70000	12538	16173	192160
Old Harbor	0	0	0	0	0	0	0	70000	8967	0	78967
Ouzinkie	0	0	0	0	203776	0	0	70000	-4533	6005	275248
Perryville	0	0	0	0	0	0	0	40000	0	0	40000
Port Graham	0	0	0	0	0	0	0	50000	3992	17659	71651
Port Lions	0	37500	18750	0	0	13951	0	70000	0	8967	131168
Tatitlek	0	0	976	381	381	381	381	40381	381	0	43262
The North Pacific Rim	0	0	400000	0	0	0	0	0	0	0	400000
NATIVE MONTHLY TOTALS	0	37500	534726	507981	263685	610188	101623	605258	110468	483147	3254576
NATIVE ACCUMULATED TOTALS	0	37500	572226	1080207	1343892	1954080	2055703	2660961	2771429	3254576	
GRAND ACCUMULATED TOTALS	0	2037500	3521250	4987033	5613334	6532201	8024998	9167171	9506003	10142811	10142811

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SHORELINE MONITORING AGREEMENTS

(Latest Update 11/21/91)

LOCATION	AREA	DATE SIGNED	CONTRACT AMOUNT	ACTION TAKEN			INITIAL PAYMENT		WORKMANS COMPENSATION			TOTAL PAYMENT
				DATE OK'D	APPROVAL DATE	APPROVAL BY	DATE PAID	AMOUNT PAID	DATE REC'D	DATE PAID	AMOUNT PAID	
Akhiok	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	11/08	11/08	$8,967.09	$48,967.09
Chenega	PWS	10/10	$60,000	10/10	10/18	O.R.Harrison	0/18	$60,000	11/07	11/14	$3,922.00	$63,922.00
Chignik	Aleutian Chain	9/10	$40,000	9/10	9/11	H.W.Beathard	9/11	$40,000		3/90	$9,333.00	$49,333.00
English Bay	Kenai Peninsula	9/13	$50,000	9/13	9/27	C.B.Loggie	9/27	$50,000				$50,000.00
Homer	Kenai Peninsula	9/12	$70,000	9/12	9/12	O.R.Harrison	9/13	$70,000				$70,000.00
Karluk	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	1/90	4/90	$8,967.09	$48,967.09
Kodiak Bor.	Kodiak Island	9/17	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000				$70,000.00
Larsen Bay	Kodiak Island	9/23	$70,000	10/04	10/04	O.R.Harrison	0/05	$70,000	12/05	12/14	$8,967.09	$78,967.09
Old Harbor	Kodiak Island	9/18	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000	10/25	11/08	$8,967.09	$78,967.09
Ouzinkie	Kodiak Island	9/18	$70,000	10/04	10/04	O.R.Harrison	0/04	$70,000	10/30	11/03	$8,967.09	$78,967.09
Perryville	Aleutian Chain	9/27	$40,000	10/05	10/06	C.B.Loggie	0/05	$40,000	1/90	1/90	$3,948.00	$43,948.00
Port Graham	Kenai Peninsula	10/04	$50,000	10/05	10/05	C.B.Loggie	0/05	$50,000	11/08	11/28	$3,992.45	$53,992.45
Port Lions	Kodiak Island	9/30	$70,000	10/04	10/04	D. Carpenter	0/05	$70,000	11/07	12/06	$8,967.09	$78,967.09
Seldovia	Kenai Peninsula	9/14	$70,000	9/14	9/27	C.B.Loggie	9/27	$70,000	5/90	5/90	$9,350.00	$79,350.00
Seward	Kenai Peninsula	9/28	$70,000	9/28	9/28	C.B.Loggie	0/01	$70,000				$70,000.00
Tatitlek	PWS	9/26	$40,000	9/28	9/29	C.B.Loggie	0/01	$40,000				$40,000.00
TOTALS			$920,000					$920,000			$84,347.99	$1,004,347.99
AK. Aquafarms	PWS	9/22	$10,000	9/27	9/27	C.B.Loggie	0/01	$10,000			$0.00	$10,000.00

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SUMMARY OF COMMUNITY INFORMATION

CORDOVA/EYAK

Exxon Company, U.S.A.
NRDA and Litigation Support Group
Houston, Texas

SER 1604

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TAB 13
COMMUNITY PAYMENT SUMMARIES

This section contains information on community reimbursements contained in "Exxon's Response to Community and Native Needs." This section may contain part or all of the following:

- Government-Native Reimbursement Summary-1989.
- Government-Native Reimbursement Summary-1990.
- Government-Native Reimbursement Summary-1991.
- Payments to Boroughs, Cities, Villages, Native Regional Corporation and Native Regional Associations Vs. Time - Year 1989.
- Shoreline Monitoring Agreements.

GOVERNMENT-NATIVE REIMBURSEMENT SUMMARY-1989

(Latest update 1/9/92)

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	APPROVED(&PAID) BY: OTHER
ChuAkCorp	Advance Agree.	6/30	500000	6/30	500000	6/30	500000	500000	0	Documentation received	Yes	500000	0
ChuAkCorp	May, June	8/30	143420	8/08	143420	8/08	0	143420	0		Yes	143420	0
ChuAkCorp	July + Aug est.	7/31	220210	8/13	220210	8/13	0	220210	0		Yes	220210	0
ChuAkFish		6/27	7800	6/27	7800	6/27	0	7800	0		Yes	0	7800
ChuAkCorp	Aug + Sept est.	8/31	71434	11/10	71434	11/10	0	71434	0		Yes	71434	0
ChuAkCorp	Sep + Oct est.	9/30	23323	12/12	23323	12/13	0	23323	0		Yes	23323	0
CHUGACH AK	SUB TOTAL		966185		966185		500000	966185	0			958385	7800
CordovaCity		4/22	350	6/16	350	6/19	0	350	0		Yes	0	350
CordovaCity	Reimbursement	6/01	100000	6/01	0	5/03	100000	100000	NA	Not listed by acct.	No.	0	100000
CordovaCity	Odiak Child Ctr	6/06	60000	6/06	18000	6/08	0	18000	42000		Yes	18000	0
CordovaCity	Advance	6/16	283200	6/21	0		0	0	283200	Disapproved	NA	0	0
CordovaCity	Reimbursement	6/16	60257	6/20	36076	6/27	0	36076	24182		Yes	36076	0
CordovaCity		6/23	3530	7/11	3530	7/11	0	3530	0		Yes	0	3530
CordovaCity	Tanis	6/28	30674	6/29	30674	6/27	0	30674	0		Yes	30674	0
CordovaCity	Reimbursement	7/18	76301	7/22	43363	7/28	0	43363	32938		Yes	43363	0
CordovaCity	Response Com.	7/30	2000	7/22	2000	7/22	0	2000	0		Yes	2000	0
CordovaCity	MOA Fuel Shed	8/02	23400	8/02	23400	8/02	23400	23400	0	No documentation requested	Yes	23400	0
CordovaCity	MOA Temp Office	8/02	40000	8/02	40000	8/03	40000	40000	0	No documentation requested	Yes	40000	0
CordovaCity	Reimbursement	9/30	30412	10/05	19032	10/05	0	19032	11380	Ltr of 10/4 sent w/check	Yes	19032	0
CordovaCity	Reimbursement	10/05	1706	10/05	1706	10/26	0	1706	0		Yes	0	1706
CORDOVA	SUB TOTAL		799824		225000		163400	326256	393772			214881	105584
ENGLISH BAY	Winter Agreement	8/01	0	8/18	80000	8/27	80000	80000	-80000	Exxon Agreement-[illegible]	[illegible]	80000	0

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Page 1 of 6

GOVERNMENT–NATIVE REIMBURSEMEI. 'UMMARY–1990
(Latest update 1/9/92)

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(AP'AID) BY: COM LIAISON	OTHER
Akhiok	OSDTOA	7/10	4700	7/10	4700	8/08	4700	4700	0	MOA dated 7/10/90	Yes	4700	0
Chenega Corp	Reimbursement	12/89	13340	1/11	13340	1/11	0	13340	0		Yes	0	13340
Chenega Corp	Invoice–Insur.	3/01	15000	4/20–Dean will check w/Dillon on status									
Chenega Corp	License Fee	4/01	50000	4/25	50000	~6/01	50000	50000	0	McDee–Formal agreement	Yes	0	50000
Chenega Corp	Invoice–Insur.	4/19	5770	5/01–Tom Dillon working with Sam Ferber									
CHENEGA COR	SUB TOTAL		84470		63340		50000	63340	0			0	63340
Chignik	Insurance Refund	3/14	9333	3/23	9333	4/04	0	9333	0	Ltr 4/4 w/Replacement Chk	Yes	9333	0
ChuAkCorp	Oct,Nov Reimb.	12/15	107226	3/20	71750	3/22	0	71750	35476			71750	0
ChuAkCorp	Resubmit O,N		35479	4/23	26817	4/24	0	26817	8662	Ltr dtd 4/23 from Dean	Yes	26817	0
ChuAkCorp	DecReimb–J,F adv	3/10	90810	8/07	Not paid–Included in 8/7/90 invoice.					Invoice 19000		NA	NA
ChuAkCorp	J,F,M + Apr adv	8/07	113000	8/21	69700	8/31	0	69700	43602	8/21Ltr–Requested info.			
ChuAkCorp	J,F,M + Apr adv	8/07	55165	9/30	41830	10/1	0	41830	13280	10/1Ltr–Part of final pay.	Yes	41830	0
	(47157.83+47077.74–[illegible]–65185.37)												
ChuAkCorp	A,M,J,J,A+	8/31	94004	9/20	90700	10/1	0	90700	3303	10/1Ltr–Part of final pay.	Yes	90700	0
	(Request of $146236.01–$61169.00 projected April– $84,063.01)												
	(Payment includes advance for Sept and all future of $16160.00)												
CHUGACH AK	SUB TOTAL		481270		299810		0	299810	190746			219800	0
CordovaCity	Reimburse–To 3/90	2/06	210000	4/20	14637	4/23	0	14637	293012			14637	0
CordovaCity	Sales Tax–1989	12/1	1400000		4/20–Vean offered $172,000, we approved max of $250,021.								
CORDOVA CITY	SUB TOTAL		1610000		14637		0	14637	298012			14637	0
Eyak	Eyak Tribal	8/31	16774	7/16	5700	7/20	5700	5700	11074	7/21–Reimbursement–McDee			
English Bay	OSDTOA–Nanwalek	6/20	8400	6/20	2000	6/20	2000	2000	NA	7/5–MOA–Dee Supplied 6/01	Yes	2000	0
English Bay	OSDTOA–Nanwalek	8/01	3400	8/02	3400	8/06	3400	3400	NA	Doc required			
English Bay	Providers Coal	5/00	800	8/08	800	8/90	800	800	0	For checks–Judy to handle	Yes	800	0
ENGLISH BAY	SUB TOTAL		12600		6200		6200	6200	0			2800	0

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GOVERNMENT-NATIVE REIMBURSEMENT SUMMARY-1991

(Latest update 1/9/92)

Page 1 of 2

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Chenega Corp	Serv.ContractTotal	1991	NA	1991	[illegible]	1991	NA	[illegible]	NA	Invoices 1-18(No # 18)	Yes	0	[illegible]
Chenega Corp	TermLeaseFee	1/91	50000	~4/91	18500	4/17	18500	18500	31500		Yes	0	18500
Chenega Corp	LicFee-LandUse				16000	6/27		16000	NA		Yes	0	16000
Chenega Corp	LicFee-LandUse				16000	8/28		16000	NA		Yes	0	16000
CHENEGA COR	SUB TOTAL		50000		1918717		18500	1918717	31500			0	1918717
Chenega IRA	Landfill	9/16	20000	9/21	20000	10/20	0	20000	0	Ltr 9/21-req. signature		20000	0
CordovaOth	CDFU Reimburse.	8/8	41367	8/21	41367	8/5	0	41367	0	Ltr-Final Payment	Yes	41367	0
HomerCity	Harbor Fees				4382	7/18	0	4382	NA	HarborFee\Litg-Settled	Yes	0	4382
KANA	Medical Exp	1990	37000	8/7	22936	4/22	0	22936	10026	4/11Ltr-Agreed to settle	Yes	22936	0
KANA	Response Costs	1990	70000	8/7	22928	4/22	0	22928	47372	for total of $45266.46.	Yes	22928	0
KANA	SUB TOTAL		107000		45867		0	45267	63362			45267	0
Kenai Bor.	Tuttle/Hansbury	4/20	2000	4/20	2000	~8/1	0	2000	0	Boom deployed on 4/7-8/60		2000	0
Perryville	Work Camp Audit	4/22	2062	4/22	2062	4/22	0	2062	0	4/22-Ltr to Homestake	Yes	2062	0
PortGrahamCorp	AccessFees	NA	NA	4/20	2000	4/20	2000	2000	NA	RockyBay,WB,Chugachis.	Yes	0	2000
SewardAssoc	VolunteerAmbCorp	1/04	1520	1/12	1520	1/16	0	1520	0	1989 Summer Ambul.Serv.	Yes	1520	0
SewardHosp	Unsettledclaims	8/30	75000	8/18	84900	3/19	0	84900	10066	3/26 ltr-Release rec'd	Yes	84900	0
SEWARD OTH	SUB TOTAL		74847		86420		0	86420	10066			86420	0

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Updated 11/26/91

PAYMENTS TO BOROUGHS, CITIES, VILLAGES, NATIVE REGIONAL CORPORATIONS
AND NATIVE REGIONAL ASSOCIATIONS VS. TIME - YEAR 1989

LOCATION	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
CITIES AND BOROUGHS											
Cordova	0	0	100350	90769	49015	63400	0	16760	0	0	320294
Homer	0	0	0	10294	19148	70925	197700	32403	0	0	330470
Kenai Peninsula Borough	0	2000000	0	0	0	0	0	0	0	0	2000000
Kodiak (City)	0	0	0	0	0	0	26028	0	0	0	26028
Kodiak Island Borough	0	0	596603	33447	198822	0	437798	70000	0	0	1341680
Seldovia	0	0	0	0	0	0	123441	0	0	0	123441
Seward	0	0	0	0	25000	0	26895	103079	15785	0	170759
Valdez	0	0	240033	734461	0	164071	487716	251853	190579	143731	2214444
Whittier	0	0	12036	81831	70631	10383	71598	62838	22000	9930	341147
CITIES/BOROUGHS MO. TOTALS	0	2000000	949024	957802	342616	308679	1391176	536915	228364	153661	6888235
CITIES/BOROUGHS ACCUM.	0	2000000	2949024	3906826	4249442	4578121	5969295	6506210	6734574	6888235	
NATIVE ORGAN./LOCATIONS	**MAR**	**APR**	**MAY**	**JUN**	**JUL**	**AUG**	**SEP**	**OCT**	**NOV**	**DEC**	**TOTAL**
Akhiok	0	0	0	0	0	3197	0	40000	8967	0	54126
Chenega	0	0	115000	0	0	0	0	114677	8942	310000	548619
Chignik	0	0	0	0	687	1494	40000	0	0	0	42181
Chugach Alaska Corporation	0	0	0	507600	0	363639	0	0	71434	23325	965998
lish Bay	0	0	0	0	0	0	30000	0	0	0	30000
luk	0	0	0	0	0	0	0	40000	0	0	40000
Kodiak Area Native Assoc.	0	0	0	0	0	200000	0	0	0	100000	300000
Larsen Bay	0	0	0	0	60861	21566	11342	70000	12538	16173	192480
Old Harbor	0	0	0	0	0	0	0	70000	8967	0	78967
Ouzinkie	0	0	0	0	203776	0	0	70000	-4533	6000	275243
Perryville	0	0	0	0	0	0	0	40000	0	0	40000
Port Graham	0	0	0	0	0	0	0	50000	3992	17889	71881
Port Lions	0	37500	18750	0	0	15951	0	70000	0	8967	151168
Tatitlek	0	0	976	381	381	381	381	40381	381	0	43262
The North Pacific Rim	0	0	400000	0	0	0	0	0	0	0	400000
NATIVE MONTHLY TOTALS	0	37500	534726	507981	265485	608278	101623	605258	110468	483147	3254576
NATIVE ACCUMULATED TOTALS	0	37500	572226	1080207	1345802	1954080	2055703	2660961	2771429	3254576	
GRAND ACCUMULATED TOTALS	0	2037500	3521250	4987033	5615334	6532201	8024998	9167171	9506003	10142811	10142811

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SUMMARY OF COMMUNITY INFORMATION

LARSEN BAY

Exxon Company, U.S.A.
NRDA and Litigation Support Group
Houston, Texas

SER 1610

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OIL SPILL LITIGATION WORK PRODUCT
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TAB 13
COMMUNITY PAYMENT SUMMARIES

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GOVERNMENT–NATIVE REIMBURSEMENT SUMMARY–1989

(Latest Update 4/9/92)

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Larsen City	Reimbursement	6/21	7642	7/30	7642	7/30	0	7642	0	9 checks–Larsen Bay	Yes	0	7642
Larsen City	Reimbursement	7/31	3888	7/30	3888	7/30	0	3888	0	Included above w/8 chks.	Yes	0	3888
Larsen City	Winter Agreement	8/01		8/23	70000	10/04	70000	70000	−70000	Exxon Agreement–NoDoc	Yes	70000	0
Larsen City	June & July	8/08	11242	8/11	11242	8/17	0	11242	0		Yes	11242	0
Larsen City	Aug,Sep–City	10/12	7208	12/07	7208	12/15	0	7208	0	Reasonable & Non Recurring	Nyd	7208	0
Larsen City	Winter–Ins/Refund	12/05	8967	12/11	8967	12/14	0	8967	0	Exxon Initiated Program	Nyd	8967	0
Larsen Trib	Reimbursement	7/01	48863	7/11	48302	7/11		48302	0		Yes	48302	0
Larsen Trib	Jul,Aug,Sep.	7/25	45885	7/25	0			0	8130	Returned–resubmitted 8/08	NA	0	0
Larsen Trib	Reimbursement	8/03	27632	8/04	21500	8/09		21500	6288		Yes	21500	0
Larsen Trib	Jul,Aug,Sep.	8/08	27636	10/31	12336	11/01		12336	25487	Letter dated 10/30/89	Nyd	12336	0
Larsen Trib	Medical–I,A,B	11/27	26407	Duplicate requests–need to resolve differences–to Dean/John 1/90									0
[illegible] [illegible] –$48,361.70 + 51,836.66 + 27,836.32 = ($100,703.00)–See ltr. dated 11/27/89.													0
LARSEN BAY	SUB TOTAL		225255		192150		70000	183190	−30107			180620	11530
Old Harbor	Winter Agreement	8/01		8/18	70000	10/02	70000	70000	−70000	Exxon Agreement–NoDoc	Yes	70000	0
Old Harbor	Winter–Ins/Refund	10/25	8967	11/06	8967	11/06	0	8967	0	Exxon Initiated Program	Yes	8967	0
OLD HARBOR	SUB TOTAL		8967		78967		70000	78967	−70000			78967	0
Ouzinkie	Reimbursement	4/28	203778	7/29	203778	7/29	0	203778	0		Yes	203778	0
Ouzinkie	Winter Agreement	8/01		8/16	70000	10/04	70000	70000	−70000	Exxon Agreement–NoDoc	Yes	70000	0
Ouzinkie	Reimbursement	10/10	10001	10/11	9003	~12/90	0	9003	3992	Ltr. dated 12/77/89	Nyd		0
Ouzinkie	Refund	10/24	−13500	11/01	−13500	11/10	0	−13500	0	Letter accepting offer	Yes	−13500	0
Ouzinkie	Winter–Ins/Refund	10/30	8967	11/02	8967	11/07	0	8967	0	Exxon Initiated Program	Yes	8967	0
OUZINKIE	SUB TOTAL		209246		278248		70000	278248	−66008			269245	0
PERRYVILLE	Winter Agreement	8/01	0	8/27	40000	10/06	40000	40000	−40000	Exxon Agreement–NoDoc	Nyd	40000	0
PERRYVILLE	SUB TOTAL		0		40000		40000	40000	−40000			40000	0

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Updated 11/26/91

PAYMENTS TO BOROUGHS, CITIES, VILLAGES, NATIVE REGIONAL CORPORATIONS AND NATIVE REGIONAL ASSOCIATIONS VS. TIME - YEAR 1989

LOCATION	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
CITIES AND BOROUGHS											
Cordova	0	0	100350	90749	49015	63400	0	16740	0	0	320254
Homer	0	0	0	10294	19148	70925	197700	32403	0	0	330470
Kenai Peninsula Borough	0	2000000	0	0	0	0	0	0	0	0	2000000
Kodiak (City)	0	0	0	0	0	0	36028	0	0	0	36028
Kodiak Island Borough	0	0	596603	38467	198822	0	457798	70000	0	0	1361690
Seldovia	0	0	0	0	0	0	123441	0	0	0	123441
Seward	0	0	0	0	25000	0	26895	103079	15785	0	170759
Valdez	0	0	240035	736461	0	164071	487714	251835	190579	143731	2214444
Whittier	0	0	12036	81831	70631	10283	71598	62838	22000	9950	361147
CITIES/BOROUGHS MO. TOTALS	0	2000000	949024	957802	362616	308679	1391174	536915	228364	153461	6888035
CITIES/BOROUGHS ACCUM.	0	2000000	2949024	3906826	4269442	4578121	5969295	6506210	6734574	6888035	
NATIVE ORGAN./LOCATIONS	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Akhiok	0	0	0	0	0	5157	0	40000	8967	0	54124
Chenega	0	0	115000	0	0	0	0	114877	8896	310824	549597
Chignik	0	0	0	0	687	1494	40000	0	0	0	42181
Chugach Alaska Corporation	0	0	0	507600	0	363659	0	0	71434	23325	966018
ilah Bay	0	0	0	0	0	0	50000	0	0	0	50000
luk	0	0	0	0	0	0	0	40000	0	0	40000
Kodiak Area Native Assoc.	0	0	0	0	0	200000	0	0	0	100000	300000
Larsen Bay	0	0	0	0	60841	21546	11242	70000	12358	16173	192160
Old Harbor	0	0	0	0	0	0	0	70000	8967	0	78967
Ouzinkie	0	0	0	0	203776	0	0	70000	-4533	6005	275248
Perryville	0	0	0	0	0	0	0	40000	0	0	40000
Port Graham	0	0	0	0	0	0	0	50000	3998	17853	71851
Port Lions	0	37500	18750	0	0	15951	0	70000	0	8967	151168
Tatitlek	0	0	976	381	381	381	381	40381	381	0	43262
The North Pacific Rim	0	0	400000	0	0	0	0	0	0	0	400000
NATIVE MONTHLY TOTALS	0	37500	534726	507981	265685	608188	101623	605258	110468	483147	3254576
NATIVE ACCUMULATED TOTALS	0	37500	572226	1080207	1345892	1954080	2055703	2660961	2771429	3254576	
GRAND ACCUMULATED TOTALS	0	2037500	3521250	4987033	5615334	6532201	8024998	9167171	9506003	10142611	10142611

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SHOREALINE MONITORING AGREEMENTS

(Latest Update 11/21/91)

				ACTION TAKEN			INITIAL PAYMENT		WORKMANS COMPENSATION			
LOCATION	AREA	DATE SIGNED	CONTRACT AMOUNT	DATE OK'D	APPROVAL DATE	APPROVAL BY	DATE PAID	AMOUNT PAID	DATE REC'D	DATE PAID	AMOUNT PAID	TOTAL PAYMENT
Akhiok	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	11/06	11/06	$8,967.09	$48,967.09
Chenega	PWS	10/10	$60,000	10/10	10/18	O.R.Harrison	0/18	$60,000	11/07	11/14	$3,922.00	$63,922.00
Chignik	Aleutian Chain	9/10	$40,000	9/10	9/11	H.W.Beathard	9/11	$40,000		3/90	$9,333.00	$49,333.00
English Bay	Kenai Peninsula	9/13	$50,000	9/13	9/27	C.B.Loggie	9/27	$50,000				$50,000.00
Homer	Kenai Peninsula	9/12	$70,000	9/12	9/12	O.R.Harrison	9/13	$70,000				$70,000.00
Karluk	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	1/90	4/90	$8,967.09	$48,967.09
Kodiak Bor.	Kodiak Island	9/17	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000				$70,000.00
Larsen Bay	Kodiak Island	9/23	$70,000	10/04	10/04	O.R.Harrison	0/05	$70,000	12/05	12/14	$8,967.09	$78,967.09
Old Harbor	Kodiak Island	9/18	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000	10/25	11/06	$8,967.09	$78,967.09
Ouzinkie	Kodiak Island	9/18	$70,000	10/04	10/04	O.R.Harrison	0/04	$70,000	10/30	11/03	$8,967.09	$78,967.09
Perryville	Aleutian Chain	9/27	$40,000	10/05	10/05	C.B.Loggie	0/05	$40,000	1/90	1/90	$3,948.00	$43,948.00
Port Graham	Kenai Peninsula	10/04	$50,000	10/05	10/05	C.B.Loggie	0/05	$50,000	11/08	11/29	$3,992.45	$53,992.45
Port Lions	Kodiak Island	9/30	$70,000	10/04	10/04	D. Carpenter	0/05	$70,000	11/07	12/05	$8,967.09	$78,967.09
Seldovia	Kenai Peninsula	9/14	$70,000	9/14	9/27	C.B.Loggie	9/27	$70,000	5/90	5/90	$9,350.00	$79,350.00
Seward	Kenai Peninsula	9/26	$70,000	9/28	9/28	C.B.Loggie	0/01	$70,000				$70,000.00
Tatitlek	PWS	9/26	$40,000	9/28	9/29	C.B.Loggie	0/01	$40,000				$40,000.00
TOTALS			$920,000					$920,000			$84,347.99	$1,004,347.99
AK. Aquafarms	PWS	9/22	$10,000	9/27	9/27	C.B.Loggie	0/01	$10,000			$0.00	$10,000.00

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SUMMARY OF COMMUNITY INFORMATION

OLD HARBOR

Exxon Company, U.S.A.
NRDA and Litigation Support Group
Houston, Texas

SER 1615

27301273558-2

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TAB 13
COMMUNITY PAYMENT SUMMARIES

This section contains information on community reimbursements contained in "Exxon's Response to Community and Native Needs." This section may contain part or all of the following:

- Government-Native Reimbursement Summary-1989.
- Government-Native Reimbursement Summary-1990.
- Government-Native Reimbursement Summary-1991.
- Payments to Boroughs, Cities, Villages, Native Regional Corporation and Native Regional Associations Vs. Time - Year 1989.
- Shoreline Monitoring Agreements.

GOVERNMENT-NATIVE REIMBURSEMENT SUMMARY-1989

: Latest update 4/9/92)

LOCATION	DESCRIPTION	DATE RECD	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Larsen City	Reimbursement	6/01	7642	7/20	7642	7/20	0	7642	0	8 checks-Larsen Bay	Yes	0	7642
Larsen City	Reimbursement	7/01	3987	7/20	3987	7/20	0	3987	0	Included above w/8 chks.	Yes	0	3987
Larsen City	Winter Agreement	6/01		9/23	70000	10/04	70000	70000	-70000	Exxon Agreement-NoDoc	Yes	70000	0
Larsen City	June & July	8/08	11242	8/11	11242	8/17	0	11242	0		Yes	11242	0
Larsen City	Aug,Sep-City	10/13	7208	12/07	7208	12/18	0	7208	0	Reasonable & Non Recurring	Nyet	7208	0
Larsen City	Winter-Ins/Refund	12/06	8867	12/11	8867	12/14	0	8867	0	Exxon Initiated Program	Nyet	8867	0
Larsen Trib	Reimbursement	7/01	40302	7/11	40302	7/11		40302	0		Yes	40302	0
Larsen Trib	Jul,Aug,Sep.	7/26	[illegible]	7/25	0			0	8130	Returned-resubmitted 8/08	NA	0	0
Larsen Trib	Reimbursement	8/03	27032	8/04	21000	8/06		21000	6200		Yes	21000	0
Larsen Trib	Jul,Aug,Sep.	8/30	27030	10/31	12330	11/01		12330	25407	Letter dated 10/30/88	Nyet	12330	0
Larsen Trib	Modified-J,A,S	11/07	26487	Duplicate requests-need to resolve differences-to DeanLitche 1/80									0
(Reconciliation: Requested =$40,301.70 + $1,888.80 + $7,898.20 = $[illegible]–See ltr. dated 11/27/88.													0
LARSEN BAY	SUB TOTAL		223366		182180		70000	182180	-30107			160920	11630
Old Harbor	Winter Agreement	6/01		9/18	70000	10/02	70000	70000	-70000	Exxon Agreement-NoDoc	Yes	70000	0
Old Harbor	Winter-Ins/Refund	10/28	8867	11/06	8867	11/06	0	8867	0	Exxon Initiated Program	Yes	8867	0
OLD HARBOR	SUB TOTAL		8867		78867		70000	78867	-70000			78867	0
Ouzinkie	Reimbursement	[illegible]	263776	7/28	263776	7/28	0	263776	0		Yes	263776	0
Ouzinkie	Winter Agreement	6/01		9/18	70000	10/04	70000	70000	-70000	Exxon Agreement-NoDoc	Yes	70000	0
Ouzinkie	Reimbursement	10/18	10891	10/11	8008	[illegible]	0	8008	2888	Ltr. dated 10/??/88	Nyet		
Ouzinkie	Refund	10/24	-13000	11/01	-13000	11/10	0	-13000	0	Letter accepting offer	Yes	-13000	0
Ouzinkie	Winter-Ins/Refund	10/28	8867	11/08	8867	11/07	0	8867	0	Exxon Initiated Program	Yes	8867	0
OUZINKIE	SUB TOTAL		299544		278240		70000	278240	-68008			299343	0
PERRYVILLE	Winter Agreement	6/01	0	9/27	40000	10/06	40000	40000	-40000	Exxon Agreement-NoDoc	Nyet	40000	0
PERRYVILLE	SUB TOTAL		0		40000		40000	40000	-40000			40000	0

GOVERNMENT–NATIVE REIMBURSEMENT SUMMARY–1990

(Relist updated 4/9/92)

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
KANA	Reimb–O,N,D,J	2/14	183807	5/09	73700	5/18	0	73700	110106	3/8/90 Ltr.	Yes	73700	0
KANA	6 mo.extension	4/30	91000	5/30	73420 —				18580	5/30/90–Draft MOA sent			
KANA	Resubmit rejects	6/14	23797	6/08	19719	8/09	0	19719	4078	8/09Ltr–Agreement closed	Yes	19719	0
KANA	Medical Services	8/21	34011	8/24–To Judy-waiting on further documentation from KANA									
KANA	SUB TOTAL		343494		166848		0	93425	142628			93425	0
KARLUK	Winter–InstRefund	1/17	6967	3/12	6967	~4/01		6967	0		Hyd	6967	0
Kenai Bor.	Advance Agree.	8/03	–400043	8/06	–400043	8/06	0	–400043	0				
Kodiak City	Reimb–S,O,N,D.	2/14	30400	3/20	19074	NA	NA	0	11202	2/20Ltr–$8804.19 adv.remains	NA	19074	0
Kodiak City	6 mo advance	2/14	21000	3/20	0		0	0	21000	Ltr. dated 3/20/90	NA	0	0
Kodiak City	Resubmit–S,O,N,D.	8/10	800	8/10	2617	NA	NA	0	–1810	8/10Ltr–$4036.63 adv.remains			
Kodiak City	Refund from City	8/13	–4837	8/13	0	8/13	NA	–4837	–4837	Refund from city.			
KODIAK CITY	SUB TOTAL		47031		21691		0	–4837	28040			19074	0
Kodiak Bor.	Reimb #12–InsRef	3/08	41001	7/18–WMT preparing response to #12 & #14.									
Kodiak Bor.	Reimb #13–O,J,F.	3/19	17410	4/02–Returned to Penney					17410	Ltr.dtd.~4/2/90			
Kodiak Bor.	Reimb #14–InsRef	3/21	30077	7/18–WMT preparing response to #12 & #14.									
Kodiak Bor.	Reimb #15–Legals	3/22	39130	4/02–Returned to Penney					39130	Ltr.dtd.~4/2/90			
Kodiak Bor.	Reimb #16–Payroll	3/30	2420	4/13–Returned w/memo to Penney									
Kodiak Bor.	Reimb #17–Misc	8/10	18900	8/14–To Commis for analysis									
Kodiak Bor.	Reimb #18–Payroll	8/10	8012	8/14–To Commis for analysis									
KODIAK BOR.	SUB TOTAL		148870		0		0	0	48000			0	0
Old Harbor	OSDTOA	6/22	0	7/10	9630	8/22	1830	1800	–8800	MOA–7/16/89–Dec.	Yes	8810	0
Old Harbor	OSDTOA	6/09	4420	3/30	4430	6/06		4430	0	MOA–7/16/89–Dec.	Yes	NA	0
OLD HARBOR	SUB TOTAL		4420		14060		1800	6600	–8890			8820	0

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PAYMENTS TO BOROUGHS, CITIES, VILLAGES, NATIVE REGIONAL CORPORATIONS AND NATIVE REGIONAL ASSOCIATIONS VS. TIME - YEAR 1989

LOCATION	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
CITIES AND BOROUGHS											
Cordova	0	0	100350	90749	49015	43408	0	16740	0	0	300254
Akhiok	0	0	0	10294	19148	70925	197700	33403	0	0	330470
Kenai Peninsula Borough	0	2000000	0	0	0	0	0	0	0	0	2000000
Kodiak (City)	0	0	0	0	0	0	36028	0	0	0	36028
Kodiak Island Borough	0	0	596403	38467	198032	0	457796	70000	0	0	1361696
Seldovia	0	0	0	0	0	0	123441	0	0	0	123441
Seward	0	0	0	0	25000	0	26895	105079	13785	0	170759
Valdez	0	0	240035	736461	0	164071	487714	251855	190571	143731	2214444
Whittier	0	0	12036	81831	70631	10283	71598	62838	22000	9930	341147
CITIES/BOROUGHS MO. TOTALS	0	2000000	949024	957802	362616	308679	1391174	536913	238364	153661	6898235
CITIES/BOROUGHS ACCUM.	0	2000000	2949024	3906826	4269442	4578121	5969295	6506210	6744574	6898235	

NATIVE ORGAN./LOCATIONS	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Akhiok	0	0	0	0	0	5157	0	40000	8967	0	54124
Chenega	0	0	115000	0	0	0	0	114877	8882	310000	548619
Chignik	0	0	0	0	487	1494	40000	0	0	0	41981
Chugach Alaska Corporation	0	0	0	507680	0	363439	0	0	71434	25525	968078
Nick Bay	0	0	0	0	0	0	30000	0	0	0	30000
[illegible]luk	0	0	0	0	0	0	0	40000	0	0	40000
Kodiak Area Native Assoc.	0	0	0	0	0	200000	0	0	0	100000	300000
Larsen Bay	0	0	0	0	60861	21344	11962	70000	12338	14173	192160
Old Harbor	0	0	0	0	0	0	0	70000	8967	0	79967
Ouzinkie	0	0	0	0	203778	0	0	70000	-4533	6005	275246
Perryville	0	0	0	0	0	0	0	40000	0	0	40000
Port Graham	0	0	0	0	0	0	0	50000	3992	17029	71021
Port Lions	0	37500	18750	0	0	19981	0	70000	0	8967	131148
Tatitlek	0	0	976	381	381	381	381	40381	381	0	43262
The North Pacific Rim	0	0	400000	0	0	0	0	0	0	0	400000
NATIVE MONTHLY TOTALS	0	37500	534726	507681	265685	408180	101425	[illegible]	110468	483147	3254576
NATIVE ACCUMULATED TOTALS	0	37500	572226	1080307	1345992	1754080	1855705	2440961	2771429	3254576	
GRAND ACCUMULATED TOTALS	0	2037500	3521250	4987033	5615334	6332201	7824598	[illegible]	9506003	10142811	10142811

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(Latest Update 11/21/91)

SHORELINE MONITORING AGREEMENTS

				ACTION TAKEN			INITIAL PAYMENT		WORKMANS COMPENSATION			
LOCATION	AREA	DATE SIGNED	CONTRACT AMOUNT	DATE OK'D	APPROVAL DATE	APPROVAL BY	DATE PAID	AMOUNT PAID	DATE REC'D	DATE PAID	AMOUNT PAID	TOTAL PAYMENT
Akhiok	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	11/08	11/08	$8,967.00	$48,967.00
Chenega	PWS	10/10	$80,000	10/10	10/19	O.R.Harrison	0/18	$80,000	11/07	11/14	$3,822.00	$83,822.00
Chignik	Aleutian Chain	9/10	$40,000	9/10	9/11	H.W.Bosthard.	9/11	$40,000		3/90	$8,333.00	$48,333.00
English Bay	Kenai Peninsula	9/13	$50,000	9/13	9/27	C.B.Loggie	9/27	$50,000				$50,000.00
Homer	Kenai Peninsula	9/12	$70,000	9/12	9/12	O.R.Harrison	9/13	$70,000				$70,000.00
Karluk	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	1/90	4/90	$8,967.00	$48,967.00
Kodiak Bor.	Kodiak Island	9/17	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000				$70,000.00
Larsen Bay	Kodiak Island	9/23	$70,000	10/04	10/04	O.R.Harrison	0/05	$70,000	12/05	12/14	$8,967.00	$78,967.00
Old Harbor	Kodiak Island	9/18	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000	10/26	11/08	$8,967.00	$78,967.00
Ouzinkie	Kodiak Island	9/18	$70,000	10/04	10/04	O.R.Harrison	0/04	$70,000	10/30	11/03	$8,967.00	$78,967.00
Perryville	Aleutian Chain	9/27	$40,000	10/05	10/05	C.B.Loggie	0/05	$40,000	1/90	1/90	$3,848.00	$43,848.00
Port Graham	Kenai Peninsula	10/04	$50,000	10/05	10/06	C.B.Loggie	0/06	$50,000	11/09	11/28	$3,862.45	$53,862.45
Port Lions	Kodiak Island	9/30	$70,000	10/04	10/04	D. Carpenter	0/05	$70,000	11/07	12/05	$8,967.00	$78,967.00
Seldovia	Kenai Peninsula	9/14	$70,000	9/14	9/27	C.B.Loggie	9/27	$70,000	5/90	5/90	$8,350.00	$78,350.00
Seward	Kenai Peninsula	9/26	$70,000	9/28	9/28	C.B.Loggie	0/01	$70,000				$70,000.00
Tatitlek	PWS	9/28	$40,000	9/28	9/29	C.B.Loggie	0/01	$40,000				$40,000.00
TOTALS			$820,000					$820,000			$84,347.98	$1,004,347.98
AK. Aquaterra	PWS	9/22	$10,000	9/27	9/27	C.B.Loggie	0/01	$10,000			$0.00	$10,000.00

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SUMMARY OF COMMUNITY INFORMATION

KODIAK ISLAND BOROUGH

Exxon Company, U.S.A.
NRDA and Litigation Support Group
Houston, Texas

SER 1621

27301273563-0

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TAB 13
COMMUNITY PAYMENT SUMMARIES

This section contains information on community reimbursements contained in "Exxon's Response to Community and Native Needs." This section may contain part or all of the following:

- Government-Native Reimbursement Summary-1989.
- Government-Native Reimbursement Summary-1990.
- Government-Native Reimbursement Summary-1991.
- Payments to Boroughs, Cities, Villages, Native Regional Corporation and Native Regional Associations Vs. Time - Year 1989.
- Shoreline Monitoring Agreements.

GOVERNMENT–NATIVE REIMBURSEMENT SUMMARY–1989

[illegible]

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Kodiak Bor.	First Invoice	4/28	360904	11/04	322441	11/20	0	NA	38467	Credit against advance	NA	Yes	0
Kodiak Bor.	Advance	4/28	0	8/08	300000	8/08	300000	300000	-300000	Advanced against invoice	Yes	300000	0
Kodiak Bor.	Adv & Reimburse	8/11	11223	8/18	111223	8/19	100000	111223	-100000	Two entries by accounting	Yes	111223	0
Kodiak Bor.	Reimbursement	5/17	188368	6/26	188368	6/26	0	188368	0		Yes	188368	0
Kodiak Bor.	Reimbursement	5/08	38467	6/14	38467	6/14	0	38467	0		Yes	38467	0
Kodiak Bor.	Reimbursement	6/20	[illegible]	7/08	188822	7/08	0	188822	4426		Yes	188822	0
Kodiak Bor.	Reimbursement	7/16	138828	9/02	57798	9/06	0	57798	70829	Summary Letter 9/2/89	Yes	57798	0
Kodiak Bor.	Advance	7/18	0	9/02	400000	9/05	400000	400000	-400000	Summary Letter 9/2/89	Yes	400000	0
Kodiak Bor.	Reimbursement	8/01	[illegible]	11/04	73368		0	NA	69171	Credit against advance	NA	Yes	0
Kodiak Bor.	Reimbursement	8/04	130878	11/04	26852		0	NA	104028	Credit against advance	NA	Yes	0
Kodiak Bor.	Reimbursement	8/08	30003	11/04	11921		0	NA	18083	Credit against advance	NA	Yes	0
Kodiak Bor.	Winter Agreement	8/01		8/17	70000	10/02	70000	70000	-70000	Exxon Agreement-McDoe	Nyel	70000	0
Kodiak Bor.	Wish List	8/07	6687633	8/12	0		0	0	6687633	Letter to Bobby 8/12	NA	0	0
Kodiak Bor.	Reimbursement	8/22	[illegible]	11/04	28014		0	NA	34898	Credit against advance	NA	Yes	0
Kodiak Bor.	Reimbursement	11/09	[illegible]	1/11	32903		0	NA	83488	Credit–Ltr dated 1/23/90	NA	Yes	0
Kodiak Bor.	Reimb #11	12/18	18837	1/11	To sent for analysis				Nyel				0
KODIAK	SUB TOTAL		8827896		1857752		870000	1361890	6182836			1361890	0
Kodiak City	Advance	8/01	78864	8/04	28028	8/17	28028	28028	52080	Letter dtd 8/11/89	Yes	28028	0
Kodiak City	Advance	11/08	24000	10/18	0		0	0	24000	Ltr. dated 12/11/89	NA	0	0
KODIAK	SUB TOTAL		102864		28028		28028	28028	76080			28028	0

SER 1623

GOVERNMENT–NATIVE REIMBURSEMENT SUMMARY–1980

[illegible] Update 7/1/8[illegible]

Page 2 of 8

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
KANA	Reimb–O,H,D,J	3/14	185887	6/00	73700	8/16	0	73700	110184	3/6/80 Ltr.	Yes	73700	0
KANA	6 mo. extension	4/30	91000	8/20	72480				10000	5/20/80–Draft MOA sent			
KANA	Resubmit rejects	8/14	53797	8/00	18719	8/20	0	18719	4070	8/80 Ltr–Agreement signed	Yes	18719	0
KANA	Modified [illegible]	8/21	84611	8/24–To Judy–waiting on further documentation from KANA									
KANA	SUB TOTAL		343484		186348		0	89420	142822			89420	–
KARLUK	Winter–fuel/Refund	1/17	5887	3/12	5887	~4/01		5887	0		Nyet	5887	0
Kenai Bor.	Advance Agree.	3/00	–400042	3/06	–400042	3/00	0	–400042	0				
Kodiak City	Reimb–S,O,H,D.	2/14	30400	3/20	19074	NA	NA	0	11382	3/20 Ltr–$0864.10 adv. remains	NA	19074	0
Kodiak City	6 mo advance	8/14	21000	3/20	0		0	0	21000	Ltr. dated 3/20/80	NA	0	0
Kodiak City	Resubmit–S,O,H,D.	8/18	862	8/18	2017	NA	NA	0	–1515	8/18 Ltr–$4208.83 adv. remains			
Kodiak City	Refund from City	8/13	–4057	8/18	0	8/18	NA	–4057	–4057	Refund from city.			
KODIAK CITY	SUB TOTAL		47901		21081		0	–4057	28046			19074	0
Kodiak Bor.	Reimb #13–Ins/Fuel	2/00	41891	7/10–WHT preparing response to #13 & #14.									
Kodiak Bor.	Reimb #12–O,J.P.	2/10	17410	4/80–Returned to Peavey					17410	Ltr. dtd. ~4/2/80			
Kodiak Bor.	Reimb #14–Ins/Fuel	3/21	30877	7/10–WHT preparing response to #13 & #14.									
Kodiak Bor.	Reimb #15–Logis-	2/22	20100	4/02–Returned to Peavey					20100	Ltr. dtd. ~4/2/80			
Kodiak Bor.	Reimb #16–Payroll	4/00	2420	4/12–Returned w/[illegible] to Peavey									
Kodiak Bor.	Reimb #17–Misc.	6/18	10065	8/14–To [illegible] for analysis									
Kodiak Bor.	Reimb #18–Payroll	8/19	6913	8/14–To [illegible] for analysis									
KODIAK BOR.	SUB TOTAL		146870		0		0	0	48864			0	0
Old Harbor	OHDTOA	8/22	0	7/10	8020	5/22	1000	1000	–6620	MOA–7/18/80–Doc.	Yes	6620	0
Old Harbor	OHDTOA	8/30	4420	8/00	4420	8/06		4420	0	MOA–7/18/80–Doc.	Yes	NA	0
OLD HARBOR	SUB TOTAL		4420		10240		1000	5000	–6620			5620	0

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Updated 11/26/89

PAYMENTS TO BOROUGHS, CITIES, VILLAGES, NATIVE REGIONAL CORPORATIONS
AND NATIVE REGIONAL ASSOCIATIONS VS. TIME - YEAR 1989

LOCATION	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
CITIES AND BOROUGHS											
Cordova	0	0	100250	90740	46015	43400	0	16740	0	0	325254
Homer	0	0	0	10894	19148	70983	197700	32443	0	0	330470
Kenai Peninsula Borough	0	2500000	0	0	0	0	0	0	0	0	2500000
Kodiak (City)	0	0	0	0	0	0	26028	0	0	0	26028
Kodiak Island Borough	0	0	306403	38647	190822	0	457798	70000	0	0	1361690
Seldovia	0	0	0	0	0	0	123441	0	0	0	123441
Seward	0	0	0	0	25000	0	26000	105879	13780	0	170759
Valdez	0	0	240835	736441	0	164077	487714	251805	190879	143731	2214464
Whittier	0	0	12054	41031	79631	16288	71998	43023	22980	9930	361147
CITIES/BOROUGHS MO. TOTALS	0	2500000	949924	957862	342616	380679	1391176	534013	220344	153661	6888255
CITIES/BOROUGHS ACCUM.	0	2500000	2949924	3906826	4249442	4578121	5969295	6504210	6734574	6888255	

NATIVE ORGAN./LOCATIONS	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Akhiok	0	0	0	0	0	5157	0	40000	8967	0	54124
Chenega	0	0	115000	0	0	0	0	114077	8982	310020	548619
Chignik	0	0	0	0	487	1694	40000	0	0	0	42181
Chugach Alaska Corporation	0	0	0	307600	0	343430	0	0	71434	23323	969996
English Bay	0	0	0	0	0	0	50000	0	0	0	50000
Karluk	0	0	0	0	0	0	0	40000	0	0	40000
Kodiak Area Native Assoc.	0	0	0	0	0	200000	0	0	0	100000	300000
Larsen Bay	0	0	0	0	40841	21546	11342	70000	12338	16173	192160
Old Harbor	0	0	0	0	0	0	0	70000	8967	0	78967
Ouzinkie	0	0	0	0	203776	0	0	70000	-4533	6005	275248
Perryville	0	0	0	0	0	0	0	40000	0	0	40000
Port Graham	0	0	0	0	0	0	0	50000	3972	17859	71831
Port Lions	0	37500	18750	0	0	15951	0	70000	0	8947	151168
Tatitlek	0	0	976	381	381	381	381	40381	381	0	43262
The North Pacific Rim	0	0	400000	0	0	0	0	0	0	0	400000
NATIVE MONTHLY TOTALS	0	37500	534726	307981	245485	469188	101625	405258	110468	485147	3254376
NATIVE ACCUMULATED TOTALS	0	37500	572226	1080207	1325692	1794880	2055703	2460961	2771429	3254576	
GRAND ACCUMULATED TOTALS	0	2537500	3521250	4987033	5615334	6532001	8024998	9167171	9506003	10142811	10142811

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SHORELINE MONITORING AGREEMENTS

(Latest Update 11/21/91)

				ACTION TAKEN			INITIAL PAYMENT		WORKMANS COMPENSATION			
LOCATION	AREA	DATE SIGNED	CONTRACT AMOUNT	DATE OK'D	APPROVAL DATE	APPROVAL BY	DATE PAID	AMOUNT PAID	DATE REC'D	DATE PAID	AMOUNT PAID	TOTAL PAYMENT
Akhiok	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	11/08	11/08	$8,967.00	$48,967.08
Chenega	PWS	10/10	$80,000	10/10	10/19	O.R.Harrison	0/19	$80,000	11/07	11/14	$3,822.00	$83,822.00
Chignik	Aleutian Chain	9/10	$40,000	9/10	9/11	H.W.Southard	9/11	$40,000		3/90	$8,333.00	$48,333.00
English Bay	Kenai Peninsula	9/13	$50,000	9/13	9/27	C.B.Loggie	9/27	$50,000				$50,000.00
Homer	Kenai Peninsula	9/12	$70,000	9/12	9/12	O.R.Harrison	9/13	$70,000				$70,000.00
Karluk	Kodiak Island	9/18	$40,000	10/04	10/04	O.R.Harrison	0/04	$40,000	1/90	4/90	$8,967.08	$48,967.09
Kodiak Bor.	Kodiak Island	9/17	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000				$70,000.00
Larsen Bay	Kodiak Island	9/23	$70,000	10/04	10/04	O.R.Harrison	0/05	$70,000	12/06	12/14	$8,967.09	$78,967.08
Old Harbor	Kodiak Island	9/18	$70,000	10/02	10/02	C.B.Loggie	0/02	$70,000	10/25	11/06	$8,967.08	$78,967.09
Ouzinkie	[illegible] Island	9/18	$70,000	10/04	10/04	O.R.Harrison	0/04	$70,000	10/30	11/03	$8,967.08	$78,967.09
Perryville	Aleutian Chain	9/27	$40,000	10/05	10/05	C.B.Loggie	0/05	$40,000	1/90	1/90	$3,948.00	$43,948.00
Port Graham	Kenai Peninsula	10/04	$50,000	10/05	10/05	C.B.Loggie	0/05	$50,000	11/08	11/28	$3,892.45	$53,892.45
Port Lions	Kodiak Island	9/30	$70,000	10/04	10/04	D. Carpenter	0/05	$70,000	11/07	12/05	$8,967.08	$78,967.09
Seldovia	Kenai Peninsula	9/14	$70,000	9/14	9/27	C.B.Loggie	9/27	$70,000	8/90	8/90	$9,350.00	$79,350.00
Seward	Kenai Peninsula	9/28	$70,000	9/28	9/29	C.B.Loggie	0/01	$70,000				$70,000.00
Tatitlek	PWS	9/28	$40,000	9/28	9/29	C.B.Loggie	0/01	$40,000				$40,000.00
TOTALS			$920,000					$920,000			$84,347.98	$1,004,347.98
AK. Aquafarms	PWS	9/22	$10,000	9/27	9/27	C.B.Loggie	0/01	$10,000			$0.00	$10,000.00

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SUMMARY OF COMMUNITY INFORMATION

OUZINKIE

Exxon Company, U.S.A.
NRDA and Litigation Support Group
Houston, Texas

SER 1627

27301273605-1

OIL SPILL LITIGATION WORK PRODUCT
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TAB 13
COMMUNITY PAYMENT SUMMARIES

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- Government-Native Reimbursement Summary-1990.
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- Payments to Boroughs, Cities, Villages, Native Regional Corporation and Native Regional Associations Vs. Time - Year 1989.
- Shoreline Monitoring Agreements.

GOVERNMENT–NATIVE REIMBURSEMENT SUMMARY–1989

([illegible])

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPR'VD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Larsen City	Reimbursement	6/21	7642	7/30	7642	7/30	0	7642	0	0 checks-Larsen Bay	Yes	0	7642
Larsen City	Reimbursement	7/01	3987	7/30	3987	7/30	0	3987	0	Included above w/3 chks.	Yes	0	3987
Larsen City	Winter Agreement	8/01		8/23	70000	10/04	70000	70000	-70000	Exxon Agreement-NoDoc	Yes	70000	0
Larsen City	June & July	8/08	11542	9/11	11542	9/17	0	11542	0		Yes	11542	0
Larsen City	Aug,Sep-City	10/15	7266	12/07	7266	12/16	0	7266	0	Reasonable & Non Recurring	Hyat	7266	0
Larsen City	Winter-IndRelated	12/08	8667	12/11	8667	12/14	0	8667	0	Exxon Initiated Program	Hyat	8667	0
Larsen Trib	Reimbursement	7/01	48362	7/11	48362	7/11		48362	0		Yes	48362	0
Larsen Trib	Jul,Aug,Sep.	7/05	48668	7/28	0			0	6128	Returned–resubmitted 8/06	NA	0	0
Larsen Trib	Reimbursement	8/06	27532	8/04	21600	8/06		21600	6032		Yes	21600	0
Larsen Trib	Jul,Aug,Sep.	9/06	37535	10/21	12236	11/01		12236	25467	Letter dated 10/30/89	Hyat	12236	0
Larsen Trib	Modified—J,A,S	11/27	25467	Duplicate requests–need to resolve differences–to Dave/John 1/90									0
(Reconciliation: Requested =$48,361.76 + 21,536.80 + 37,435.32 = $104,763.09)–See ltr. dated 11/27/89.													0
LARSEN BAY	SUB TOTAL		224866		162189		70000	162189	-30157			150559	11630
Old Harbor	Winter Agreement	8/01		9/18	70000	10/02	70000	70000	-70000	Exxon Agreement-NoDoc	Yes	70000	0
Old Harbor	Winter-IndRelated	10/18	8667	11/06	8667	11/06	0	8667	0	Exxon Initiated Program	Yes	8667	0
OLD HARBOR	SUB TOTAL		8667		78667		70000	78667	-70000			78667	0
Ouzinkie	Reimbursement	4/30	203770	7/20	203770	7/26	0	203770	0		Yes	203770	0
Ouzinkie	Winter Agreement	8/01		8/18	70000	10/04	70000	70000	-70000	Exxon Agreement-NoDoc	Yes	70000	0
Ouzinkie	Reimbursement	10/10	10001	10/11	6066	~12/00	0	6066	3996	Ltr. dated 10/??/89	Hyat		0
Ouzinkie	Refund	10/24	-13000	11/01	-13000	11/16	0	-13000	0	Letter accepting offer	Yes	-13000	0
Ouzinkie	Winter-IndRelated	10/26	8667	11/03	8667	11/07	0	8667	0	Exxon Initiated Program	Yes	8667	0
OUZINKIE	SUB TOTAL		209441		275240		70000	275240	-66666			269513	0
PERRYVILLE	Winter Agreement	8/01	0	8/27	40000	10/06	40000	40000	-40000	Exxon Agreement-NoDoc	Hyat	40000	0
PERRYVILLE	SUB TOTAL		0		40000		40000	40000	-40000			40000	0

GOVERNMENT–NATIVE REIMBURSEMENT SUMMARY–1990

Page 3 of 6

LOCATION	DESCRIPTION	DATE REC'D	AMOUNT REQUESTED	ACTION DATE	AMOUNT APPRVD	DATE PAID	AMOUNT ADVANCED	AMOUNT PAID	AMOUNT REJECTED	REMARKS	VERIFIED ACCT.	APPROVED(&PAID) BY: COM LIAISON	OTHER
Ouzinkie	Patrol Car	2/20	3995	2/26	2350	2/26	0	2100	1645	Ltr 2/26—paid $50/day		2350	0
Perryville	Winter–IneRefund	1/01	2000	1/21	2000	1/22	0	2000	0		Yes	2000	0
Perryville	Winter–IneRefund	2/07	848	2/13	848	~2/13	0	848	0		Yes	848	0
PERRYVILLE	SUB TOTAL		2848		2848		0	2848	0			2848	0
Port Graham	OEDTO	4/01	21000	7/26	12500		0	0	9100	MOA signed 7/26/90			
Port Graham	OEDTO	8/13	8815	8/15	7581	8/18	0	7581	1234	Doc for MOA of 7/26/90	Yes	7581	0
Port Graham	OEDTO	9/04	5114	9/04	4918	9/11	0	4918	196	9/11 Ltr.—Ends MOA	Yes	4918	0
PORT GRAHAM	SUB TOTAL		34929		25000		0	12500	10620			17500	0
Port Lions	OEDTOA	7/18	0	7/18	9510	7/18	9000	9000	-9510	MOA–7/18/90–Doc–Ltr7/18	Yes	9000	0
Port Lions	OEDTOA	8/26	4610	8/30	4610	8/30	0	4610	0	7/18 MOA Doc. provided	Yes	4610	0
PORT LIONS	SUB TOTAL		4610		14120		9000	9610	-9510			9610	0
Seldovia	Workers Camp	8/01	5000	8/10	5000		0	0	0	8/31 Ltr–Offset–CompEquip	NA	NA	NA
Seldovia	Remarks	8/10–Above was for log boom project.									NA	NA	NA
Seldovia	Final Reimb.	9/07	Finalized all outstanding leases, including equipment.								NA	NA	NA
SELDOVIA	SUB TOTAL		5000		5000		0	0	0			0	0

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Updated 11/26/91

AYMENTS TO BOROUGHS, CITIES, VILLAGES, NATIVE ! NAL CORPORATIONS
AND NATIVE REGIONAL ASSOCIATIONS VS. TIME - YEAR 1989

LOCATION	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
CITIES AND BOROUGHS											
Cordova	0	0	100250	90749	49015	43400	0	16740	0	0	300154
Homer	0	0	1	10294	19148	70925	197700	32403	0	0	330470
Kenai Peninsula Borough	0	2000000	0	0	0	0	0	0	0	0	2000000
Kodiak (City)	0	0	0	0	0	0	26026	0	0	0	26026
Kodiak Island Borough	0	0	594603	38447	198822	0	457796	70000	0	0	1361680
Seldovia	0	0	0	0	0	0	123441	0	0	0	123441
Seward	0	0	0	0	25000	0	26893	103079	15787	0	170759
Valdez	0	0	240033	734461	0	166071	487714	251855	190579	143731	2214444
Whittier	0	0	12534	81831	70631	10283	71598	62628	22009	9930	341167
CITIES/BOROUGHS MO. TOTALS	0	2000000	949024	956802	363616	308679	1391174	536915	228364	153661	6888235
CITIES/BOROUGHS ACCUM.	0	2000000	2949024	3905826	4269442	4578121	5969295	6506210	6734574	6888235	

NATIVE ORGAN./LOCATIONS	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Akhiok	0	0	0	0	0	5157	0	40000	8967	0	54124
Chenega	0	0	115000	0	0	0	0	114877	8922	310820	549619
Chignik	0	0	0	0	687	1494	40000	0	0	0	42181
Chugach Alaska Corporation	0	0	0	507600	0	363639	0	0	71434	23323	965996
lish Bay	0	0	0	0	0	0	30000	0	0	0	30000
ik	0	0	0	0	0	0	0	40000	0	0	40000
Kodiak Area Native Assoc.	0	0	0	0	0	200000	0	0	0	100000	300000
Larsen Bay	0	0	0	0	60941	21346	11342	70000	12338	16173	192140
Old Harbor	0	0	0	0	0	0	0	70000	8967	0	78967
Ouzinkie	0	0	0	0	203776	0	0	70000	-4533	6005	275248
Perryville	0	0	0	0	0	0	0	40000	0	0	40000
Port Graham	0	0	0	0	0	0	0	50000	3992	17859	71851
Port Lions	0	37500	18750	0	0	15931	0	70000	0	8967	151148
Tatitlek	0	0	976	381	381	381	381	40381	381	0	43262
The North Pacific Rim	0	0	400000	0	0	0	0	0	0	0	400000
NATIVE MONTHLY TOTALS	0	37500	534726	507981	265785	608088	101623	605258	110468	483147	3254576
NATIVE ACCUMULATED TOTALS	0	37500	572226	1080207	1345992	1954080	2055703	2660961	2771429	3254576	
GRAND ACCUMULATED TOTALS	0	2037500	3521250	4986033	5615334	6532201	8024998	9167171	9506005	10142811	10142811

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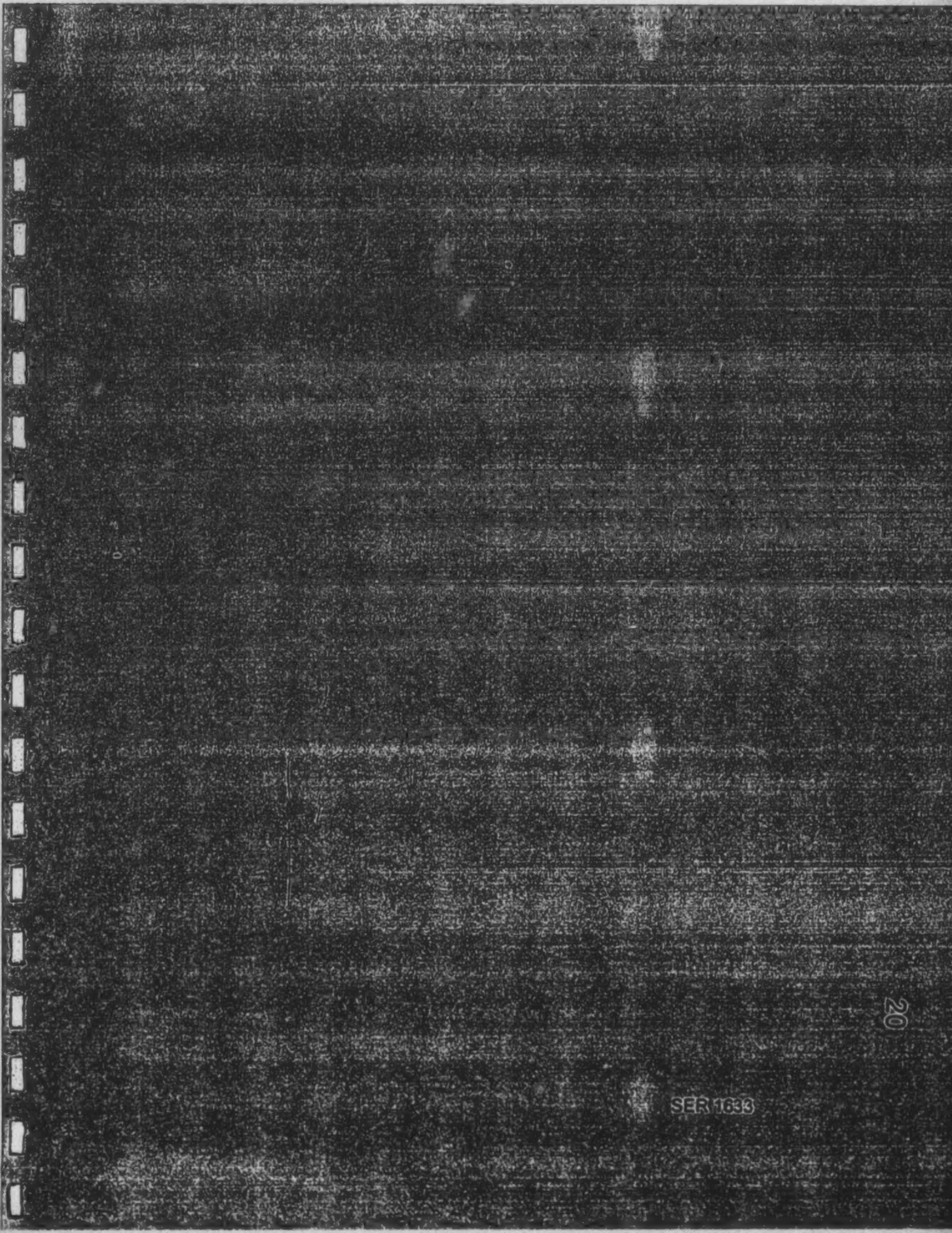

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In re:

EXXON VALDEZ OIL SPILL LITIGATION

THIS DOCUMENT RELATES TO:

Case No.: 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.,

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.,

Case No. 3AN-89-4827A
Chugach Alaska Corporation, et al.,
v.
Exxon Corporation et al.,

Case No. 3AN-89-4827A
Chenega et al., v.
Exxon Corporation, et al.,

Case No.: 3AN-89-2533 Civil
(Consolidated)

JURY VERDICT FORM

Chugach Alaska Corporation

1. We the jury find land damages in the amount of: $ 2,075,015.57.

2. We the jury find archaeological damages in the amount of: $ 728,803.19.

Harold Lee Owen
Jury Foreperson
September 24, 1994

EXHIBIT 20

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In re:

EXXON VALDEZ OIL SPILL LITIGATION

THIS DOCUMENT RELATES TO:

Case No.: 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.,

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.,

Case No. 3AN-89-4827A
Chugach Alaska Corporation, et al.,
v.
Exxon Corporation et al.,

Case No. 3AN-89-4827A
Chenega et al., v.
Exxon Corporation, et al.,

Case No.: 3AN-89-2533 Civil
(Consolidated)

JURY VERDICT FORM

Chenega Corporation

1. We the jury find land damages in the amount of: $3,186,934.41.

2. We the jury find archaeological damages in the amount of: $665,120.62.

Harold Lee Olsen
Jury Foreperson
September 24, 1994

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In re:

EXXON VALDEZ OIL SPILL LITIGATION

THIS DOCUMENT RELATES TO:

Case No.: 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.,

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.,

Case No. 3AN-89-4827A
Chugach Alaska Corporation, et al.,
v.
Exxon Corporation et al.,

Case No. 3AN-89-4827A
Chenega et al., v.
Exxon Corporation, et al.,

Case No.: 3AN-89-2533 Civil
(Consolidated)

JURY VERDICT FORM

The Eyak Corporation

We the jury find land damages in the amount of: $ -0- .

Harvel Lee Olsen
Jury Foreperson
September 24, 1994

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In re:

EXXON VALDEZ OIL SPILL LITIGATION

THIS DOCUMENT RELATES TO:

Case No.: 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.,

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.,

Case No. 3AN-89-4827A
Chugach Alaska Corporation, et al.,
v.
Exxon Corporation et al.,

Case No. 3AN-89-4827A
Chenega et al., v.
Exxon Corporation, et al.,

Case No.: 3AN-89-2533 Civil
(Consolidated)

JURY VERDICT FORM

The Tatitlek Corporation

We the jury find land damages in the amount of: $ 243,948.00.

Harold [illegible]
Jury Foreperson
September 24, 1994

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In re:

EXXON VALDEZ OIL SPILL LITIGATION

THIS DOCUMENT RELATES TO:

Case No.: 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.,

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.,

Case No. 3AN-89-4827A
Chugach Alaska Corporation, et al.,
v.
Exxon Corporation et al.,

Case No. 3AN-89-4827A
Chenega et al., v.
Exxon Corporation, et al.,

Case No.: 3AN-89-2533 Civil
(Consolidated)

JURY VERDICT FORM

Port Graham Corporation

1. We the jury find land damages in the amount of: $ 284,810.38

2. We the jury find archaeological damages in the amount of: $ 755,456.02.

Jury Foreperson
September 24, 1994

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In re:

EXXON VALDEZ OIL SPILL LITIGATION

THIS DOCUMENT RELATES TO:

Case No.: 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.,

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.,

Case No. 3AN-89-4827A
Chugach Alaska Corporation, et al.,
v.
Exxon Corporation et al.,

Case No. 3AN-89-4827A
Chenega et al., v.
Exxon Corporation, et al.,

Case No.: 3AN-89-2533 Civil
(Consolidated)

JURY VERDICT FORM

English Bay Corporation

1. We the jury find land damages in the amount of: $225,921.55.

2. We the jury find archaeological damages in the amount of: $797,598.89.

Harold Lee Dever
Jury Foreperson
September 24, 1994

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SER 1640

BOGLE&GATES

LAW OFFICES

PATRICK W. CRUMB

1031 West 4th Avenue
Suite 600
Anchorage, Alaska 99501

Main Office: (907) 276-4557
Facsimile: (907) 276-2594
Direct Dial: (907) 257-7831

Anchorage
Bellevue
Olympia
Portland
Tacoma
Vancouver, B.C.
Washington, D.C.

22137/03616

September 7, 1994

HAND DELIVERED

Ralph V.L. Ertz, Jr.
Birch, Horton, Bittner & Cherot
1127 West 7th Avenue
Anchorage, Alaska 99501

Re: Exxon Valdez Oil Spill Litigation:
Stipulation and Release re CAC's
Administrative Cost Claims

Dear Ralph:

Enclosed are the Stipulation and Partial Release regarding the Chugach Alaska Corporation administrative cost claims. Upon receipt of fully executed originals of these documents I will provide you with the $60,000 settlement check.

If you have any questions, please do not hesitate to contact me.

Best regards.

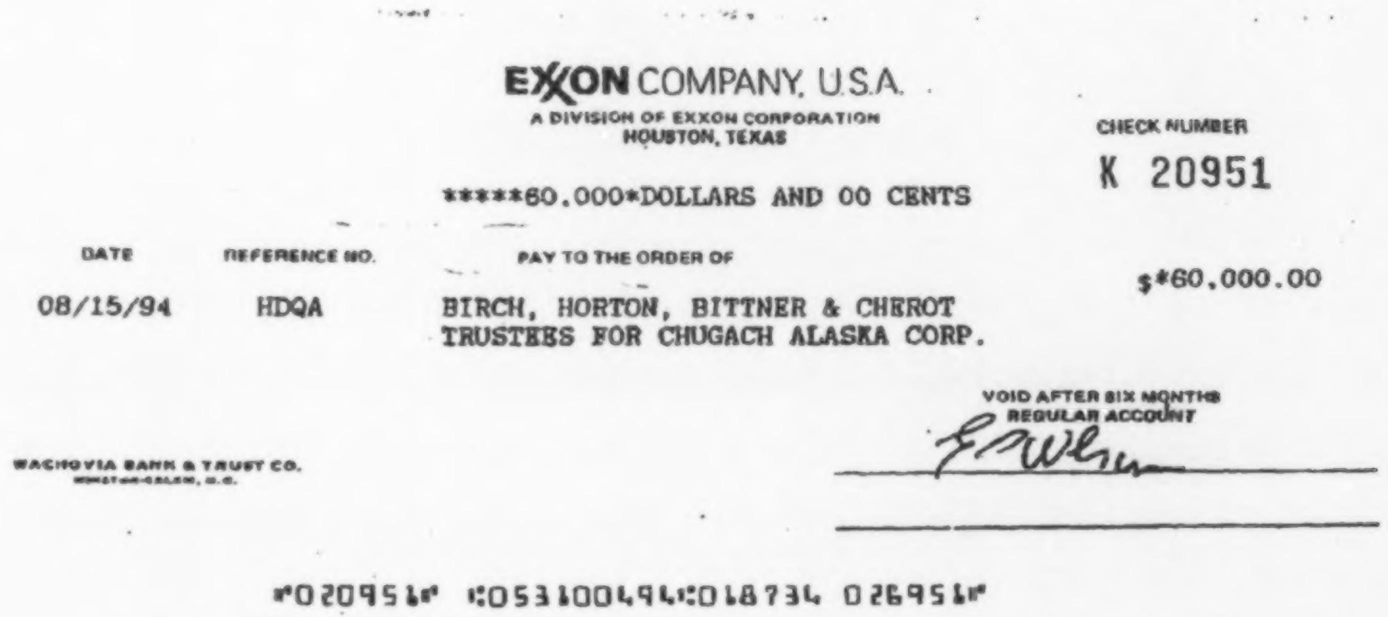
Very truly yours,

BOGLE & GATES

Patrick W. Crumb

Enclosures

EXHIBIT 21



EXXON COMPANY, U.S.A.
A DIVISION OF EXXON CORPORATION
HOUSTON, TEXAS

CHECK NUMBER
K 20951

*****60.000*DOLLARS AND 00 CENTS

DATE	REFERENCE NO.	PAY TO THE ORDER OF	
08/15/94	HDQA	BIRCH, HORTON, BITTNER & CHEROT TRUSTEES FOR CHUGACH ALASKA CORP.	$*60,000.00

VOID AFTER SIX MONTHS
REGULAR ACCOUNT

WACHOVIA BANK & TRUST CO.
WINSTON-SALEM, N.C.

⑈020951⑈ ⑆053100494⑆018734 026951⑈

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

In re: EXXON VALDEZ OIL SPILL LITIGATION	
This Document Relates To: Case No. 3KO-89-264 *Kodiak Island Borough v. Exxon Corporation, et al.* Case No. 3KO-92-134 *City of Seward, et al. v. Exxon Corporation, et al.* Case No. 3AN-89-4827 *Chugach Alaska Corporation, et al. v. Exxon Corporation, et al.* Case No. 3AN-89-4827A *Chenega, et al., v. Exxon Corporation, et al.*	Case No. 3AN-89-2533 Civil (Consolidated)

STIPULATION AND [PROPOSED] ORDER DISMISSING WITH PREJUDICE CERTAIN CLAIMS OF CHUGACH ALASKA CORPORATION

A. Claims Dismissed

The Exxon defendants and plaintiff Chugach Alaska Corporation ("Chugach"), including its subsidiaries, for the purpose of limiting the issues to be heard at trial, stipulate that the following compensatory damage claims are surrendered by Chugach and shall be dismissed with prejudice:

1. Any and all claims relating to business operations of Chugach, and its subsidiaries including, without limitation, any assertion that the spill distracted Chugach's management, caused or contributed to any financial difficulties or otherwise disrupted its business;

2. Any and all claims relating to administrative and related costs incurred by Chugach as a result of the oil spill or in connection with the oil spill response activities, and damage assessment costs;

3. Any and all claims relating to any increase in interest or financing costs to Chugach as a result of the spill;

4. Specifically excluded from the scope of this Stipulation are all claims for damage to real property owned by Chugach or it's subsidiaries, or selected but unconveyed real property, pursuant to the Alaska Native Claims Settlement Act, including archaeological or historical sites selected pursuant to 14(h)(1) of said Act. Nothing in this Stipulation shall be construed as affecting in any way Chugach's right to pursue punitive damages; or attorneys' fees, pre- or post-judgment interest or costs related to the non-dismissed claims.

This Stipulation shall not be read to specifically limit or preclude the introduction of evidence; but rather, all evidence concerning matters discussed above shall be subject to the normal rules of relevance and admissibility as to claims remaining in the litigation.

By entering this Stipulation, defendants do not agree or concede that any of plaintiffs' claims are compensable or proper, and defendants reserve all rights to challenge such claims.

Each party will bear its own costs and fees with respect to the claims surrendered and dismissed above.

BIRCH, HORTON, BITTNER & CHEROT

8 Sep. 1994
DATED

By
Timothy J. Petumenos
Attorneys for Plaintiffs
Chugach Alaska Corporation

BOGLE & GATES

DATED

By
Douglas J. Serdahely
Attorneys for defendant
Exxon Shipping Company

CLOUGH & ASSOCIATES

DATED

By
John F. Clough, III
Attorneys for defendant
Exxon Corporation

ORDER

IT IS SO ORDERED.

ENTERED:______________________________

____
HONORABLE BRIAN C. SHORTELL
Superior Court Judge

PARTIAL RELEASE OF CLAIMS AND RIGHTS

For and in consideration of the sum of SIXTY THOUSAND AND NO/100th DOLLARS ($60,000.00), receipt of which is hereby acknowledged, Chugach Alaska Corporation and its officers, directors, subsidiaries and affiliates ("Releasor") hereby release and forever discharge Exxon Corporation, Exxon Company USA, Exxon Shipping Company, SeaRiver Maritime, Inc., and their officers, directors, employees, agents and contractors, and the T/V EXXON VALDEZ, and its officers and crew, ("Releasees") from any and all rights, claims, causes of action, demands and damages of every kind and character, known or unknown, existing or arising in the future, which relate to administrative and damage assessment costs, costs associated with increased interest or financing charges, diversion of corporate staff or management, or disruption to general business activities, and arising in any way, directly or indirectly, from the discharge of crude oil from the T/V EXXON VALDEZ on March 24, 1989, or thereafter, including any oil containment or cleanup operations that followed ("the released claims").

Specifically excluded from the scope of this partial release are all claims for damage to real property owned by releasor or selected by releasor pursuant to the Alaska Native Claims Settlement Act, including archaeological or historical sites selected under § 14(h)(1) of said Act. Nothing in this release shall be construed as affecting in any way releasor's right to pursue punitive damages; or attorneys fees, pre- or post-judgment interest or costs relating to the non-released claims.

Releasor understands and agrees that releasee's payment is a compromise of a disputed claim and without any admission of lability by the releasees. Releasor's signatory below represents and warrants that he/she is fully and legally authorized by releasor to execute this release on its behalf and that he/she has done so following consultation with the releasor's legal counsel, Birch, Horton, Bittner & Cherot. Releasor also represents and warrants that it has not assigned or transferred the released claims, or any of them, to any other person or entity.

EXECUTED this 9th day of September 1994, at Anchorage, Alaska.

CHUGACH ALASKA CORPORATION

By John Christensen

Its Chairman of The Board

APPROVED AS TO FORM:

Timothy Petumenos
Birch, Horton, Bittner & Cherot

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SER 1649

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into by Exxon Mobil Corporation and SeaRiver Maritime, Inc., named in the litigation as Exxon Shipping Company ("ExxonMobil"), English Bay Corporation and Port Graham Corporation ("EBC and PGC"). ExxonMobil, and EBC and PGC may be referred to herein collectively as "the Parties."

WHEREAS, there is pending in the Superior Court for the State of Alaska, Third Judicial District Anchorage, an action entitled Chenega Corporation, et al. v. Exxon, Case No. 3AN-89-2533 (the "Action"), and

WHEREAS, the Parties now wish permanently and fully to resolve and compromise the Action, as well as all other compensatory claims, rights, and actions, whether arising in contract, tort, statute, or regulation, existing now or at any time between and among the Parties, it being understood and agreed, however, that this Agreement is not intended to affect EBC's and PGC's rights in their capacity as members of the mandatory punitive damages class in connection with an action entitled In re the Exxon Valdez, Case No. A89-095 Civil (HRH) (Consolidated), or any further action arising out of that case as a result of the appeals currently pending or further appeals;

NOW THEREFORE, IT IS AGREED AS FOLLOWS:

1. Payment by ExxonMobil. Upon execution of the Agreement ExxonMobil shall pay to EBC and PGC jointly by check pursuant to instruction provided by EBC's and PGC's counsel the amount of Five Hundred Thirty Two Thousand Five Hundred Dollars ($532,500), one third of which is allocated as compensatory damages and the remaining two thirds of which

EXHIBIT 22

are allocated to costs and attorney's fees. Such allocation does not affect any allocations between EBC, PGC or their attorneys.

2. Settlement of Litigation and Dismissal with Prejudice. Upon payment as provided in Paragraph 1 of this Agreement, EBC and PGC shall cause to be filed a stipulation in the form annexed hereto dismissing the Action with prejudice, with all Parties bearing their own costs and attorney's fees.

3. No Admission of Liability. No aspect of this Agreement or the settlement which has led to it is intended to be nor shall it at any time be deemed, construed, or treated in any respect as an admission of the truth of any allegations made in the Action by any person or entity.

4. Release. EBC and PGC on behalf of themselves, and for their directors, officers, subsidiaries, affiliates, shareholders, members, partners, employees, representatives, predecessors, successors, alter egos, joint ventures, assigns, parents, attorneys, agents, beneficiaries and trustees, each generally and specifically hereby settle, release and forever discharge ExxonMobil, and its respective directors, officers, subsidiaries, affiliates, shareholders, members, partners, employees, representatives, predecessors, successors, alter egos, joint ventures, assigns, parents, attorneys, agents, beneficiaries and trustees, of and from any and all rights, claims, expenses, debts, demands, costs, contracts, liabilities, obligations, actions and/or causes of action of any nature, whatsoever and whether known or unknown, past, present, or future, ascertained or unascertained, suspected or unsuspected, existing, or unclaimed to exist, which exist currently or may exist in the future including without limitation all compensatory damage claims in the Action, provided that nothing in this Agreement is intended to affect EBC's and PGC's rights in their capacity as members of the mandatory punitive damages class

in the aforementioned federal action or any further causes of action arising out of that action as a result of the appeals currently pending or further appeals.

5. Integration Clause. This Agreement constitutes the complete and intended agreement of the Parties with respect to its subject matter. It is fully integrated, and there are no provisions of any nature whatsoever relating to the subject matter of this Agreement which are not contained herein. This document constitutes the entire agreement between the Parties with respect to the subject matter thereof and supercedes all prior and contemporaneous oral and written agreements, discussions and representations. This Agreement may only be amended by an agreement in writing, signed by the Parties hereto.

6. Authority to Enter Agreement. The Parties to this Agreement represent and warrant that (1) they have the right and authority to enter into this Agreement without the consent of any third party and (2) they are represented by counsel in connection with the making of this Agreement and have entered into this Agreement with full knowledge of its legal and practical effect.

7. Advice of Counsel. The Parties acknowledge that they have been represented throughout negotiations leading to this Agreement by counsel, and that they have been advised by those attorneys of the meaning of this Agreement and the consequences of their signing it.

8. Acknowledgment of Non-Reliance. EBC and PGC acknowledge and agree that they have executed this Agreement freely and voluntarily, and that no representation or promise not expressly contained in the Agreement has been made by ExxonMobil or its agents, employees, representatives or attorneys. EBC and PGC further acknowledge that they are not entering into this Agreement on the basis of any oral representation, express or implied. EBC and PGC further acknowledge that they are signing this Agreement without any coercion

whatsoever and further, that they knowingly and voluntarily waive any and all rights to void this Agreement or any of its provisions due to economic or business compulsion. EBC and PGC further acknowledge that they are fully knowledgeable about the Alaska Supreme Court's rulings in Witt v. Watkins, 579 P.2d 1065 (Alaska 1978), Helstrom v. North Slope Borough, 797 P.2d 1192 (Alaska 1990), and Zeilinger v. Sohio Alaska Petroleum Co., 823 P.2d 653 (Alaska 1992), and that they have expressly waived all protections provided under these and other similar decisions.

9. Applicable Law. This Agreement shall be interpreted and construed according to the internal and substantive laws of the State of Alaska.

10. Absence of Duress. The Parties to this Agreement agree and acknowledge that this Agreement, and each term, condition and provision hereof, is fair, just and equitable, and was freely and voluntarily entered into in the absence of coercion and duress. It is to be fairly and equitably construed and interpreted or construed as if drafted by all Parties hereto jointly.

11. Successor and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective representatives, heirs, executors, trustees, administrators, and assigns and successors.

12. No Reliance. The Parties have all conducted their own investigation of all facts they deem to be material concerning their decision to enter into this Agreement, and have not based that decision on any representations by any other party not expressly contained in this Agreement.

13. Further Documents and Acts. Each Party agrees, in good faith, to do all things necessary and convenient to execute and deliver such additional documents and instruments, and

to perform such additional acts as may be necessary or appropriate to effectuate or consummate, or to perform the terms and intent of this Agreement.

14. Confidentiality. The parties shall keep the terms of this settlement confidential, except that the parties are free to disclose publicly the fact that a settlement has been reached herein, and are further free to state the terms of this settlement to the Alaska Judicial Council (pursuant to the requirements of Alaska Civil Rule 41(a)(3)), to auditors, the Internal Revenue Service, any state or international taxing service, and to other parties in this litigation to the extent such terms must be revealed for allocation or other purposes and provided that except as provided herein, such parties further agree to keep such terms confidential other than for the purposes for which they are intended.

15. Execution of Agreement. This Agreement may be executed by the Parties in duplicate original counterparts at different places and different times.

DATED: ____________ ENGLISH BAY CORPORATION

By: ____________

DATED: ____________ PORT GRAHAM CORPORATION

By: ____________

DATED: 6/1/2000 EXXON MOBIL CORPORATION

By: ____________

DATED: 6/1/2000 SEARIVER MARITIME, INC., named in the litigation as EXXON SHIPPING COMPANY

By: ____________

15. Execution of Agreement. This Agreement may be executed by the Parties in duplicate original counterparts at different places and different times.

DATED: 6-1-2000

ENGLISH BAY CORPORATION

By: ______________________

DATED: 6-1-2000

PORT GRAHAM CORPORATION

By: Patrick Norman

DATED: ______________

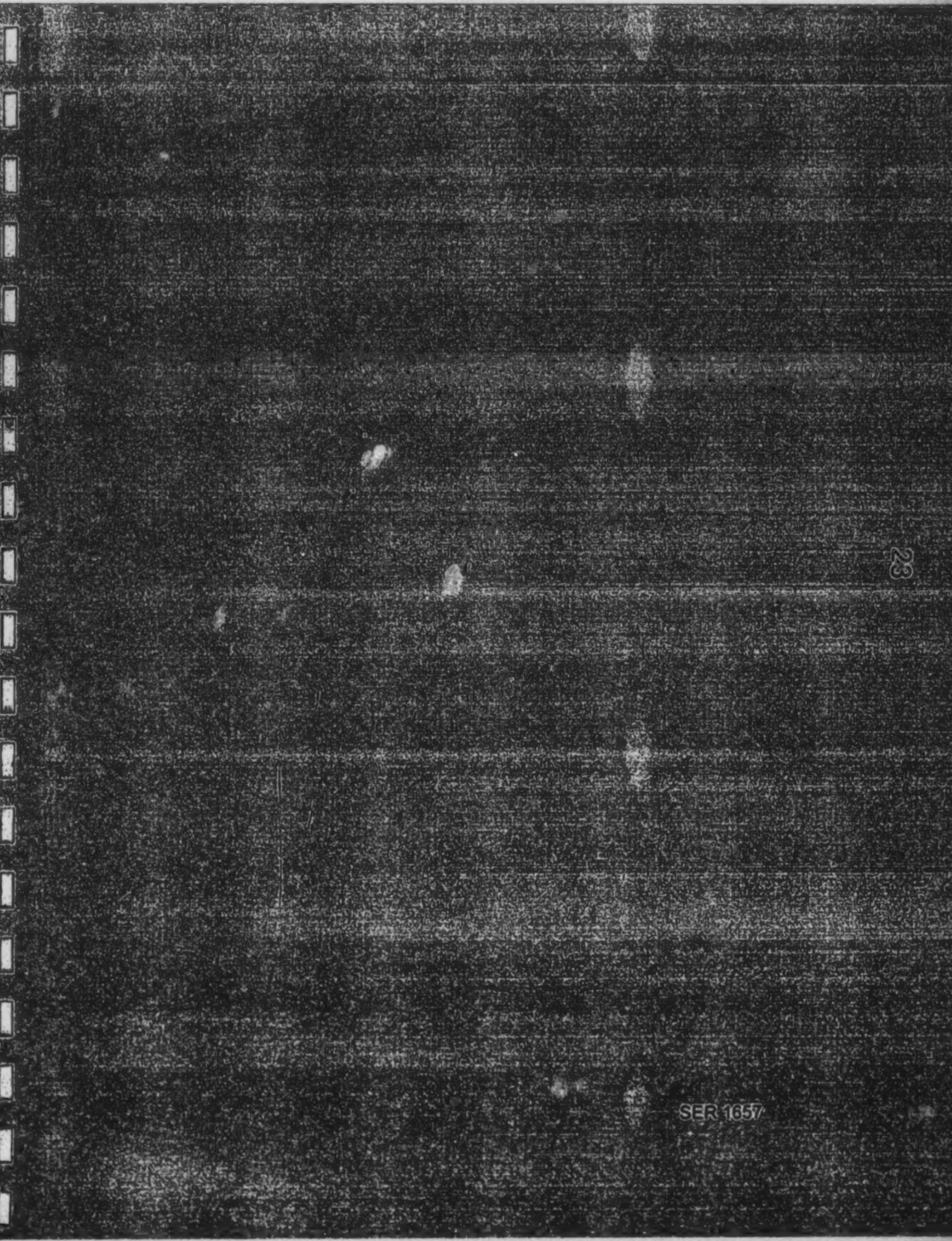
EXXON MOBIL CORPORATION

By: ______________________

DATED: ______________

SEARIVER MARITIME, INC., named in the litigation as EXXON SHIPPING COMPANY

By: ______________________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SER 1657

SETTLEMENT AGREEMENT AND RELEASE

This settlement agreement (the "Agreement") is entered into by and between the Trans-Alaska Pipeline Liability Fund (the "Fund") and Chugach Alaska Corporation and Subsidiaries, Chenega Corporation and Subsidiaries, English Bay Corporation and Subsidiaries, and Port Graham Corporation and Subsidiaries (collectively the "Native Corporations").

WHEREAS, pursuant to Order No. 35, In Re Exxon Valdez, No. A89-095 Civil (HRH) (Consolidated) (D. Alaska Dec. 14, 1990), persons who had filed actions for damages allegedly caused by the Exxon Valdez oil spill were directed to submit claims for such damages to the Fund for administrative resolution of those claims under the Trans-Alaska Pipeline Authorization Act ("TAPAA"), 43 U.S.C. § 1651 et seq.;

WHEREAS, the Fund retained the Honorable John J. Gibbons, the retired Chief Judge of the United States Court of Appeals for the Third Circuit, to serve as the Fund's Administrator -- Exxon Valdez Claims;

WHEREAS, the Fund Board granted Judge Gibbons full authority over claims arising out of the Exxon Valdez oil spill, and Judge Gibbons thereupon oversaw the Fund's entire Exxon Valdez claim-determination process, reviewing and rendering decision on each of the submitted claims;

EXHIBIT 23

WHEREAS, Judge Gibbons issued determinations for all claims and detailed memoranda explaining the governing legal principles and central findings of fact for each principal claim category;

WHEREAS, claimants were entitled to appeal their Fund claim-determinations, and the Court established a separate proceeding specifically to consider such appeals, In re Joint Briefing of Issues on Appeal From the Trans-Alaska Pipeline Fund, No. T92-1000 Civil (HRH) (Consolidated);

WHEREAS, among the claims submitted, reviewed, and determined to be compensable by Judge Gibbons were claims submitted by the Native Corporations for, inter alia, land damages;

WHEREAS, the Native Corporations were determined through the Fund's Exxon Valdez claim-determination process to have suffered approximately $18.8 million in land damages, before allowable interest;

WHEREAS, the Native Corporations also continued to pursue their claims for land damages against Exxon in the Superior Court for the State of Alaska, In re Exxon Valdez Oil Spill Litigation, 3AN-89 2533 Civil (Consolidated) (the "State Court Action");

WHEREAS, the jury in the State Court Action found that the Native Corporations had suffered approximately $6 million in land damages, before allowable interest;

WHEREAS, the difference between the Fund's and the state court jury's land damage determinations, including prejudgment interest on the respective determinations, is approximately $21 million;

WHEREAS, the Fund filed an action against Exxon, Trans-Alaska Pipeline Liability Fund v. Exxon Shipping Co., No. A94-462 Civil (HRH) (the "Fund Reimbursement Action"), seeking, among other relief, to recover under TAPAA, 43 U.S.C. § 1653(c)(8), the amount of its payments to claimants;

WHEREAS, the Court ruled in the Fund Reimbursement Action that the Fund could not recovery against Exxon the amount of the difference between the Fund's claim-determinations and the state court jury verdicts for the Native Corporations (the "Difference");

WHEREAS, the Fund and the Native Corporations believe that the $21 million difference between the Fund's and the state court jury's land damage determinations overstates the Difference because it fails to account for the amount by which the jury verdicts on archaeological damages exceeded the Fund's determinations for such damages. Consideration of the differences in the archaeological damage determinations would reduce the amount of the Difference by $1,134,807, plus interest and the aliquot portion of Fund earnings on such difference.

WHEREAS, in conjunction with the Fund's payment of claims, each Native Corporation signed a Release, Covenant, and Assignment that assigned to the Fund "an undivided interest in such claims as Claimant has against any other entity for damages arising out of the Exxon Valdez spill" (the "Assignments");

WHEREAS, the Fund takes no position as to the dispute between Exxon and plaintiffs in _In re Exxon Valdez_ concerning plaintiffs' entitlement to punitive damages;

WHEREAS, the Fund contends that the Assignments encompass the Native Corporations' punitive damages claims against Exxon and that the Fund is entitled to recover on a first-dollar basis out of any punitive damages that may be awarded to the Native Corporations;

WHEREAS, the Native Corporations challenge this contention and assert, _inter alia_, that the Assignments do not encompass punitive damages and therefore that the Fund is not entitled to any portion of any punitive damages awarded to the Native Corporations;

WHEREAS, the Native Corporations recognize the public interest to be served by reimbursement to the Fund of sums it has paid to claimants, plus interest, which reimbursement, pursuant to Section 8102(a)(2)(B) of the Oil Pollution Act of 1990 ("OPA"), Pub. L. 101-380, 104 Stat. 484, 565, would go to the Oil Spill Liability Trust Fund to compensate victims of future oil spills under OPA and to the State of Alaska (for its pro rata contributions to the Fund as an owner of oil);

WHEREAS, the Fund and the Native Corporations believe that the Fund's independent, reasoned evaluation and determination of claims is highly relevant to the allocation of any punitive damages award;

WHEREAS, the Fund and the Native Corporations agree that, if the Court concurs that Fund claim-determinations for the Native Corporations should play a significant role in determining the allocation of punitive damages among plaintiffs, then in fairness and equity the Fund should recover any shortfall in the recovery it is able to obtain from Exxon for sums paid to the Native Corporations out of those Native Corporations' punitive damages recovery;

WHEREAS, in light of these factors and to avoid the expense and disruption of litigation, the Fund and the Native Corporations have determined that it would be equitable for the Fund to settle and dismiss any claims it has against the Native Corporations (whether based on the Assignments or otherwise); for the Fund to share in any punitive damages recovery by the Native Corporations, (which will be paid entirely to the new spill fund and the State of Alaska); and for the Fund's share of any such punitive damages to be distributed over an allocation that reflects a consideration of the Fund's determination of the extent of the damages suffered by the Native Corporations; and

WHEREAS, the Fund and the Native Corporations understand and intend any payments provided under this Agreement to be in excess of any liability Exxon is determined to have, either through litigation or settlement, for Fund payments to the Native Corporations, and, moreover, do not understand or intend this Agreement to settle, or otherwise compromise, resolve, or limit, any portion of any liability Exxon (or any other party) otherwise has to the Fund for amounts paid by the Fund to the Native Corporations.

NOW THEREFORE, in consideration of the foregoing and the mutual promises set forth below, and for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Fund and the Native Corporations agree as follows:

1. Following execution of this Agreement, the Fund will fully release any and all causes of action that it has, has had, or might have against the Native Corporations in connection with the Exxon Valdez oil spill, whether under Assignments or otherwise (subject to retention of the right to enforce this Agreement), in the form of Exhibit A hereto.

2. This Agreement clarifies and reaffirms that the Native Corporations have released any and all claims they have, have had, or might have against the Fund, including any claims to any proceeds the Fund may recover from Exxon for reimbursement of amounts paid by the Fund to the Native Corporations in connection with the Fund's Exxon Valdez claim-determination process. This Agreement also clarifies and reaffirms that the Native Corporations agree that any and all claims for attorneys' fees, of whatever nature, in whatever amount, and arising from whatever context, are released.

3. The Fund's recovery from the Native Corporations under this Agreement is intended to reimburse the amount of the difference between the Fund's land damages payments to the Native Corporations and the state court jury verdicts on land damages, plus interest and the aliquot portion of Fund earnings on such difference, that the Fund, as of the time any punitive damages award becomes final, has not recovered from Exxon (the "Shortfall"). Accordingly, the Fund's recovery from the Native Corporations under this Agreement (exclusive of post-judgment interest) will not exceed the amount (if any) of the Shortfall. Further, the Native Corporations expressly do not waive their interest in the existing or any future jury verdicts in the State Court Action to the extent (i) that the Native Corporations prevail on appeal on the set-off and collateral source rule

issues or (ii) that the verdicts exceed the amount of the Shortfall.

4. Following execution of this Agreement, the Fund will jointly move with the Native Corporations for dismissal with prejudice of the Exxon third-party claims in the Fund Reimbursement Action.

5. In return for the Fund's compromise of its assignments and other rights, the Fund will be re-paid out of any share of punitive damages recovered by the Native Corporations in accordance with the enclosed schedules, subject to the limitation that the amount of that recovery (exclusive of post-judgment interest) will not exceed the amount (if any) of the Shortfall. Under these schedules, the Fund will receive a set, linear amount ($1.68 million) for each percentage of the total punitive damages award allocated to the Native Corporations, up to a total recovery by the Fund of the Shortfall (plus post-judgment interest, as set forth below). That linear ratio applies to all partial, as well as whole, percentages. So, for example, on a one-half percent allocation, the Fund would recover one-half of $1.68 million, or $840,000.

6. Any such recovery by the Fund will bear its aliquot share of the post-judgment interest paid on any punitive damages portion of a judgment or settlement.

7. The Fund will pay 25 percent of any such recovery by the Fund (including any share of post-judgment interest) to the Native Corporations for attorneys' fees, as provided for in the enclosed schedules.

8. The Fund will appear as a party in interest before the District Court in In re Exxon Valdez to support the position that, as reflected by the Fund claim-determinations for the Native Corporation claims, the Native Corporations suffered a significant portion of the damages caused by the Exxon Valdez oil spill and should, accordingly, receive a substantial allocation of any punitive damages award.

9. With respect to the state court appeal being prosecuted by the Native Corporations (No. 7252, filed August 16, 1995): (a) the appeal will continue to be prosecuted in the name of the Native Corporations; (b) the Native Corporations will retain control over the portion of the appeal addressing Fund offset and collateral source issues; (c) the Fund will control all other issues and retains an absolute right to end its participation in the appeal at any point; (d) subject to the terms of clause (e) of this paragraph, the Fund will pay reasonable attorneys' fees in the briefing of those issues on appeal that are subject to its control, plus the costs of preparing an appendix and any costs that may be taxed against appellants in connection with appellate litigation of such issues; (e) if the Fund decides to abandon the appeal or its

participation therein, it will have no obligation for any attorneys' fees or costs incurred after the Fund informs the Native Corporations that its participation has ended. Under such circumstances, however, the Fund will pay the Native Corporations a lump sum of $10,000, in full compensation of all such reasonable attorneys' fees and costs, if the Native Corporations continue to prosecute the appeal of issues other than the offset/collateral source issues. Any such reasonable attorneys' fees or costs (including the $10,000 lump sum payment) shall be credited against the Fund's obligation for attorneys' fees as that obligation is set out in paragraph 7 hereof and the enclosed schedules. If the Fund is still participating at the time of any remand, the Fund and the Native Corporations will, at that time, address the legal work to be done on remand.

10. The Fund agrees that the Native Corporations may, in their sole discretion, settle or compromise with their co-plaintiffs, in mediation or in other proceeding, the issue of the allocation of punitive damages, provided that the Fund receives the benefit of any such settlement according to the agreed-on schedules. Likewise, the Fund may, in its sole discretion, settle or compromise its dispute with Exxon, provided that the Native Corporations receive the benefit from any such settlement or compromise, to the extent such settlement results in a reduction in the Shortfall. The Native Corporations and the Fund further agree to conduct any settlement negotiations in good

faith and not for the purpose of avoiding or limiting any obligation or right under this Agreement.

11. On execution of this Agreement and execution of the supplemental assignments, the Fund will forward to counsel for the Native Corporations, either by courier or overnight mail, the checks for the Fund's second distribution to the Native Corporations.

11. Counsel signing below warrant that they have full authority to enter this Agreement on behalf of their respective clients.

IN WITNESS WHEREOF, the Fund and the Native Corporations have executed this Agreement through their counsel of record.

Date: February 7, 1996

A. Stephen Hut, Jr.
Counsel for the Trans-Alaska
Pipeline Liability Fund

Date: 28th February 1996

Timothy J. Petumenos
Counsel for Chugach Alaska
Corporation and Subsidiaries

Date: Feb 17, 1996

Samuel J. Fortier
Counsel for Chenega Corporation
and Subsidiaries, English Bay
Corporation and Subsidiaries,
and Port Graham Corporation
and Subsidiaries

RELEASE

The Trans-Alaska Liability Fund (the "Fund") does hereby release, remise, and forever discharge Chugach Alaska Corporation and Subsidiaries, Chenega Corporation and Subsidiaries, English Bay Corporation and Subsidiaries, and Port Graham Corporation and Subsidiaries (collectively the "Native Corporations") from any and all claims, obligations, actions, causes of action, debts, demands, suits, agreements, damages, administrative complaints, claims in alternative dispute resolution including binding arbitration, and claims of every nature, including all claims for compensatory or punitive damages, costs disbursements, attorneys' fees, or interest, whether in contract or tort, whether legal or equitable, pursuant to statute or common law, known or unknown, which the Fund now has, has had, or may hereafter have against the Native Corporations arising out of, relating to, or incurred in connection with the Exxon Valdez oil spill, provided, however, that this release shall not in any way limit or impair the Fund's right or ability to enforce the terms of any settlement agreement entered into between the Fund and the Native Corporations.

Date:____________________

____
E. William Cole, Jr.
Administrator
Trans-Alaska Pipeline
Liability Fund

EXHIBIT A

SCHEDULE OF RECOVERY AT $1 BILLION IN PUNITIVE DAMAGES

INCREMENTAL AMOUNT OF PUNITIVE DAMAGE AWARD	INCREMENTAL AMOUNT TO NATIVE CORPORATIONS	INCREMENTAL AMOUNT TO THE FUND	INCREMENTAL AMOUNT TO ATTORNEYS' FEES	INCREMENTAL AMOUNT NET TO THE FUND
First $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 8,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $ 5,000,000	$ 4,160,000	$ 840,000	$ 210,000	$ 630,000

SCHEDULE OF RECOVERY AT $2 BILLION IN PUNITIVE DAMAGES

INCREMENTAL AMOUNT OF PUNITIVE DAMAGE AWARD	INCREMENTAL AMOUNT TO NATIVE CORPORATIONS	INCREMENTAL AMOUNT TO THE FUND	INCREMENTAL AMOUNT TO ATTORNEYS' FEES	INCREMENTAL AMOUNT NET TO THE FUND
First $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$18,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $10,000,000	$ 9,160,000	$ 840,000	$ 210,000	$ 630,000

SCHEDULE OF RECOVERY AT $3 BILLION IN PUNITIVE DAMAGES

INCREMENTAL AMOUNT OF PUNITIVE DAMAGE AWARD	INCREMENTAL AMOUNT TO NATIVE CORPORATIONS	INCREMENTAL AMOUNT TO THE FUND	INCREMENTAL AMOUNT TO ATTORNEYS' FEES	INCREMENTAL AMOUNT NET TO THE FUND
First $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $30,000,000	$28,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $15,000,000	$14,160,000	$ 840,000	$ 210,000	$ 630,000

SCHEDULE OF RECOVERY AT $4 BILLION IN PUNITIVE DAMAGES

INCREMENTAL AMOUNT OF PUNITIVE DAMAGE AWARD	INCREMENTAL AMOUNT TO NATIVE CORPORATIONS	INCREMENTAL AMOUNT TO THE FUND	INCREMENTAL AMOUNT TO ATTORNEYS' FEES	INCREMENTAL AMOUNT NET TO THE FUND
First $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $40,000,000	$38,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $20,000,000	$19,160,000	$ 840,000	$ 210,000	$ 630,000

SCHEDULE OF RECOVERY AT $5 BILLION IN PUNITIVE DAMAGES

INCREMENTAL AMOUNT OF PUNITIVE DAMAGE AWARD	INCREMENTAL AMOUNT TO NATIVE CORPORATIONS	INCREMENTAL AMOUNT TO THE FUND	INCREMENTAL AMOUNT TO ATTORNEYS' FEES	INCREMENTAL AMOUNT NET TO THE FUND
First $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $50,000,000	$48,320,000	$ 1,680,000	$ 420,000	$ 1,260,000
Next $25,000,000	$24,160,000	$ 840,000	$ 210,000	$ 630,000

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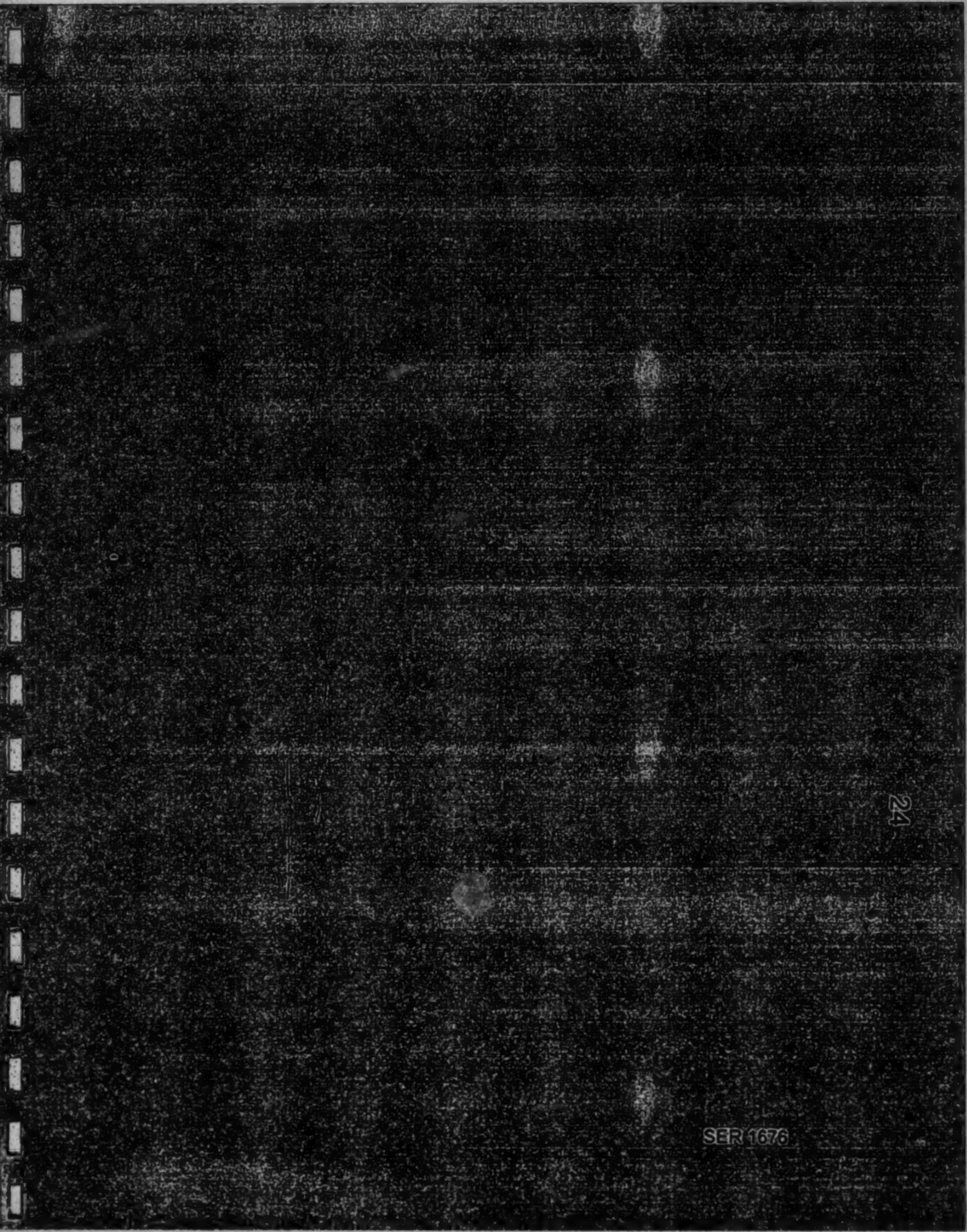
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SER 1676

Settlement Payments From Exxon During 1989-1991

City/Borough/Village	Total Exxon Payments
City of Cordova	$334,292
City of Valdez	$2,299,657
City of Whittier	$359,175
Kenai Peninsula Borough	$1,593,957
City of Homer	$334,861
City of Seldovia	$123,441
City of Seward	$358,823
Kodiak Island Borough	$1,361,690
City of Kodiak	$21,064
Chenega	$549,619
Tatitlek	$92,025
English Bay	$50,000
Port Graham	$71,852
Akhiok	$58,824
Karluk	$48,967
Larsen Bay	$192,159
Old Harbor	$78,967
Ouzinkie	$275,249
Port Lions	$160,678
Chignik	$51,501
Perryville	$46,611
Eyak Tribal Council	$5,700
English Bay Village	$6,980
Old Harbor Village	$5,930
Ouzinkie Village	$2,350
Port Graham Village	$12,500
Mount Marathon Natives	$4,795
Chenega IRA	$20,000
TOTAL	$8,521,667.00

EXHIBIT 24

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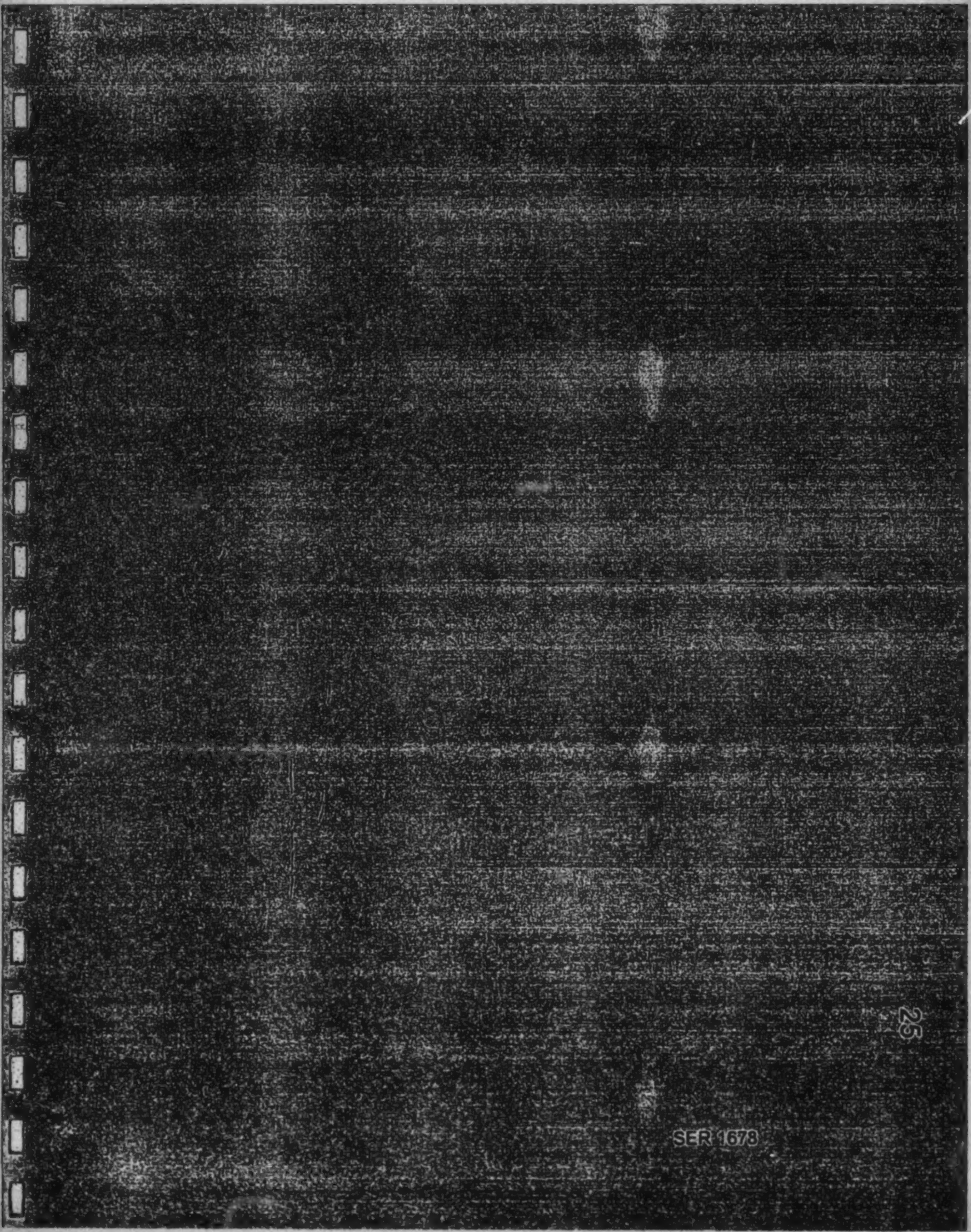

PARTIAL SETTLEMENT AND RELEASE

FOR AND IN CONSIDERATION of the sum of Two Hundred Forty-Five Thousand and No/100 ($245,000.00) (the "Payment") paid to the undersigned City of Seward, City of Old Harbor, City of Ouzinkie, City of Port Lions, and the City of Larsen Bay, (collectively "Municipal Plaintiffs"), receipt of which is hereby acknowledged, and intending to be legally bound hereby, the undersigned Municipal Plaintiffs absolutely and irrevocably release and discharge Exxon Corporation, Exxon Shipping Company (now known as SeaRiver Maritime, Inc.), Exxon Pipeline Company, their directors, officers, employees and agents, and the M/V EXXON VALDEZ, its officers and crew, (collectively "Exxon"), from any and all claims, demands and causes of actions of every kind and character, whether known or unknown, for any and all damages that have been sustained or may be sustained at any time in the future by the undersigned Municipal Plaintiffs which arise out of or in association with the grounding of the M/V EXXON VALDEZ on March 24, 1989 and the resulting oil spill, including any oil containment or cleanup procedures that followed, except the following claims expressly reserved and specifically set forth as follows:

(1) The claims for damages to land and/or real property brought by City of Old Harbor, City of Ouzinkie, City of Port Lions and City of Larsen Bay were settled with Exxon for Two Hundred Fifty-Five Thousand and No/100 Dollars ($255,000.00) and are the subject of a separate Partial Settlement Agreement; and

EXHIBIT 25

2) The undersigned Municipal Plaintiffs reserve the right to bring an appeal of the summary judgment motion granted in favor of Exxon Corporation and Exxon Shipping Company in the above action in the Alaska Superior Court by the Honorable Brian Shortell on May 5, 1994, on claims for diverted services (copy attached):

(a) Provided that, and in further consideration of the Payment stated above: Should such summary judgment ruling in Exxon's favor be reversed on appeal, and the claims brought to trial and result in a recovery of damages by the undersigned Municipal Plaintiffs, the undersigned Municipal Plaintiffs covenant and agree that Exxon shall receive a credit in the amount of Eighy-Eight Thousand Nine Hundred and No/100 Dollars ($88,900.00) to be offset against any such recovery prior to any calculation or award of statutory interest and prior to any application for or award of attorneys' or other costs or fees.

(3) The undersigned Municipal Plaintiffs reserve all claims for punitive damages which arise out of our in association with the grounding of the M/V EXXON VALDEZ on March 24, 1989 and the resulting oil spill, including any oil containment or cleanup procedures that followed.

The undersigned Municipal Plaintiffs hereby acknowledge receipt of the Payment stated above and agree by their acceptance of the Payment to be legally bound by all the terms and covenants of this agreement. The undersigned Municipal Plaintiffs further covenant and agree that they will divide the Payment among themselves, and they hereby acknowledge that whatever amount they determine to allocate to each of them shall constitute good and satisfactory consideration for the undertakings of each. In further consideration of the Payment stated above, the undersigned Municipal Plaintiffs, and each of them, hereby specifically release Exxon from any claims or causes of action whatsoever, arising now or in the future, known or unknown, concerning the division of this Payment among themselves.

In order to facilitate the implementation of this Partial Settlement and Release, the undersigned Municipal Plaintiffs further agree that this Partial Settlement and Release may be executed by each of them in counterpart, by means of separate facsimile or other duplicate copies, and as so executed shall be of the same binding force and effect as if executed in a single copy.

DATED: ~~February~~ March 17, 1995.

STOLL, STOLL, BERNE & LOKTING

Attorneys for Municipal Plaintiffs City of Larsen Bay, City of Old Harbor, City of Ouzinkie, City of Port Lions and City of Seward

By ____________________
N. Robert Stoll

DATED: February ____, 1995

CITY OF LARSEN BAY

By ____________________
Mayor, City of Larsen Bay

undertakings of each. In further consideration of the Payment stated above, the undersigned Municipal Plaintiffs, and each of them, hereby specifically release Exxon from any claims or causes of action whatsoever, arising now or in the future, known or unknown, concerning the division of this Payment among themselves.

In order to facilitate the implementation of this Partial Settlement and Release, the undersigned Municipal Plaintiffs further agree that this Partial Settlement and Release may be executed by each of them in counterpart, by means of separate facsimile or other duplicate copies, and as so executed shall be of the same binding force and effect as if executed in a single copy.

DATED: February ____, 1995.

STOLL, STOLL, BERNE & LOKTING

Attorneys for Municipal Plaintiffs City of Larsen Bay, City of Old Harbor, City of Ouzinkie, City of Port Lions and City of Seward

By ______________________________
N. Robert Stoll

DATED: February 14, 1995

CITY OF LARSEN BAY

By ______________________________
Mayor, City of Larsen Bay

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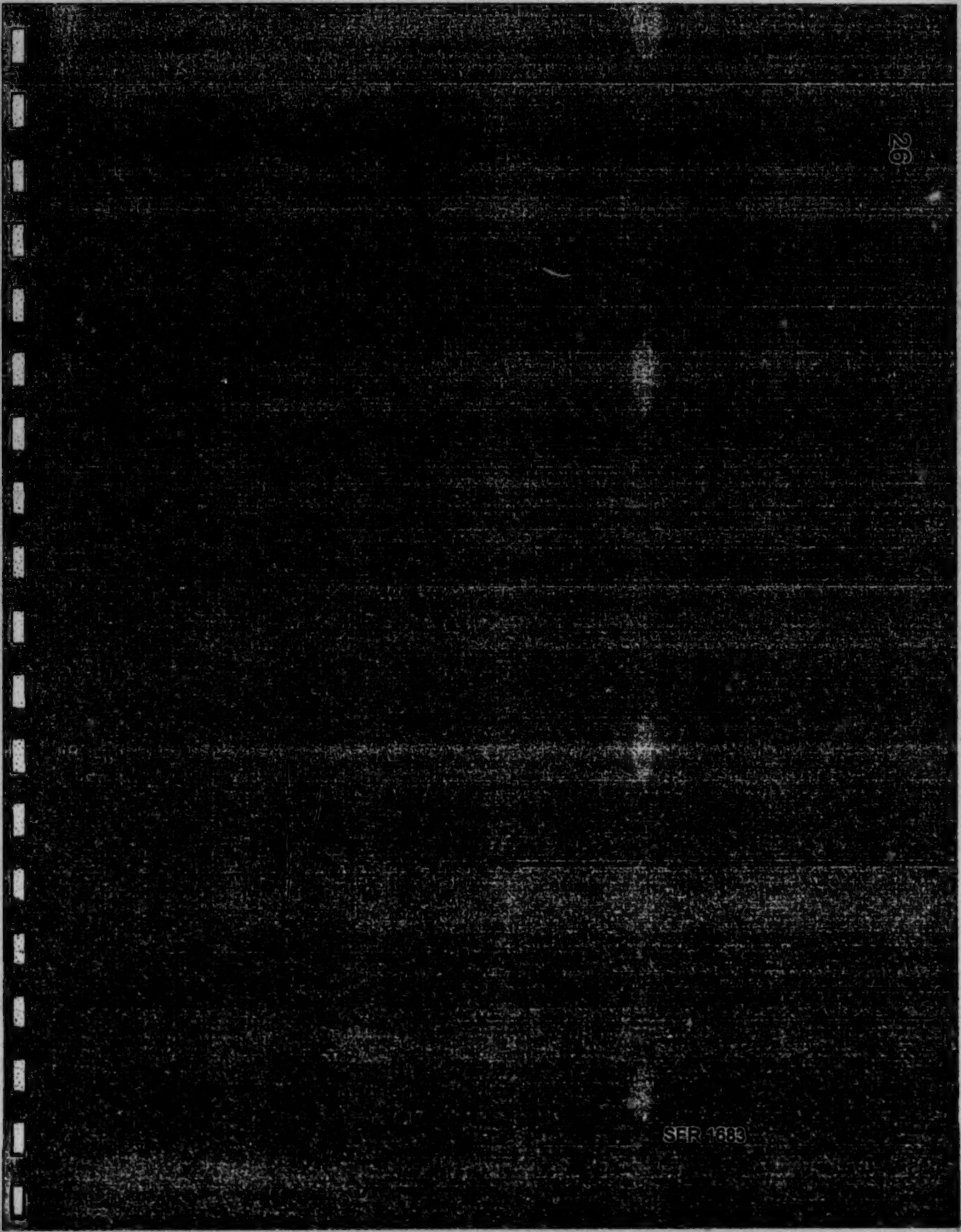

PARTIAL SETTLEMENT AND RELEASE

FOR AND IN CONSIDERATION of the sum of Four Hundred Fifty-Five Thousand and No/100 ($455,000.00) (the "Payment") paid to the undersigned City of Cordova and Kodiak Island Borough (collectively "Municipal Plaintiffs"), receipt of which is hereby acknowledged, and intending to be legally bound hereby, the undersigned Municipal Plaintiffs absolutely and irrevocably release and discharge Exxon Corporation, Exxon Shipping Company (Now SeaRiver Maritime Financial Holdings, Inc.), Exxon Pipeline Company, their directors, officers, employees and agents, and the M/V EXXON VALDEZ, its officers and crew (collectively "Exxon") from any and all claims, demands, and causes of actions of every kind and character, whether known or unknown, for any and all damages that have been sustained or may be sustained at any time in the future by the undersigned Municipal Plaintiffs which arise out of or in association with the grounding of the M/V EXXON VALDEZ on March 24, 1989, and the resulting oil spill, including any oil containment or cleanup procedures that followed, except the following claims expressly reserved and specifically set forth as follows:

(1) The undersigned Municipal Plaintiffs reserve the right to pursue their appeal of the summary judgment motion granted in favor of Exxon Corporation and Exxon Shipping Company in the above action in the Alaska Superior Court by the Honorable Brian Shortell on May 5, 1994, on claims for diverted services, which appeal was filed on February 28, 1996, provided that, and in further consideration of the Payment stated above: Should such summary judgment ruling in Exxon's favor be reversed on appeal, and

EXHIBIT 26

the claims brought to trial and result in a recovery of damages by the undersigned Municipal Plaintiffs, the undersigned Municipal Plaintiffs covenant and agree that Exxon shall receive a credit in the amount of Eighty-Six Thousand One Hundred and No/100 Dollars ($86,100.00) to be offset against any such recovery prior to any calculation or award of statutory interest and prior to any application for or award of attorneys' or other costs or fees.

(2) The undersigned Municipal Plaintiffs reserve all claims for punitive damages which arise out of or in association with the grounding of the M/V EXXON VALDEZ on March 24, 1989, and the resulting oil spill, including any oil containment or cleanup procedure that followed.

The undersigned Municipal Plaintiffs hereby acknowledge receipt of the Payment stated above and agree by their acceptance of the Payment to be legally bound by all the terms and covenants of this agreement. The undersigned Municipal Plaintiffs further covenant and agree that they will divide the Payment among themselves, and they hereby acknowledge that whatever amount they determine to allocate to each of them shall constitute good and satisfactory consideration for the undertakings of each. In further consideration of the Payment stated above, the undersigned Municipal Plaintiffs, and each of them, hereby specifically release Exxon from any claims or causes of action whatsoever, arising now or in the future, known or unknown, concerning the division of this Payment among themselves.

In order to facilitate the implementation of this Partial Settlement and Release, the undersigned Municipal Plaintiffs further agree that this Partial Settlement and Release may be executed by each of them in counterpart, by means of separate facsimile or other duplicate copies, and as so executed shall be the same binding force and affect as if executed in a single copy.

DATED: July 17, 1996 ~~March ____, 1996~~.

JAMIN, EBELL, BOLGER & GENTRY

Attorneys for Municipal Plaintiffs
City of Cordova and Kodiak Island Borough

By: ______________________
Matthew D. Jamin

DATED: April 3, 1996 ~~March ____, 1996~~.

CITY OF CORDOVA

By: Margaret Johnson
Mayor, City of Cordova

DATED: July 17, 1996 ~~March ____, 1996~~.

KODIAK ISLAND BOROUGH

By: ______________________
Mayor, Kodiak Island Borough

[illegible]

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SER 1687

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

In re:

EXXON VALDEZ OIL SPILL
LITIGATION

THIS DOCUMENT RELATES TO

Case No. 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.

Case No. 3AN-89-2533
(Consolidated)

Honorable Brian C. Shortell

COPY
Original Received
APR 5 2000
Clerk of the Trial Courts
By__________Deputy

ACCEPTANCE OF OFFER OF JUDGMENT

Through counsel the City of Ouzinkie hereby accepts Defendants Exxon Mobil Corporation and Exxon Shipping Company's offer of judgment dated March 14, 2000, the acceptance date for which was extended by agreement of counsel through the close of business on April 6, 2000.

EXHIBIT 27

Respectfully submitted this 5th day of April, 2000, at Anchorage, Alaska.

JAMIN, EBELL, SCHMITT & MASON
Matthew D. Jamin
Counsel for the City of Ouzinkie
ABA #7410085

DAVIS WRIGHT TREMAINE

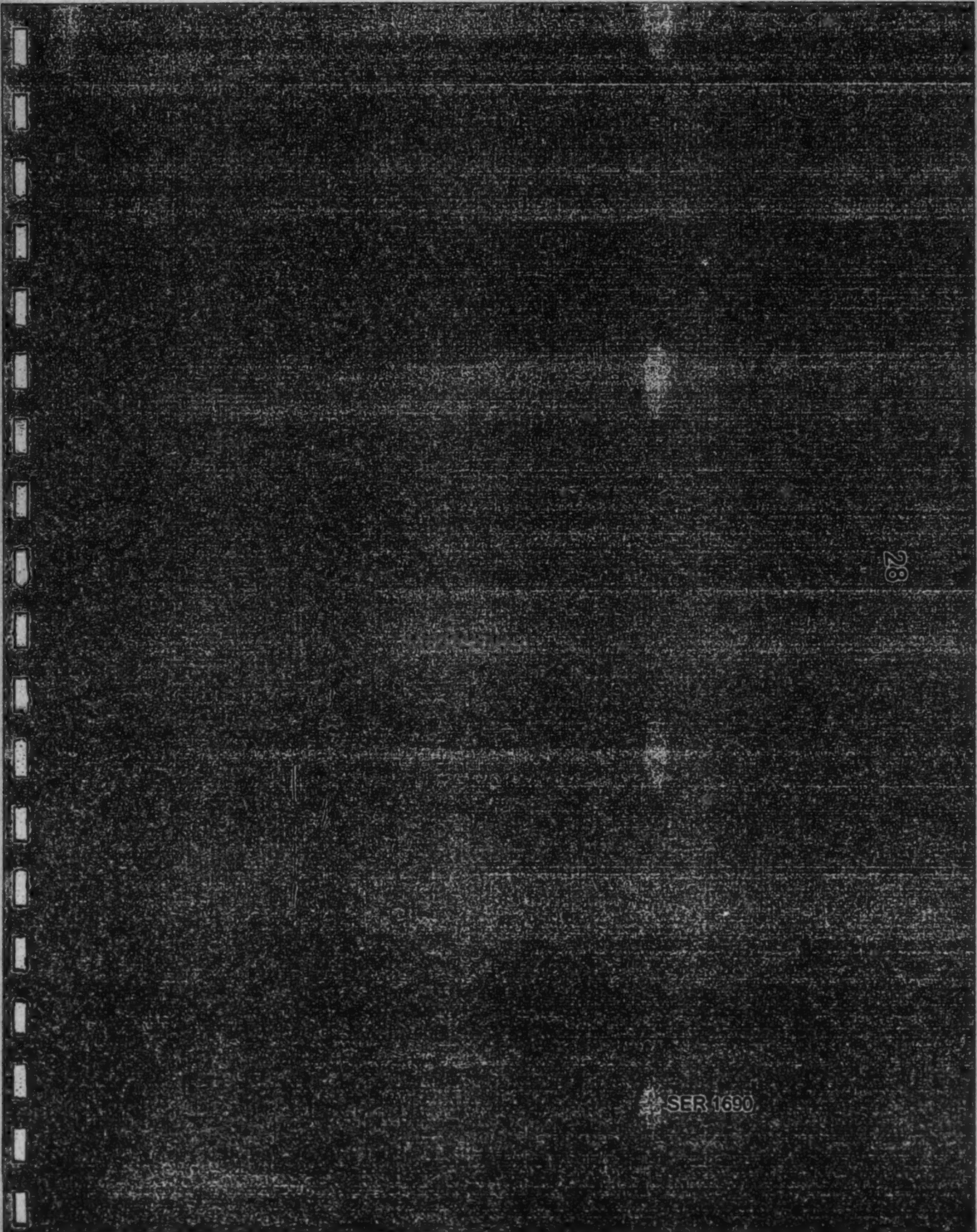
By: ______________________
David W. Oesting
Lead Counsel for Plaintiffs
ABA #8106041

Certificate of Service

I certify that on April 5, 2000 a copy of the foregoing was served via fax and hand delivery on the following:

Douglas J. Serdahely
Patton Boggs
1031 West Fourth Avenue, Fifth Floor
Anchorage, AK 99501

Kim Lamoureux
Kim Lamoureux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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In re:

EXXON VALDEZ OIL SPILL LITIGATION

THIS DOCUMENT RELATES TO:

Case No.: 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.,

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.,

Case No. 3AN-89-4827A
Chugach Alaska Corporation, et al.,
v.
Exxon Corporation et al.,

Case No. 3AN-89-4827A
Chenega et al., v.
Exxon Corporation, et al.,

Case No.: 3AN-89-2533 Civil
(Consolidated)

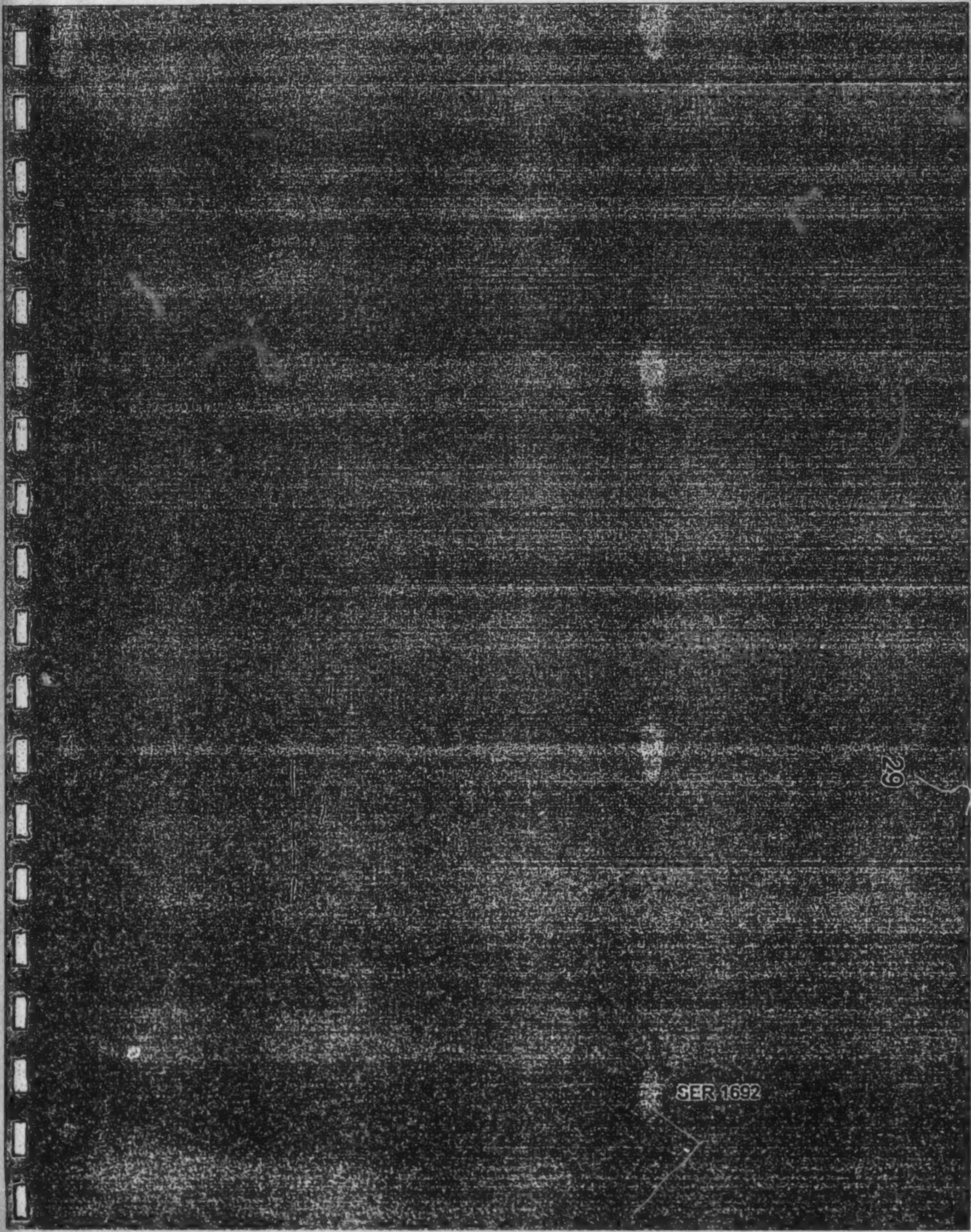
JURY VERDICT FORM

Kodiak Island Borough

We the jury find land damages in the amount of: $ 724,734.99.

Harold Lu deven
Jury Foreperson
September 24, 1994

EXHIBIT 28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APPENDIX 3

	Category of Claims	EXXON CLAIMS PAYMENTS	CLAIMS PAYMENT AMOUNT UTILIZED AS OFFSET
(a)	Lower Cook Inlet Salmon	$3,296,528	$1,374,182
(b)	Kodiak Sac Roe Herring	-0-	-0-
(c)	Kodiak Salmon	-0-	-0-
(d)	Pot Shrimp	884,221	221,902
(e)	Trawl Shrimp	183,187	135,945
(f)	Halibut	125	125
(g)	Sablefish	211,654	72,127
(h)	Misc. Finfish	52,887	52,887
(i)	Dungeness Crab	816	-0-
(j)	King Crab	-0-	-0-
(k)	Tanner Crab	-0-	-0-
(l)	Fall Food & Bait Herring	-0-	-0-
(m)	Misc. Shellfish (PWS & LCI)	-0-	-0-
(n)	Kodiak Scallops	-0-	-0-
(o)	Kodiak Misc. Shellfish	-0-	-0-
(p)	Prince William Sound Clams	-0-	-0-
(q)	Lower Cook Inlet Smelt	-0-	-0-
(r)	Oyster Farmer	-0-	-0-
(s)	Permit Sales	-0-	-0-
(t)	Boat Sales	-0-	-0-
(u)	Emotional Distress	-0-	-0-
(v)	Cook Inlet Aquaculture Association	-0-	-0-
(w)	Prince William Sound Aquaculture Association	-0-	-0-
(x)	Kodiak Regional Aquaculture Association	-0-	-0-
(y)	Landowners	-0-	-0-
(z)	Afognak Native Corporation	-0-	-0-
(aa)	Other Phase IV Claims	-0-	-0-
	TOTAL OFFSETS AGAINST SETTLEMENT AMOUNT AS RESULT OF EXXON CLAIMS PAYMENTS		$1,857,168

EXHIBIT 29

30

SER 1694

Amounts Recovered by Area Businesses

Claim Category	Amount	Source
Area Businesses	$82,081	Exhibit 17, p.C-2
Not-For-Profit	$250,000	Exhibit 17, p.C-2
Fishermen Property Damage	$1,000	Exhibit 17, p.C-2
Other Claimants	$14,148	Exhibit 17, p.C-2
CDFU	$41,367	Exhibit 19, Taylor Memo, Z7301273455
TOTAL	$388,596.00	

EXHIBIT 30

31

SER 1696

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

In re:

EXXON VALDEZ OIL SPILL
LITIGATION

THIS DOCUMENT RELATES TO

ORIGINAL

Case No. 3KO-89-264
Kodiak Island Borough v.
Exxon Corporation, et al.,

Case No. 3KO-92-134
City of Seward, et al. v.
Exxon Corporation, et al.
____________________________________ /
Case No. 3AN-89-2533 CI (Consolidated)

VOLUME XVII

TRANSCRIPT OF PROCEEDINGS

July 11, 2002 - Pages 2499 through 2643

EXCERPT-TESTIMONY OF OTTO HARRISON
(Pages 2568, 2571, 2572, 2587, 2588,
2618, 2619, 2620, 2621)

SER 1697

EXHIBIT 31

TRIAL BY JURY

BEFORE THE HONORABLE BRIAN C. SHORTELL

Superior Court Judge

Anchorage, Alaska

July 11, 2002

8:45 a.m.

APPEARANCES:

For Plaintiff: BRIAN O'NEILL, ESQ.
Faegre & Benson, LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402

For Defendant: CHARLES P. DIAMOND, ESQ.
M. RANDALL OPPENHEIMER, ESQ.
O'Melveny & Myers
1999 Avenue of the Stars, #700
Los Angeles, California 90067

JOHN F. CLOUGH, III, ESQ.
Clough & Associates
8505 Old Dairy Road, Suite 202
Juneau, AK 99801

Reported by: Kim Behrens, RMR-CRR

And we had other in-house and out-of-house experts that were already on the ground beginning to develop the science programs that would allow us to proceed intelligently with the cleanup operations.

We had oil tracking underway. At the time that I got there, which was the 5th, there had already been two major storms of about hurricane level intensity, which had intended to spread the oil over a great portion of Prince William Sound. And so one of the things we needed to do was to be able to track where the oil was, so that we could get our skimmers into the right place and be most effective in both pick-up and protection. And we did this with fly-overs, we used some infrared techniques, we actually used a little bit of satellite technology in that process, and that work was underway.

We had -- excuse me here while I flip over. We had a traffic control center. We had a lot of air traffic coming and going, particularly in and out of the City of Valdez. So with the FAA and the Air Force and our Exxon aviation group, we had set up an air traffic control center within Valdez.

In addition, if you came into the Anchorage airport, there was also an Exxon desk there, with a big Exxon name on it, for people that were coming in to be able to get to the right place for moving themselves or

A Those were -- those were all Exxon activities, correct.

Q When you got there, you were at that point the highest ranking Exxon executive and the man in charge of managing Exxon's response to the oil spill, is that right?

A That is correct.

Q And did you have your own set of goals that you established to build on what had already been done?

A Yes, I did.

MR. OPPENHEIMER: I'd like to show you what has been marked as Defendant's DX-9356-B. I offer, Your Honor.

(Exhibit DX-9356-B offered)

THE COURT: It's admitted

(Exhibit DX-9356-B admitted)

BY MR. OPPENHEIMER:

Q Is this chart a list of those goals and priorities?

A Yes, it is.

Q Could I ask you to just come up with me and walk the jury through what you set up as Exxon's priorities when you got there.

A We established the priorities that you see here. The first one we talked about, which was offloading the tanker, and that was a very important operation. We had spilled 11 million gallons of oil, and that's serious, and that's what we were working on. But we still had over a million barrels on that tanker, or over --

Q 40 million?

A No. 40 million gallons, but about a million barrels -- 42 gallons to a barrel -- that were still on the tanker. And we had this tanker on the rocks with eight tanks torn open on the bottom, and we had to lighter that oil off of that tanker. Because, you know, if we had spilled any more of that oil, we would have just made the impact that much greater. So we had four times as much oil still on the tanker to get out of there as we had spilled.

We wanted to capture the oil off the water. That's the skimming operation that I talked about. We put out equipment to catch as much oil as we could on top of the water before -- every bit we could capture would be something that wouldn't get on the shoreline, wouldn't damage a bird, wouldn't damage an otter. And so we did that as a major goal and operation.

We had one that we call here to defend the hatcheries and the salmon streams. Within Prince William Sound there are some of the world's greatest fish hatcheries. You heard a little about the one at Sawmill Bay in some earlier testimony. But there's other great hatcheries. There's one at Esther Island and there's the one over at Nellie Juan, and there's one

Q I'd like to return briefly to the goals that you've set up. First thing you said you had to do was contain and offload oil, lightering. Nick, if you could bring up segment 38.

MR. OPPENHEIMER: Exhibit 9360, move admission.

(Exhibit DX-9360 offered)

MR. O'NEILL: No objection.

THE COURT: It's admitted.

(Exhibit DX-9360 admitted)

BY MR. OPPENHEIMER:

Q Would you tell us, are we looking at the lightering operation here?

A Yes. What you're looking at is, of course, the EXXON VALDEZ, and it has eight of his tanks torn open, and inside it has rocks the size of Volkswagons. And it's -- that eight of the 11 tanks that were on it, it had spilled 250-some odd thousand barrels, or 11 million gallons of oil. It was sitting on these rocks, and of course we had two hurricane force storms. We had 15-foot tidal variations each day. And beside that, we brought in a tanker, a smaller tanker which wouldn't ground on the rock, and carefully offloaded the oil that remained on the EXXON VALDEZ, repeatedly, with different ships coming in, until we got all of that oil out of EXXON VALDEZ before we moved it. So that's the lighting operation.

Then we were able to move and fix the vessel for transport and move it to San Diego.

Q And was the lightering operation successful?

A It was successful and it received national awards and recognitions to -- for the kind of job that was done.

It was truly -- it was a tremendous technical and operational feat, and our people that did that were just remarkable.

Q Thanks, Nick. Capturing the oil off the water. Can you give us a little more detail about that, how you did it and what was done?

A That work was primarily done by skimming, and I gave you a brief description of skimming. We brought in every known type of skimmer, and in addition we adapted a few more to operate on the water.

We had some problems. I described to you earlier also a communication problem. And as we went out into the skimming operation, we had the issue -- the fact that our boats couldn't talk to boats because these islands are mountains out there, and marine band communication won't talk -- the marine band radios won't talk across mountains. And in addition, that same frequency on radios didn't talk to aircraft.

So we could have a spotter aircraft out there that

CROSS-EXAMINATION

BY MR. O'NEILL:

Q How are you, Mr. Harrison?

A I'm fine, Mr. O'Neill.

Q We've known each other for many years, haven't we?

A Yes, sir.

Q With regard to the oil spill, Exxon spilled the oil?

A Yes, sir.

Q And it had a legal obligation to clean it all up.

A I don't know about the legal obligation. I do know that we took responsibility, we agreed to do that, and we did it.

Q And you pled guilty to a criminal charge of negligent discharge of oil, didn't you?

A Mr. O'Neill, I'm just not -- that was not a case I was involved in, I don't know.

Q Now this was -- it's one of the great disasters of modern times, isn't it?

A This was the largest oil spill in U.S. waters, and at the time it occurred it was the 33rd largest oil spill in the world.

Q I was curious about one of the statements you made. Could we have the picture of the lightering vessel, I think it's DX-9360. I do want to talk, if we could, just for a minute about this, which is the first thing that you talked about.

A Right.

Q Only about 1/5th of the oil on the vessel spilled.

A That is correct.

Q And you said that you -- well, one of the reasons that you lightered the 40 million gallons that were still on the ship was because if they would have also spilled, it would have made the impact that much greater. Do you recall saying that?

A Yes, sir, and that is correct.

Q Tell me about that.

A Well, you know, we had spilled the 10 million barrels -- pardon me. Wrong number, that tanker wouldn't carry that much. 10 million gallons of oil on the water.

Q There's 40 gallons to a barrel?

A About 42 gallons to a barrel.

Q 42. And people sometimes say gallons and they sometimes say barrels?

A But I'm talking gallons here for a moment. So we had spilled about 11 million gallons. There were a little over 40 million gallons still on the ship. So the ship, all told, carried something in excess of 50 million gallons.

Q And there was a chance that the rest of the oil -- a good chance that the rest of the oil could have spilled?

A There was a possibility that the rest of the oil could have spilled.

Q And you brought in a fellow named Deppe, and he was able to, to his great credit, get those additional 40 million gallons off.

A We had Deppe, along with a very skilled crew, and we had the Coast Guard right there with us, and we were able to get the oil off of that vessel, yes, sir.

Q And this really isn't really a cross-examination point or anything, but just to recognize the fact, Captain Deppe put his life at risk to do that.

A You know, I think that you have to say that a ship that's been damaged that much, that went through two hurricane level storms before we got in that offloading, that had to be a risky situation. We did everything that we could to make that as safe as possible for people and everybody around during the process, but you've got to say that you have to do that, because it is a risky program.

Q And if you hadn't done that, and you would have lost the other 40 million gallons of oil, there could have been even a greater impact on wildlife, beaches, fishing seasons, Native subsistence. There would have been, wouldn't there?

A I think you'd have to say that more oil would lead you in that direction, yes, sir.

Q More oil would have caused the whole group of people, from fishermen to Natives to animals, to suffer even more than they already suffered?

A It would have had a greater impact wherever the oil was going, and that includes the range of a range of things, yes, sir.

Q You're here -- you said you retired, but you're here in court as the company's formal representative, aren't you, sir?

A Yes, sir.

Q I want to talk a little bit about, if I could, about the capture of oil off the water.

What percentage do you think of oil off the water that you captured?

A As you know, we did not capture a large percentage. We captured -- I think we cleaned up probably 10 to 20 percent off of the water. Once the storms spread out the oil over as much oiled area in square miles as it did, the task of recovering oil off the water was very difficult.

Q Now, you talked a little bit about defending salmon streams, and you had -- you said that no fish were killed, and you use that as a trivia question.

A I use that as a trivia question, yes, sir.

CERTIFICATE

We, LEONARD J. DiPAOLO, Registered Professional Reporter; and KIM BEHRENS, Registered Merit Reporter and Certified Realtime Reporter, Notary Publics in and for the State of Alaska, do hereby certify:

That the proceedings were then taken before us at the time and place herein set forth; that the testimony and proceedings were reported stenographically and later transcribed under our direction by computer transcription; that the foregoing is a true record of the testimony and proceedings taken at that time; and that we are not a party to nor have any interest in the outcome of the action herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 14th day of July, 2002.

LEONARD J. DiPAOLO
Notary Public for Alaska
My Commission Expires: 2-3-2004

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 14th day of July, 2002.

Kim Behrens
KIM BEHRENS
Notary Public for Alaska
My Commission Expires: 4/24/04

APPENDIX B

SUMMARY OF POTENTIAL PENALTIES

The following summarizes the relevant potential penalties:

	Penalties as of March 24, 1989	**Penalties After Exxon Valdez Inspired Amendments**
For 11 million gallon spill (per defendant)	Criminal Fine $5.1 billion Civil Penalties $80.5 million Total **$5.2 billion** **and imprisonment**	Criminal Fine $5.1 billion Civil Penalties $1.3 billion Total **$6.4 billion** **and imprisonment**
For 53 million gallon spill (per defendant)	Criminal Fine $5.1 billion Civil Penalties $386.7 million Total **$5.5 billion** **and imprisonment**	Criminal Fine $5.1 billion Civil Penalties $4.3 billion Total **$9.4 billion** **and imprisonment**

A. Criminal Penalties.

Order 358, 236 F. Supp. 2d at 1066, discusses the calculation of the available federal criminal penalty. This figure does not take into account the unquantified harms discussed in Order 358, 236 F. Supp. 2d at 1062-63.

B. Civil Penalties as of March 24, 1989.

1. State Civil Penalties.

Under AS 46.03.758(b) and 18 AAC 75.570(3), as they existed on March 24, 1989, the applicable state civil penalty was the product of four numbers:

1. Number of gallons spilled;

2. A base penalty per gallon, determined according to "the most sensitive receiving environment." 18 AAC 75.570(3). In this case, the applicable base penalty was $2.50 per gallon, *see* 18 AAC 75.570(1), because receiving environments included:

(a) "marine water within the boundaries of state game refuges," 18 AAC 75.520(a)(1)(A), and National Wildlife Refuges, 18 AAC 75.520(a)(1)(D) (*e.g.*, Kodiak National Wildlife Refuge, designated as a state game refuge under AS 16.20.030(a)(9), qualifies as both);

(b) "marine water within one statute mile of a seabird colony or marine mammal rookery or hauling ground identified by the Alaska Department of Fish and Game in Alaska's Wildlife and Habitat, January, 1973," 18 AAC 75.520(a)(1)(F) (*e.g.*, along the southern Kenai Peninsula coast, see attached pages M50A, M50D and M51D from the referenced 1973 ADF&G publication); and

(c) "high density sea otter habitat identified" in the same publication, 18 AAC 75.520(a)(1)(G) (*e.g.*, Afognak and Shuyak Islands, see attached page M47B from the referenced publication).

See generally PX-226 (Hazmat display of path of oil).

3. A factor determined by calculating "the arithmetic mean of the toxicity, degradability, and dispersibility factors" applicable to the product spilled. 18 AAC 75.570(3). Crude oil was classified as moderately toxic, 18 AAC 75.540(2)(D), moderately degradable, 18 AAC 75.550(2)(D), and moderately dispersible, 18 AAC

75.560(2)(D), yielding toxicity, degradability and dispersibility factors of 0.75, 0.5 and 0.5, respectively. 18 AAC 75.570(2)(A)(ii), (B)(ii), (C)(ii). The arithmetic mean of these factors was $0.58\overline{3}$; and

4. A multiplier of 5 for "discharges of oil which are caused by the gross negligence or intentional act of the discharger . . . ." AS 46.03.758(b)(2).

These factors yield the following calculations:

11 million gallons x \$2.50/gallon x $0.58\overline{3}$ x 5 = \$80.2 million

53 million gallons x \$2.50/gallon x $0.58\overline{3}$ x 5 = \$386.5 million[1]

2. Federal Civil Penalties.

Pursuant to a variety of statutes, *see* Plaintiffs' 2002 Mem. at 70 n.61, a number of federal penalties could have been imposed. Several of these penalties imposed specified amounts "per violation" or "per day." The summary chart above assumes only a single violation of each statute on a single day, yielding penalties in excess of \$200,000.

C. Civil Penalties After *Exxon Valdez*-Inspired Amendments.

1. State Civil Penalties.

In 1989, AS 46.03.759 was amended to provide for civil penalties of \$8.00 per gallon for the first 420,000 gallons discharged and \$12.50 for each additional gallon, to be multiplied by 4 if "the discharge was caused by the gross negligence or intentional act of the defendant," subject to a maximum penalty of $500 million. AS 46.03.759(a)(1), (a)(2), (c)(1). The $500 million maximum penalty would apply to spills of 11 million and 53 million gallons.

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[1] Copies of the relevant Alaska statutes and regulations as they existed on March 24, 1989 are attached for the Court's convenience. The calculations set forth above correct errors contained in the table set forth in Plaintiffs' 2002 Memorandum that had understated the state civil penalties as of March 24, 1989.

2. Federal Civil Penalties.

The Oil Pollution Act of 1990 imposed a civil penalty on discharges of oil on account of "gross negligence or willful misconduct" of $3,000 per barrel. 33 U.S.C. § 1321(b)(7)(D). The penalty for an 11 million gallon spill would be $786 million. *See In re: the* Exxon Valdez, 270 F.3d at 1246. The penalty for a 53 million gallon spill would be $3.8 billion (53 million gallons ÷ 42 gallons/barrel x $3,000/barrel).

APPENDIX B

ATTACHED STATUTES AND REGULATIONS IN EFFECT AS OF MARCH 24, 1989

1.	AS 46.03.758: Civil Penalties for Discharge of Oil
2.	18 AAC 75.500-.600: Schedule of Civil Penalties
3.	AS 16.20.030: Refuges Established
4.	Alaska's Wildlife & Habitat, January, 1973 (pages M47B, M50A, M50B, M51D)

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ALASKA STATUTES

Title 46

Water, Air, Energy, and Environmental Conservation

SEPTEMBER 1987

SER 1811

Cross references. — For discharge of ballast into navigable waters, see AS 30.50.020.

NOTES TO DECISIONS

Alaska and Coast Guard regulations can be applied concurrently. — The objectives of this section do not conflict with those of the Coast Guard regulations under the Ports and Waterways Safety Act of 1972, as amended by the Ports and Tanker Safety Act of 1978 (PWSA/PTSA); therefore, the Alaska and Coast Guard regulations can be applied concurrently in Alaska territorial waters. Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984), cert. denied, U.S. 105 S. Ct. 2686, 86 L. Ed. 2d 703 (1985).

Sec. 46.03.755. Discharge reporting. (a) A person in charge of a facility, operation or vessel, as soon as the person has knowledge of any discharge from the facility, operation or vessel in violation of AS 46.03.740 or 46.03.750, shall immediately notify the department of the discharge.

(b) Notwithstanding (a) of this section, the department may enter into a written agreement with a person for the periodic reporting of minor discharges other than into the waters of the state. (§ 8 ch 220 SLA 1976; am § 4 ch 266 SLA 1976; am § 4 ch 116 SLA 1980)

Sec. 46.03.758. Civil penalties for discharges of oil. (a) The legislature finds that

(1) recent information discloses that the discharge of oil may cause significant short and long-term damage to the state's environment. Even minute quantities of oil released to the environment may cause high mortalities among larval and juvenile forms of important commercial species, may affect salmon migration patterns, and may otherwise degrade and diminish the renewable resources of the state;

(2) the exact nature and extent of oil pollution can be neither documented with certainty nor precisely quantified on a spill-by-spill basis; however, in light of the magnitude of harm which may be caused by oil discharges, and the vital importance of commercial, sport and subsistence fishing, tourism, and Alaska's natural abundance and beauty to the economic future of the state and its quality of life, it is the judgment of the legislature that substantial civil penalties should be imposed for the discharge of oil in order to provide a meaningful incentive for the safe handling of oil and to insure that the public does not bear substantial losses from oil pollution for which, because of its subtle, long-term or unquantifiable nature, compensation would not otherwise be received; and

(3) the handling of oil in large quantities is a hazardous undertaking which poses a significant threat to the economy and environment of the state, which can be substantially reduced only by the taking of rigorous safety precautions involving considerable expense; conversely, persons handling oil in smaller amounts pose a correspond-

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984), cert. denied, U.S.
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ingly lower risk to the economy and environment of the state, and are capable of safe oil handling practices at correspondingly lower costs; in order to provide an incentive which is effective, but not punitive, it is necessary and appropriate that the assessment of civil penalties for discharges of small quantities of oil be left for case-by-case judicial determination, while insuring, through the penalty provisions of this section, that the handling of oil in large quantities occurs in a manner which will not impair the renewable resources of the state.

(b) No later than the 10th day after the convening of the Second Session of the Tenth Alaska Legislature, the department shall submit to the legislature regulations establishing the following schedule of fixed penalties for discharges of oil:

(1) Subject to (2) of this subsection, the penalties for the following categories of receiving environments may not exceed

(A) $10 per gallon of oil which enters an anadromous stream or other freshwater environment with significant aquatic resources;

(B) $2.50 per gallon of oil which enters an estuarine, intertidal or confined saltwater environment; and

(C) $1 per gallon of oil which enters an unconfined saltwater environment, public land or freshwater environment without significant aquatic resources.

(2) For discharges of oil which are caused by the gross negligence or intentional act of the discharger, or when the court finds that the discharger did not take reasonable measures to contain and clean up the discharged oil, the penalty shall be determined by multiplying the penalty established under (1) of this subsection by a factor of five.

(c) Regulations adopted under (b) of this section shall become effective 60 days after submission to the legislature, unless disapproved by a special concurrent resolution introduced in either house, and concurred in by a majority of the members in joint session within 60 days of the submission of the regulations. The department may periodically revise regulations adopted under (b) of this section. Revised regulations shall be submitted to the legislature no later than 10 days after the convening of the appropriate regular session of the legislature, and are subject to disapproval as specified in this subsection.

(d) The schedule shall vary according to the toxicity, degradability and dispersal characteristics of the oil. The schedule shall also vary according to the sensitivity and productivity of the receiving environment. Variations under this subsection may be by subcategories of receiving environments, specific receiving environments, or both. The maximum penalties established in (b) of this section shall apply to discharges in the most sensitive and productive of receiving environments within each category of receiving environment, and the penalty shall decrease for less productive or sensitive receiving environments.

(e) After April 19, 1978, if a discharge of oil in excess of 18,000 gallons not permitted under applicable state and federal law occurs within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state, the following persons, in addition to the person causing or permitting the discharge, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established in the regulations, or $100,000,000, whichever is less,

(1) if the discharge occurs from any commercial or industrial facility other than a vessel or offshore platform, the owner, lessee or permittee, and operator of the facility;

(2) if the discharge occurs from a vessel,

(A) the owner and operator of the vessel; and

(B) the owner of the oil carried as cargo on the vessel at the time the vessel was loaded, if the loading occurred within the territorial jurisdiction of the state, or at a deepwater port or other offshore storage facility adjacent to the state; however, if the owner of the oil temporarily transfers ownership of the oil to another person, and the transfer has the purpose or effect of evading the vicarious liability imposed by this section, the transferor will be considered the owner of the oil for the purposes of this subsection; and

(3) if the discharge occurs from an offshore platform, the lessee or permittee of the tract or acreage upon which the platform is situated, and the operator of the platform.

(f) The court shall deduct from the penalties for which the person charged is liable under (e) of this section that amount of oil which was removed from the environment as a result of a cleanup operation undertaken in conformity with applicable state and federal law, unless the oil was removed by an agency of state, local or federal government. The dispersal of oil through the use of chemical agents or other means is not considered removal for the purposes of this subsection. The court may estimate the amount of oil removed.

(g) Except as provided in (f) and (j) of this section, the entire penalty specified in the regulations shall be imposed, except that a person who discharges oil into a receiving environment may demonstrate, by a preponderance of evidence, that mitigating circumstances relating to the effects of the discharge would make imposition of the full penalty inappropriate. In determining whether mitigating circumstances exist, the court shall recognize that scientific knowledge pertaining to oil spills is very limited and if there is insufficient knowledge either to predict a base case or to show mitigating circumstances varying from that base case, the administratively established schedule of penalties shall apply. If mitigating circumstances are proven by a preponderance of the evidence, the court may reduce or totally eliminate the penalty, in accordance with the purposes of this section.

(h) A person otherwise liable for penalties under (e) of this section is not liable if the person demonstrates, by a preponderance of the evidence, that the discharge occurred solely as a result of

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(1) an act of God;

(2) an act of a third person with intent to cause a discharge, unless the third person is a person with whom the person charged is made jointly and severally liable under (e)(1) — (3) of this section;

(3) a negligent or intentional act of the State of Alaska or the United States; or

(4) an act of war.

(i) Notwithstanding AS 46.03.875, a person liable under this section is not also liable for the discharge of oil under AS 46.03.760(a). A person causing or permitting a discharge of oil of 18,000 gallons or less not permitted under applicable state or federal law is liable for that discharge under the penalty provisions of AS 46.03.760(a); however, the court may impose a penalty of less than $500 for the discharge.

(j) The court may reduce the penalty imposed under this section if the person charged demonstrates, by a preponderance of the evidence, that the discharge was caused solely by a negligent act of a third person, unless the third person is a person with whom the person charged is made jointly and severally liable under (e)(1) — (3) of this section.

(k) *[Repealed, § 19 ch 59 SLA 1986.]*

(*l*) In this section

(1) "adjacent outer continental shelf" means that portion of the outer continental shelf which would be within the territorial jurisdiction of the state if its boundaries were extended seaward to the outer margin of the outer continental shelf;

(2) "confined saltwater environment" means a bay, sound or other partially enclosed saltwater body in which flushing through tidal or current action is significantly restricted;

(3) "discharge of oil" means the entry of oil into or upon the water or public land of the state (except oil discharges into an enclosed and impervious oil spill containment area), regardless of causation;

(4) "intertidal" means the ocean area between highest high water and lowest low water of tidal action;

(5) "offshore platform" means an offshore structure, whether floating or temporarily or permanently secured to the floor of the ocean or other water body, which is used primarily for the exploration for or production of oil or natural gas;

(6) "oil" means petroleum, crude oil, and any substance refined from petroleum or crude oil;

(7) "operator" means the person who, through contract, lease, sublease, or otherwise, exerts general supervision and control of activities at the facility; the term includes, by way of example and not limitation, a prime or general contractor, the master of a vessel and the master's employer, or any other person who, personally or through an agent or contractor, undertakes the general functioning of the facility;

(8) "vessel" means any form or manner of watercraft, whether or not capable of self-propulsion, except offshore platforms. (§ 1 ch 129 SLA 1977; am §§ 1-3 ch 128 SLA 1978; am § 110 ch 59 SLA 1982; am § 19 ch 59 SLA 1986)

Revisor's notes. — In 1987, a reference in paragraph (b)(1) to "(3) of this subsection" was changed to "(2) of this subsection" to correct a manifest error.

Cross references. — For provision that actions brought under this section may be brought directly against insurers or other persons providing evidence of financial responsibility, see AS 46.04.040(e).

For schedule of civil penalties under (b) of this section, see 18 AAC 75.510 — 18 AAC 75.600.

Effect of amendments. — The 1986 amendment repealed subsection (k), concerning the "oil spill mitigation account."

Editor's notes. — The effective date (referred to in (e) of this section) of the regulation adopting the schedules is April 19, 1978.

Sec. 46.03.760. Civil action for pollution; damages. (a) A person who violates or causes or permits to be violated a provision of this chapter other than AS 46.03.250 — 46.03.314, or a provision of AS 46.04 or AS 46.09, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter or AS 46.04 or AS 46.09 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $500 nor more than $100,000 for the initial violation, nor more than $5,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, which shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged.

(b) Except as determined by the court under (f)(4) of this section, actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature.

(c) The court, upon motion of the department or upon its own motion, may defer assessment of all or part of that portion of the sum imposed upon a person under (a)(3) of this section conditioned upon the person complying, within the shortest feasible time, with the requirement for which a violation is shown.

(d) As used in this section, "economic savings" means that sum which a person would be required to expend for the planning, acquisi-

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ALASKA ADMINISTRATIVE CODE

REG. 107
PART 5

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(1) "approved loading manual" means the manual including information regarding trim and stability, hullbending moment, and information meeting the requirements of 46 CFR § 45.105;

(2) "containment and exclusion equipment" means booms, logs, curtains, and other devices designed or constructed and deployed in order to control, concentrate and restrict the movement and spreading of oil;

(3) "discharge" means any spilling, leaking, pumping, pouring, sweating, emitting, emptying, or dumping;

(4) "lightering" means pumping or transferring of oil from cargo compartments of tank vessels to another vessel or storage container;

(5) "liquefied petroleum gas" means natural gas converted to a liquid state by pressure and cooling, butane, propane, and other light ends which at 70 degrees F. and atmospheric pressure revert to the gaseous state. (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

Editor's notes. — For the purposes of this chapter, the following terms are defined in AS 46.04.120: "department"; "offshore exploration and production facility"; "oil"; "oil barge"; "oil terminal facility"; "operator"; "person"; "tank vessel"; "vessel."

Article 5. Schedule of Civil Penalties

Section
500. Applicability
510. Freshwater environments
520. Marine environments
530. Public land environments
540. Toxicity of petroleum, petroleum products, and byproducts
550. Degradability of petroleum, petroleum products, and byproducts

Section
560. Dispersibility of petroleum, petroleum products, and byproducts
570. Schedule of civil penalties
580. Prosecutorial discretion
590. Annual report
600. Definitions

18 AAC 75.500. APPLICABILITY. 18 AAC 75.510 — 18 AAC 75.600 establish a schedule of civil penalties for the discharge of oil under AS 46.03.758. The schedule of civil penalties established by this chapter does not apply to discharges of oil which are specifically made subject to the penalty provisions of AS 46.03.760(a). (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.510. FRESHWATER ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(A), freshwater environments with significant aquatic resources are classified as follows:

(1) Critical freshwater environments include

(A) surface and subsurface water supplies for which the commissioner of natural resources has issued a water use permit under AS 46.15.040 et seq., or which are in fact being used for a purpose that would qualify for a water use permit;

(B) rivers, lakes, and streams designated under AS 16.05.870(a) as important for the spawning, rearing, or migration of anadromous fish, and the water of lakes, streams, and rivers which flows or empties into those designated waters;

(C) lakes, streams, rivers, and freshwater wetlands within the boundaries of land administered under the National Wildlife Refuge System, and the water of lakes, streams, and rivers which flows or empties into those waters;

(D) lakes, streams, rivers, and freshwater wetlands within the boundaries of game reserve areas, refuges, critical habitat areas, and sanctuaries established under AS 16.05.255(1) or AS 16.20, and the water of lakes, streams, and rivers that flows or empties into those waters; and

(E) lakes, streams, rivers, and freshwater wetlands within the boundaries of fish reserve areas, refuges, critical habitat areas, and sanctuaries established under AS 16.05.251(1) or AS 16.20, and the water of lakes, streams, and rivers that flows or empties into those waters;

(2) Sensitive freshwater environments include

(A) lakes other than those classified in (1) of this subsection;

(B) freshwater wetlands other than those classified in (1) of this subsection; and

(C) subsurface freshwaters other than those classified in (1)(A) of this subsection.

(b) For the purposes of AS 46.03.758(b)(1)(C), all freshwater of the state not classified in (a)(1) or (2) of this section is classified as without significant aquatic resources. (Eff. 4/19/78, Register 66; am 8/6/87, Register 103)

Authority: AS 46.03.758

18 AAC 75.520. MARINE ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(B), estuarine, intertidal and saltwater environments are classified as follows:

(1) Critical marine environments include

(A) marine water within the boundaries of state game refuges established under AS 16.05.255(1) or AS 16.20;

(B) marine water within the boundaries of fish and game critical habitats established under AS 16.20;

(C) marine water within the boundaries of marine sanctuaries established under 33 U.S.C. 1401 *et seq.*, (P.L. 92-532);

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(D) marine water within the boundaries of areas administered under the National Wildlife Refuge System;

(E) marine water within one statute mile of the mouth of waters designated under AS 16.05.870(a) as important for the spawning, rearing or migration of anadromous fish;

(F) marine water within one statute mile of a seabird colony or marine mammal rookery or hauling ground identified by the Alaska Department of Fish and Game in Alaska's Wildlife and Habitat, January, 1973;

(G) high density sea otter habitat identified by the Alaska Department of Fish and Game in Alaska's Wildlife and Habitat, January, 1973; and

(H) marine water within the barrier island-lagoon ecosystems extending from the Colville River to Canning River, and seaward of the Copper River delta;

(2) Sensitive marine environments include

(A) the inside waters of Southeast Alaska not otherwise classified in (1) of this subsection;

(B) saltwater wetlands and other intertidal and estuarine areas not otherwise classified in (1) of this subsection; and

(C) Prince William Sound, and the bays, arms, fjords, ports and other inside marine waters of Prince William Sound; and

(D) all marine water within 10 statute miles of any point of those waters designated in (1) of this subsection.

(b) For the purposes of AS 46.03.758(b)(1)(C), marine water not classified in (a) of this section is classified as without significant aquatic resources. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.530. PUBLIC LAND ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(C), public land is classified as follows:

(1) Critical terrestrial environments include

(A) state game reserve areas, refuges and sanctuaries established under AS 16.05.255(1) or AS 16.20 *et seq.*;

(B) state parks, campgrounds and waysides;

(C) municipal parks and park reserves;

(D) national parks, preserves, wilderness areas, monuments, recreation areas and lands administered under the National Wildlife Refuge System;

(E) established campgrounds, scenic waysides and picnic areas; and

(F) national historical sites;

(2) Very sensitive terrestrial environments include

(A) land administered under the National Forest System not otherwise classified in (1) of this subsection;

(B) land underlain with continuous permafrost not otherwise classified in (1) of this subsection; and

(C) land in state forests and research areas not otherwise classified in (1) of this subsection;

(3) Sensitive terrestrial environments include land other than that classified in (1) or (2) of this subsection upon which continuous natural terrestrial vegetation cover is present.

(b) For the purposes of AS 46.03.758(b)(1)(C), all public land not classified in (a) of this section is classified as without significant terrestrial environmental resources. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.540. TOXICITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes of AS 46.03.758(d), the toxicity of petroleum, petroleum products, and byproducts is as follows:

(1) highly toxic
  (A) numbers 1, 2 and Arctic diesel fuel and heating oil;
  (B) jet aviation fuels A and B;
  (C) motor gasoline including aviation gasoline;
  (D) kerosene; and
  (E) stationary turbine fuels;
(2) moderately toxic
  (A) waste oil and waste oil mixtures;
  (B) lubricating oil;
  (C) jet fuels other than those specified in (1)(B) of this section; and
  (D) crude oil;
(3) less toxic
  (A) bunker and residual fuel oils; and
  (B) hydraulic fluids;
(4) relatively nontoxic
  (A) asphalts;
  (B) tars; and
  (C) other petroleum, petroleum products, and byproducts not listed in (1) — (3) of this section. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.550. DEGRADABILITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes of AS 46.03.758(d), the degradability of petroleum, petroleum products and byproducts is as follows:

(1) low degradability
  (A) asphalt;

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(B) tar;
(C) bunker and residual fuel oils; and
(D) other petroleum, petroleum products, and byproducts not otherwise listed in (2) or (3) of this section;
(2) moderate degradability
(A) hydraulic fluids;
(B) lubricating oil;
(C) waste oils and waste oil mixtures; and
(D) crude oil;
(3) high degradability
(A) motor gasoline, including aviation gasoline;
(B) numbers 1, 2 and Arctic diesel fuel and heating oil;
(C) jet and stationary turbine fuels; and
(D) kerosene.
(Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.560. DISPERSIBILITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes of AS 46.03.758(d), the dispersibility of petroleum, petroleum products, and byproducts is as follows:
(1) highly dispersible
(A) motor gasoline, including aviation gasoline;
(B) all jet fuels;
(C) kerosene;
(D) numbers 1, 2 and Arctic diesel fuel and heating oil;
(E) hydraulic fluids; and
(F) stationary turbine fuels;
(2) moderately dispersible
(A) emulsified oil mixtures;
(B) lubricating oils;
(C) waste oil and waste oil mixtures; and
(D) crude oils;
(3) low dispersibility
(A) bunker and residual fuel oils;
(B) asphalts;
(C) tars; and
(D) other petroleum, petroleum products, and byproducts not otherwise listed in (1) or (2) of this section. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.570. SCHEDULE OF CIVIL PENALTIES. The schedule of civil penalties for which a person may be held liable under AS 46.03.758(e) is established as follows:

(1) The base civil penalty for discharges into various receiving environments is as follows:

	Freshwater	Marine	Public Land
Critical environmental resources	$10.00	$2.50	$1.00
Very sensitive environmental resources	N/A	N/A	.75
Sensitive environmental resources	5.00	2.00	.50
Without significant environmental resources	1.00	1.00	.25

(2) Toxicity, degradability and dispersibility factors are as follows:

	Factor
(A) toxicity*	
(i) highly toxic	1.0
(ii) moderately toxic	0.75
(iii) less toxic	0.5
(iv) relatively nontoxic	0.25
(B) degradability**	
(i) low degradability	1.0
(ii) moderate degradability	0.5
(iii) high degradability	0.25
(C) dispersibility	
(i) high dispersibility	0.15
(ii) moderate dispersibility	0.5
(iii) low dispersibility	1.0

(3) The net civil penalty which will be assessed per gallon of oil discharged is calculated by multiplying the base penalty established in (1) of this section by the arithmetic mean of the toxicity, degradability, and dispersibility factors established in (2) of this section. If a portion of the oil enters more than one receiving environment, the civil penalty will be based upon the most sensitive receiving environment which that portion of the oil enters. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

*To determine the toxicity factor for a particular oil, the factor from the table is multiplied by a fraction whose numerator is the percent concentration of aromatics in the oil and whose denominator is 45. In no event shall the toxicity factor exceed 1.0.

The toxicity factor in crude oil is .75 multiplied by a fraction whose numerator is the API gravity of the crude oil and whose denominator is 30.

**The degradability factor for crude oil is .5 multiplied by a fraction whose numerator is 30 and whose denominator is the API gravity of the crude oil.

receiving

arine	Public Land
$2.50	$1.00
N/A	.75
2.00	.50
.00	.25

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Factor
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18 AAC 75.580. PROSECUTORIAL DISCRETION. In appropriate cases, the department will, in its discretion, either settle actions out of court under AS 46.03.758 for less than the full penalty provided for under this chapter, or decline to file an action under AS 46.03.758. This section is intended to confirm the department's litigation discretion, and may not be construed as creating a reviewable decision. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.590. ANNUAL REPORT. Within 10 days after the convening of each regular legislative session, the department will report to the legislature on all actions brought during the preceding calendar year, and the status and disposition of those actions. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.600. DEFINITIONS. As used in secs. 500 — 600 of this chapter

(1) "estuary" means a semienclosed, coastal body of water which has a free connection with the sea and within which seawater is measurably diluted with freshwater derived from land drainage;

(2) "freshwater wetlands" means those environments characterized by rooted vegetation which is partially submerged either continuously or periodically by surface freshwater with less than .5 parts per thousand salt content and not exceeding three meters in depth;

(3) "inside waters of Southeast Alaska" includes all those marine waters lying inside the boundary line established in 33 C.F.R. secs. 82.1705-1730, 42 Federal Register 35791 (July 11, 1977);

(4) "marine water" means all saltwater environments, including saltwater wetlands, estuaries, and the intertidal zone;

(5) "permafrost" means soil or other earth material supporting vegetation with a temperature which remains below 0 degrees Celsius (32 degrees Fahrenheit) for two or more years;

(6) "Prince William Sound" includes all marine water lying inside the boundary line established in 33 C.F.R. sec. 82-1740, 42 Federal Register 35791 (July 11, 1977;) and

(7) "saltwater wetlands" means those coastal areas along sheltered shorelines characterized by halophytic hydrophytes and macroalgae extending from extreme low tide to an area above extreme high tide which is influenced by sea spray or tidally induced water table changes. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

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September 1987

(3) special recognition of the value to the state and the na areas of unspoiled habitat and the game characteristic to it demonstrated by designating as state game refuges those lands which were National Bird and Wildlife Refuges or Ranges time that Alaska achieved statehood. (§ 1 ch 114 SLA 1960

Collateral references. — 38 C.J.S., Game, §§ 7, 8, 15.

Sec. 16.20.020. Purpose. The purpose of this chapter is to and preserve the natural habitat and game population in certain ignated areas of the state. (§ 1 ch 114 SLA 1960)

Sec. 16.20.030. Refuges established. (a) Those land area included in the National Wildlife Refuge System which are ci this subsection are designated as state game refuges, and the shall assign them appropriate refuge names:

(1) Aleutian Islands Refuge (except Umnak, Unalaska, Akutan, Sanak, and Tigalda Islands);

(2) Bering Sea Refuge (St Matthews and Hall Islands, and Pi Islet in Bering Sea);

(3) Bogoslof Island Refuge;

(4) Chamisso Island Refuge;

(5) Forrester Island Refuge;

(6) Hazen Bay (Nunivakchak and Kirgegag Islands);

(7) Hazy Islands Refuge;

(8) Kenai National Moose Range;

(9) Kodiak National Wildlife Refuge;

(10) Nunivak Island Refuge;

(11) St Lazaria Island Refuge;

(12) Semidi Islands Wildlife Refuge;

(13) Tuxedni Refuge (Islands in Tuxedni Harbor);

(14) Izembek Refuge, including the tide and submerged lan scribed as follows:

(A) Township 58 South, Range 91 West, Seward Meridian
Sections 1 — 4
Sections 9 — 12

(B) Township 58 South, Range 90 West, Seward Meridian
Sections 1 — 9
Section 16

(C) Township 57 South, Range 91 West, Seward Merid
Section 13
Sections 24 — 26
Sections 35 — 36

(D) Township 57 South, Range 90 West, Seward Meridian
Sections 1 — 36

Township 57 South, Range 89 West, Seward Meridian
tions 5 — 6

Township 56 South, Range 87 West, Seward Meridian
tions 1 — 6
tions 10 — 11

Township 56 South, Range 88 West, Seward Meridian
tions 1 — 23
tions 27 — 32

Township 55 South, Range 87 West, Seward Meridian
tions 1 — 36

Township 56 South, Range 89 West, Seward Meridian
tions 1 — 36

Township 55 South, Range 89 West, Seward Meridian
tions 1 — 36

Township 55 South, Range 88 West, Seward Meridian
tions 1 — 36

Township 55 South, Range 86 West, Seward Meridian
tions 6 — 7
tions 18 — 19
tions 30 — 31

Township 56 South, Range 90 West, Seward Meridian
tire township);

Cape Newenham National Wildlife Range, including tide and merged land in Chagvan Bay described as follows:

Township 16 South, Range 75 West, Seward Meridian
tion 1
tions 11 — 15
tions 22 — 27
tions 34 — 36

Township 16 South, Range 74 West, Seward Meridian
tions 7 — 9
tions 17 — 19
tion 30;

Clarence Rhodes National Wildlife Range;

Arctic National Wildlife Range.

The following described state-owned land and adjacent state r, excluding existing and applied-for highway, pipeline and rail- rights-of-way as of May 20, 1971, are established as the Potter t State Game Refuge: All land and water south and west of and cent to the toe of the bluff which extends from Campbell Point heasterly to Potter Creek. Notwithstanding any other provision of before June 26, 1976, the municipality in which the Potter Point Game Refuge is contained may zone privately owned land in the refuge. If no zoning action is taken by the municipality re June 26, 1976, the Department of Natural Resources may t, in accordance with the Administrative Procedure Act (AS

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A.R.L.I.S.
ANCHORAGE, ALASKA
Est. 1997

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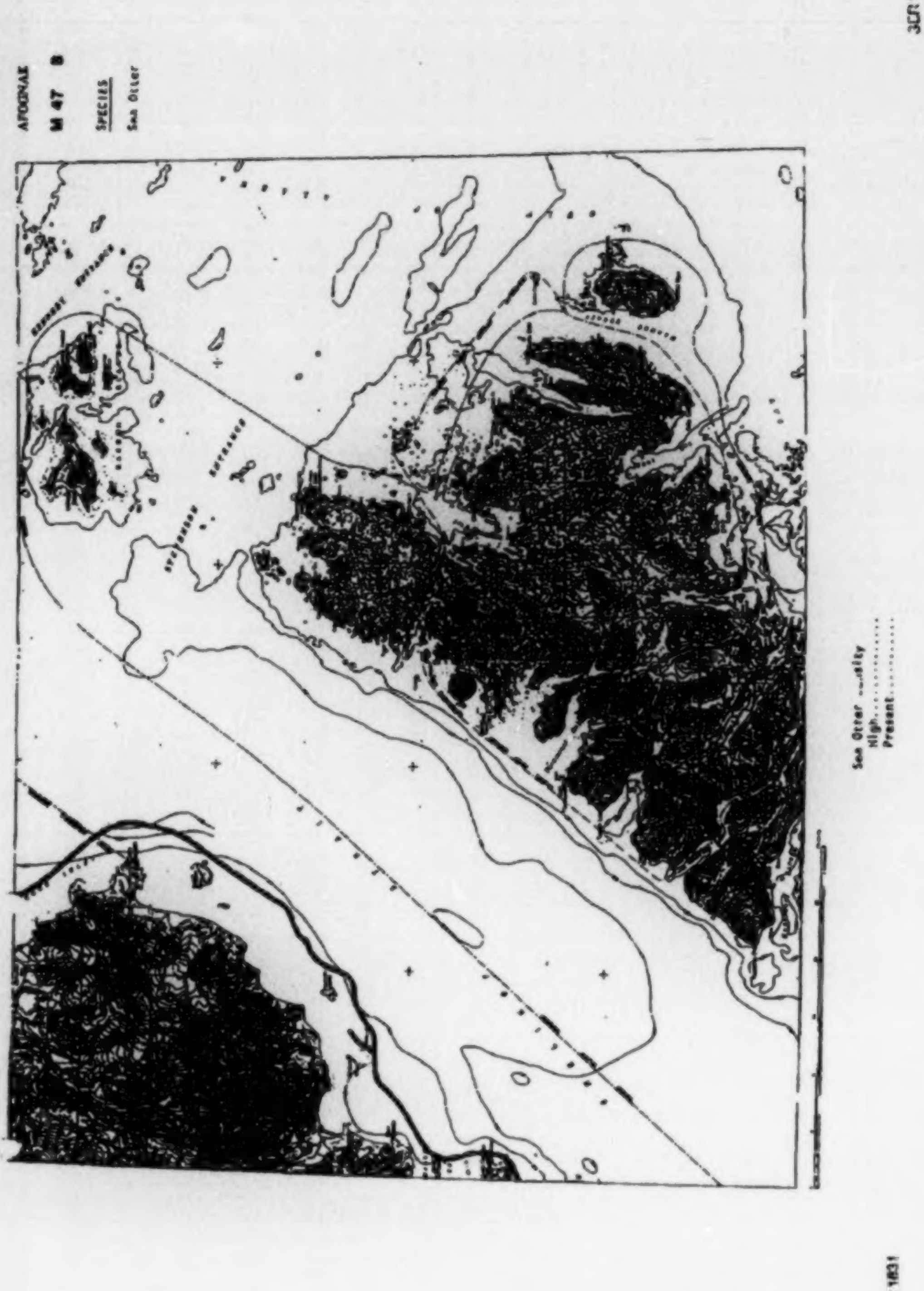
Alaska's Wildlife and Habitat

Alaska Department of Fish and Game

JANUARY, 1973

Funded by Federal Aid in Wildlife Restoration Funds

PRICE: $15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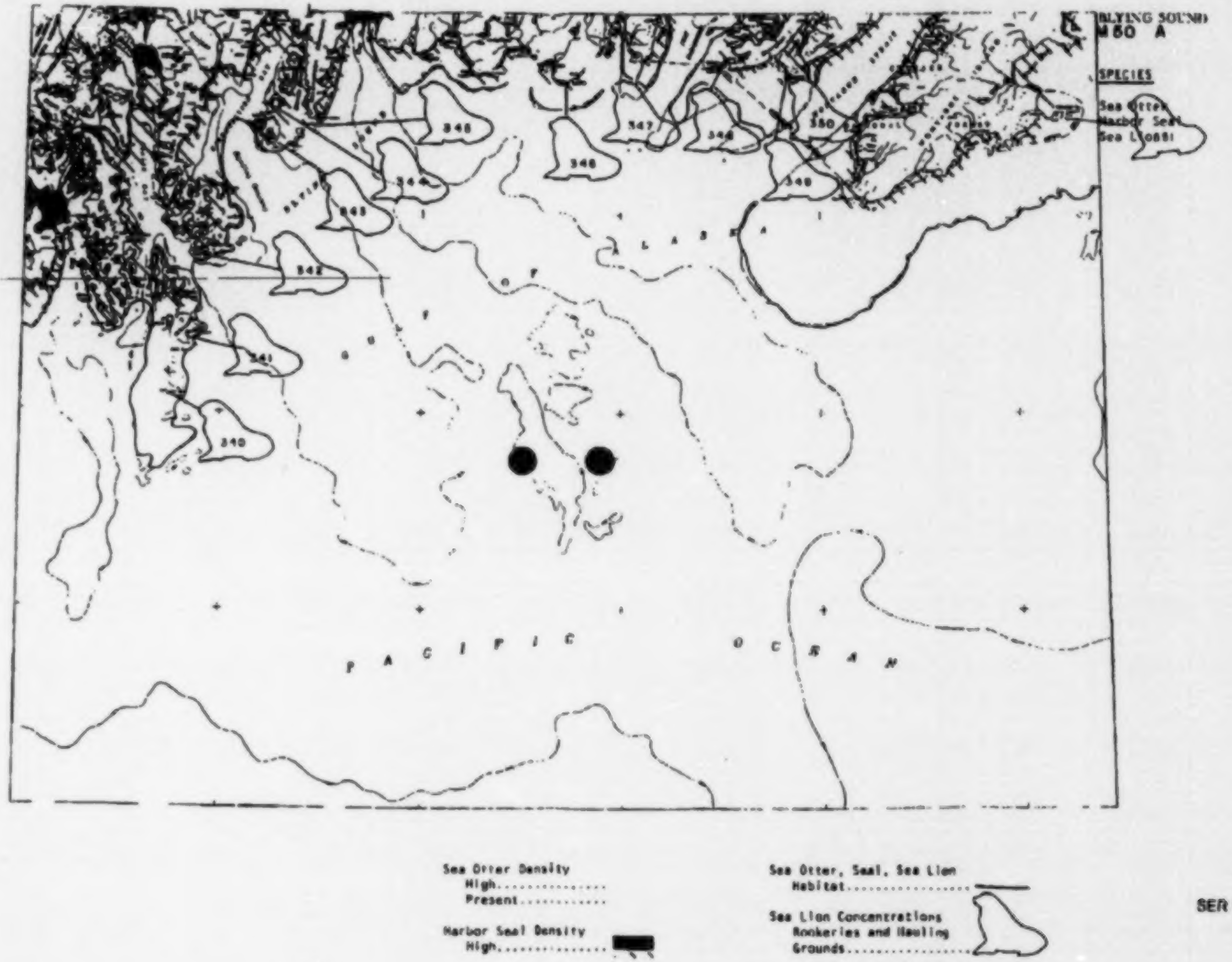
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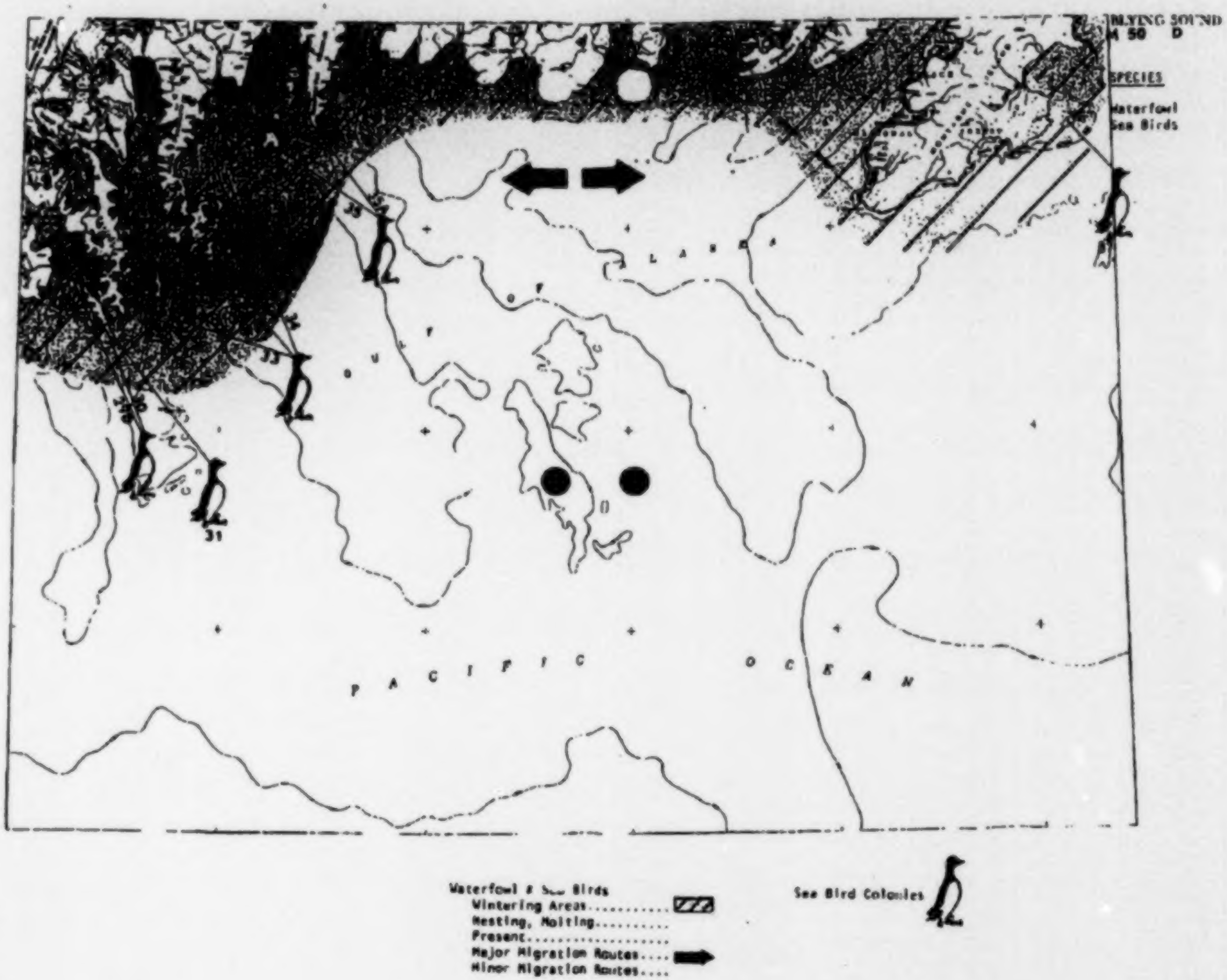
Habitat
Sea Lion Concentrations
Rookeries and Hauling
Grounds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Nesting, Molting..........
Present...................
Major Migration Routes....
Minor Migration Routes....
Sea Bird Colonies

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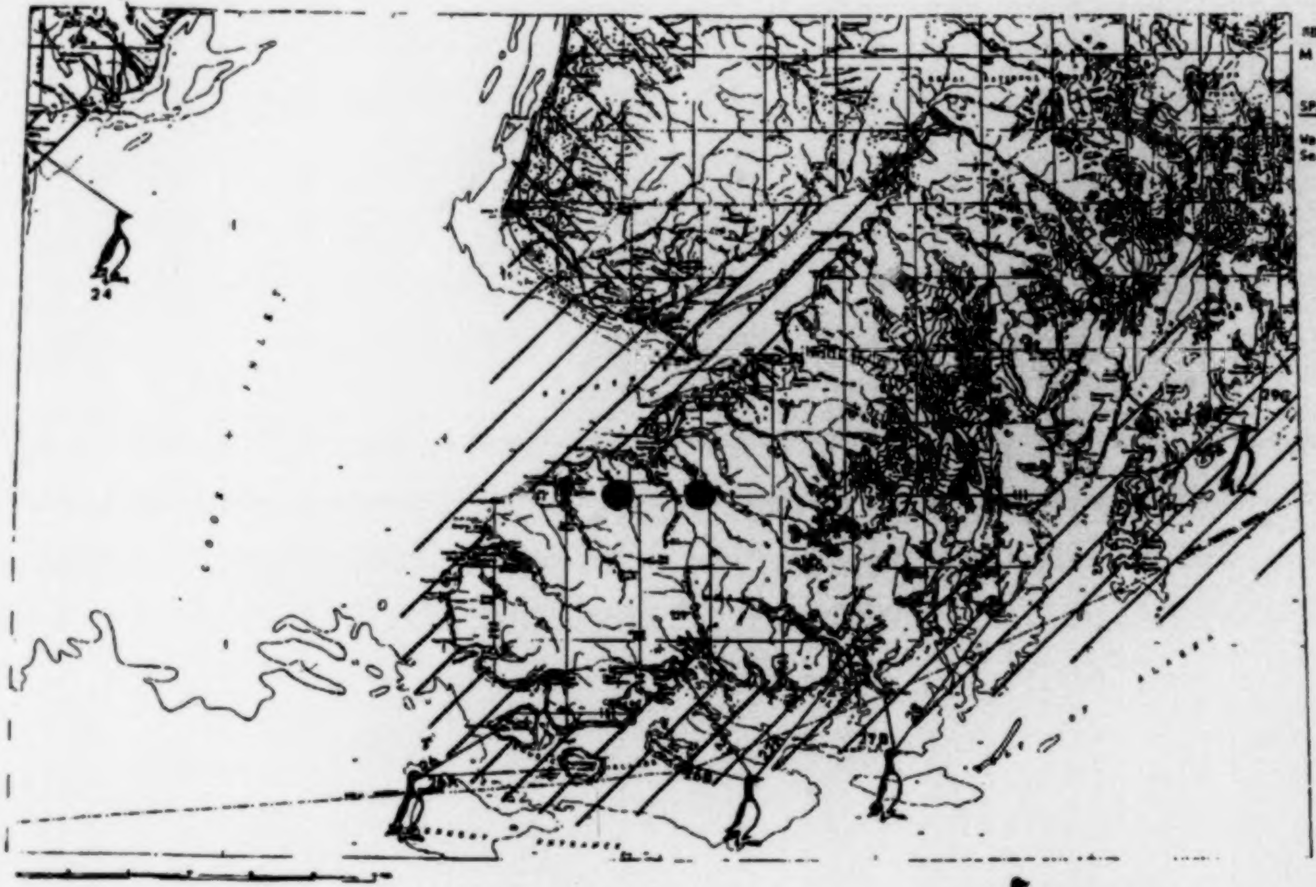

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SPECIES

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Major Migration Routes..
Minor Migration Routes..

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SUPREME COURT, U.S.

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445 pp (22)

No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL JOINT APPENDIX
VOLUME TWO

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Certiorari Granted October 29, 2007

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BRIEF

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IN THE
Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL.,
Petitioners,
v.
GRANT BAKER, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Bell v. Hood, 327 U.S. 678 (1946) 20

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CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995) 17, 21, 22

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Day v. Woodworth, 54 U.S. (13 How.) 363 (1852) 25

De Zon v. American President Lines, 318 U.S. 660 (1943) 19

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Dooley v. Korean Air Lines Co., 524 U.S. 116 (1998) 34

Easley v. Cromartie, 532 U.S. 234 (2001) 26

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Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) 20

Gaffney v. Riverboat Servs. of Indiana, Inc., 451 F.3d 424 (7th Cir. 2006) 26

Gaston v. Flowers Transp., 866 F.2d 816 (5th Cir. 1989) 17

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 26

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 20

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 24

Laidlaw Transit, Inc. v. Crouse, 53 P.3d 1093 (Alaska 2002) 24

Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101 (1893) 14, 22, 23, 25

Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) 17

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 15, 31, 32

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 15, 31, 34

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 15, 31, 33, 34

P & E Boat Rentals, Inc. v. Ennia Gen. Ins. Co., 872 F.2d 642 (5th Cir. 1989) 23

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 16, 17, 22, 24, 25, 26

Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985) 23

Ralston v. The State Rights, 20 F. Cas. 201 (D.C.E.D. Pa. 1836) (No. 11,540) 16-17, 21

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) 13, 17, 27

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 27, 30

Stoot v. D & D Catering Serv., Inc., 807 F.2d 1197 (5th Cir. 1987) 20

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 20

The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818) 13, 20, 21

The City of Carlisle, 39 F. 807 (D. Or. 1889) 21, 23

The Yankee v. Gallagher, 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (No. 18,124) 17, 26

United States v. Maine, 469 U.S. 504 (1985) 2

United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969) 23

Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967) 19, 20

Workman v. Mayor of New York, 179 U.S. 552 (1900) 19

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996) 24, 33

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Clean Water Act, 33 U.S.C. § 1251 *et seq.* 15, 31, 32, 33, 34

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Alaska Stat.:

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LEGISLATIVE MATERIALS

S. Rep. No. 101-94 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722 2

ADMINISTRATIVE MATERIALS

Alaska Dep't of Envtl. Conservation, *The* Exxon Valdez *Oil Spill: Final Report, State of Alaska Response* (June 1993) 2, 3, 4, 7, 8, 9

U.S. Census Bureau, *Statistical Abstract of the United States: 2008* (Oct. 2007), *available at* http://www.census.gov/prod/2007pubs/08statab/pop.pdf 8

1 U.S. Coast Guard, *Federal On Scene Coordinator's Report: T/V Exxon Valdez Oil Spill* (Sept. 1993) 2, 3, 4, 5, 6

U.S. Dep't of Justice & Alaska Dep't of Law, *Comprehensive Plan for Habitat Restoration Projects Pursuant to Reopener for Unknown Injury* (June 2006), *available at* http://www.evostc.state.ak.us/Store/Event_Documents/Comprehensive_Plan_1June2006FINAL.pdf 9

JUDICIAL MATERIALS

Agreement and Consent Decree, *United States and Alaska v. Exxon Corp.*, Nos. A91-082 CIV & A91-083 CIV (D. Alaska filed Oct. 9, 1991) 11, 12

Complaint, *Alaska v. Exxon Corp.*, No. A91-083 CIV (D. Alaska filed Mar. 15, 1991) 11

Governments' Memorandum in Support of Agreement and Consent Decree, *United States and Alaska v. Exxon Corp.*, Nos. A91-082 CIV & A91-083 CIV (D. Alaska filed Oct. 8, 1991) 11, 12

Plea Agreement, *United States v. BP Exploration (Alaska), Inc.*, No. 07-cr-125 (D. Alaska filed Oct. 25, 2007) 9, 10

OTHER MATERIALS

Richard T. Carson et al., *A Contingent Valuation Study of Lost Passive Use Values Resulting from the Exxon Valdez Oil Spill* (Nov. 1992), *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/Economic/Econ_Passive.pdf 5

Richard T. Carson & W. Michael Hanemann, *A Preliminary Economic Analysis of Recreational Fishing Losses Related to the Exxon Valdez Oil Spill* (Dec. 1992), *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/Economic/Econ_Fishing.pdf 7

Exxon Valdez Oil Spill Trustee Council:

Exxon Valdez *Oil Spill Restoration Project Final Report: Information Synthesis and Recovery Recommendations for Resources and Services Injured by the* Exxon Valdez *Oil Spill* (Oct. 2006), *available at* http://www.evostc.state.ak.us/Files.cfm?doc=/Store/FinalReports/2006-060783-Final.pdf 5, 6, 7, 8

Update on Injured Resources and Services 2006 (Nov. 2006), *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/2006IRSUpdate.pdf 5, 6, 8

George Frost, *2nd Spill Settlement Looks Like the 1st; Exxon Agrees to $125 Million Criminal Fine for 1989 Oil Spill*, Anchorage Daily News, Oct. 1, 1991, at A1 12-13

Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975) 23

Inst. of Social & Econ. Research, Univ. of Alaska Anchorage, *Alaska Gross State Product: 1961-1998* (June 1999), *available at* http://www.iser.uaa.alaska.edu/publications/client/gsp/GSP992.pdf 5

2 John C. Kircher & Christine M. Wiseman, *Punitive Damages Law & Practice* (2d ed. 2005) 24

Wesley Loy, *Crews Clean Up Spill on North Slope*, Anchorage Daily News, Dec. 18, 2007, at B1 10

McDowell Group, *An Assessment of the Impact of the* Exxon Valdez *Oil Spill on the Alaskan Tourism Industry* (Aug. 1990), *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/Economic/Econ_Tourism.pdf 7

Restatement (Third) of Agency (2006) 24

Restatement (Second) of Torts (1979) 23, 24, 29

David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997) 16, 17, 21, 26

Thomas J. Schoenbaum, *Admiralty and Maritime Law* (4th ed. 2004):

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Douglas A. Wolfe et al., *The Fate of the Oil Spilled from the* Exxon Valdez, 28 Envtl. Sci. & Tech. 561A (1994) 4

INTEREST OF *AMICUS CURIAE*

The State of Alaska depends on maritime shipping, commercial fishing, and the petroleum industry for most of its economic livelihood. Alaska therefore has a significant interest in ensuring that remedies under the general maritime law balance properly the needs of those industries with the need to compensate Alaska's citizens for, and appropriately deter and punish, corporate wrongdoing. For that reason, Alaska has long supported the efforts of its citizens to recover the full spectrum of remedies for their private economic and emotional losses caused by the *Exxon Valdez* oil spill.

STATEMENT

On March 24, 1989, the *Exxon Valdez* ran aground in Prince William Sound, causing one of the worst environmental disasters in American history. The 11 million gallons of oil that spilled into the Sound that morning had a profound and lasting impact on Alaska and its citizens. *See* Pet. App. 64a. In civil and criminal proceedings, the State vindicated its interest in punishment and compensation for damage to Alaska's natural resources. But Alaska has consistently recognized that the enormity of the harm to its citizens goes beyond environmental damage and that the full spectrum of legal remedies should be available to private plaintiffs who, by obtaining punitive damages to punish Exxon for the wrongs inflicted upon them, complemented the State's efforts.

A. The spill and cleanup efforts

When the *Exxon Valdez* ran aground, it was under the command of Joseph Hazelwood, a known, relapsed alcoholic who was seen drinking heavily before boarding the ship. *See* Pet. App. 63a-64a.

Hazelwood was the only crew member authorized under Alaska's pilotage law to navigate through Prince William Sound,[1] yet he was not present on the bridge to execute a critical turn that would have avoided the reef. *See id.* at 63a.

Hazelwood returned to the bridge after the grounding. He notified the Port of Valdez traffic control and the Coast Guard about his ship's distress. *See id.* at 122a; Supp. JA 80sa; PX92A (Resps. Lodging). He then spoke via satellite phone with his superiors at Exxon Shipping in San Francisco. *See* JA 354-55, 872-76.

The industry response to the spill – led by Exxon – proved "slow and inadequate"[2] and "failed miserably in containing the spill and preventing damage."[3] Exxon took over recovery operations from Alyeska Pipeline Service Company (the manager of the Trans-Alaska Pipeline) in a confusing hand-off of authority. *See State Report* 13-14; 1 United States Coast Guard, *Federal On Scene Coordinator's Report: T/V Exxon Valdez Oil Spill* 104 (Sept. 1993) ("*Federal Report*"). Exxon then implemented its own recovery plan instead of Alyeska's state-approved plan. *See State Report* 14. Exxon did not provide the State with a copy of its plan, which was not specific to Prince William Sound and which was not approved by any state or federal authority. *See id.* at 13-14. Problems of coordination and accountability would continue over the next two years of cleanup operations. *See id.* at 17-20.

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[1] Since the First Congress, the federal government has recognized that States have jurisdiction over pilotage requirements "'in the bays, inlets, rivers, harbors, and ports of the United States.'" *United States v. Maine*, 469 U.S. 504, 513 n.6 (1985) (quoting Act of Aug. 7, 1789, ch. 9, § 4, 1 Stat. 53, 54)). Alaska requires every oil tanker operating in "state water," Alaska Stat. § 08.62.185, to employ a state-licensed pilot "to safely navigate" through its waters, *id.* § 08.62.157.

[2] Alaska Dep't of Envtl. Conservation, *The* Exxon Valdez *Oil Spill: Final Report, State of Alaska Response* 1 (June 1993) ("*State Report*").

[3] S. Rep. No. 101-94, at 2 (1990).

Partly as a result of that confused response, a critical window of opportunity to contain and remove floating oil was missed. *See Federal Report* 35. And Exxon's early efforts appeared to focus more on addressing the "public relations nightmare" of the spill than effective cleanup. PX722A, at 6:03-10 (Resps. Lodging). As one Exxon official stated, the company did not "care so much whether it's working or not," so long as there was "something out there that people can see . . . that looks bright and yellow and like somebody's doing something." *Id.* at 1:45-2:00.

The slowness and ineffectiveness of the immediate response meant that, when an impending storm struck two-and-a-half days after the spill, little if any cleanup or containment had occurred. The storm then made the job much more difficult by transforming the "single, compact slick" (*State Report* 91) that "remained within a few miles of the vessel" (*Federal Report* 51) into "[b]reakaway patches and thick windrows of oil and mousse" that extended more than 40 miles from the vessel and began to hit shorelines (*State Report* 91). *See also* PX226 (Resps. Lodging) (depicting spread of *Exxon Valdez* oil).

After the storm cleared, the citizens and commercial fishermen of Cordova and Chenega – towns on Prince William Sound whose economies "depend[ed] almost entirely on commercial fishing," JA 1442 – took matters into their own hands to save the critical salmon hatchery in Sawmill Bay, which Exxon had not protected at all. *See State Report* 94-96. For nearly two weeks, and with no help from Exxon, individual fishermen committed their fleets to saving the hatchery, often using nothing more than "five-gallon plastic buckets" to "scoop[] oil from the surface by hand." *Id.* at 96.

Although the salmon hatchery survived, *see id.*, significant portions of Alaska's pristine coastline were damaged. *Exxon Valdez* oil contaminated 3,245 miles of beach stretching from Prince William Sound all the way to the Alaska Peninsula, with more than 275 miles classified as "heavily oiled." *See Federal Report* 123-25 & Table 6.1. As the oil washed ashore, it "pooled" and left "stretches of greasy, brown emulsion up to and exceeding two feet deep stranded on shorelines." *State Report* 62.

After several weeks in which there was "little activity on the shorelines," Exxon "made one highly publicized, almost desperate effort to do shoreline cleanup with workers literally wiping rocks by hand." *Id.* That effort "looked ludicrous" and proved "useless and impractical." *Id.* Shoreline cleanup operations did not end until 1992, some three years after the disaster. *See id.* at 146-47. Exxon, however, recovered only 14 percent of the spilled oil. *See* Douglas A. Wolfe et al., *The Fate of the Oil Spilled from the* Exxon Valdez, 28 Envtl. Sci. & Tech. 561A, 566A, Table 2 (1994).

B. Impact of the spill

The oil spill devastated Prince William Sound's natural resources, economy, and social fabric. The Sound's natural beauty and abundant resources are valuable not only in their own right – and suffered damages estimated at $2.8 billion[1] – but also as the lynchpin of the region's economy and way of life. Seafood and tourism are two of Alaska's largest industries and have historically been the largest non-petroleum basic private sector businesses in the State. *See* Inst. of Social & Econ. Research, Univ. of Alaska Anchorage, *Alaska Gross State Product: 1961-1998*, at 10 (June 1999). With the loss of these resources, the communities' traditional way of life was devastated.

1. Wildlife in Prince William Sound and western Alaska suffered tremendous losses. *See generally* EVOSTC, *Update on Injured Resources and Services 2006*, at 9-34 (Nov. 2006) ("*EVOSTC Report*"). Those losses affected commercial fishermen, tourism, recreation, Native subsistence cultures, and the psyche of the entire region.

In the days immediately following the spill, scores of volunteers on land and sea attempted to rescue and clean sea otters covered in oil. *See Federal Report* 352-53. Despite these efforts, between 1,000 and 2,650 sea otters died in Prince William Sound alone. *See* EVOSTC, Exxon Valdez *Oil Spill Restoration Project Final Report: Information Synthesis and Recovery Recommendations for Resources and Services Injured by the* Exxon Valdez *Oil Spill* 14-4 (Oct. 2006) ("*Information Synthesis*"); *Federal Report* 353. The population of sea otters did not begin to recover until the late 1990s. *See EVOSTC Report* 6.

Harbor seals in the area "swam in oiled water," "surfaced in oil slicks to breathe" air containing

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[1] *See* Richard T. Carson et al., *A Contingent Valuation Study of Lost Passive Use Values Resulting from the Exxon Valdez Oil Spill* 5-123 (Nov. 1992).

"volatile hydrocarbon vapors," and "became heavily coated with oil." *Information Synthesis* 15-2. More than 80 percent of the seals observed in central Prince William Sound had oil on them. *See id.* The harbor seal population did not recover for about 15 years after the spill. *See EVOSTC Report* 6.

Marine and migratory bird populations were devastated. The United States estimated that 260,000 to 580,000 birds died in the spill area, with the "best estimates" ranging from 350,000 to 390,000. *Federal Report* 354. Even rescued birds "frequently d[ied] in [workers'] hands, the apparent victims of heart failure." *Id.* at 351.

Sockeye salmon fisheries were closed in 1989 to avoid putting contaminated fish on the market. That closure created "overescapement," a situation in which an overabundance of fish creates systemic imbalances in the ecosystem. *See EVOSTC Report* 32. As a result, the population of sockeye salmon initially declined and did not return to pre-spill levels until 2002. *See id.* at 32-33. In 1991 and 1992, wild adult pink salmon returns in some parts of the Sound declined by 11 percent. *See id.* at 28. Pacific herring stocks collapsed in 1993 and have never recovered. *See id.* at 24-26; *Information Synthesis* 17-5. "[T]he 1989 year class was one of the smallest cohorts ever to return to spawn." *Information Synthesis* 11-1.

2. The region suffered tremendous economic losses. Commercial fishing accounts for approximately one-fifth of Alaska's employment and is the State's largest private sector source of jobs. *See Information Synthesis* 17-1. For the remaining nine months of 1989, the State closed commercial fisheries for salmon, crab, shrimp, rockfish, sablefish, and herring in Prince William Sound, Cook Inlet, Kodiak, and the Alaska Peninsula. *See id.* at 17-2; Supp. JA 228sa-230sa (listing closures in detail). The Prince William Sound salmon and shrimp fisheries remained closed into 1990. Prices for fish in those fisheries that reopened were depressed in part because of fears of contamination, and the value of commercial fishing permits decreased after the spill. *See* JA 1392-93. The reviewing courts, evaluating the "actual harm" from the spill, estimated the economic losses at $504 million. *See* Pet. App. 38a, 160a-163a. That figure likely understates the true harm; the closures had a ripple effect that shuttered local businesses supporting the industry, affected city tax revenues and services, and even drove up utility rates. *See State Report* 102-03.

Recreation and tourism in Prince William Sound, Cook Inlet, and the Kenai Peninsula declined markedly in 1989. The spill left visible oil on a wide swath of beaches, damaged the fauna and flora, and prevented the use of affected waters for tourism, kayaking, and other recreational activities. Sport fishing and hunting in the affected area were closed. *See Information Synthesis* 19-1 to 19-2. One study estimated a loss of 9,400 visitors and $5.5 million in in-state spending for summer 1989 alone. *See* McDowell Group, *An Assessment of the Impact of the* Exxon Valdez *Oil Spill on the Alaskan Tourism Industry* 6 (Aug. 1990). Another found the lost revenue from recreational fishing to be $31 million. *See* Richard T. Carson & W. Michael Hanemann, *A Preliminary Economic Analysis of Recreational Fishing Losses Related to the Exxon Valdez Oil Spill* 9 (Dec. 1992).

3. Alaskans' lives and livelihoods are intimately bound with the water. Approximately 85 percent of Alaskans live in coastal areas. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2008*, at 31, Table 26 (Oct. 2007). The spill caused massive and lasting disruption to residents' daily lives.

At the time of the spill, the area around Prince William Sound, Cook Inlet, Kodiak, and the Alaska Peninsula was home to 15 native Alaskan communities. *See Information Synthesis* 18-1. These traditional communities relied on the sea and land around them for subsistence harvests critical to maintaining their traditional way of life; fishing was a central part of their culture.[5] *See* Pet. App. 123a. Those harvests declined by up to 77 percent in the year after the spill. *See Information Synthesis* 18-2, 18-5. "[T]raditional foods became contaminated with oil," and native communities' "confidence in the health of the environment on which they depended was shaken." *Id.* at 18-1. "[D]isorientation and fear" turned many away from traditional consumption patterns. *State Report* 109. The invasion of clean-up crews and equipment created additional stress. *See EVOSTC Report* 37. Eighty-three percent of native Alaskans surveyed in 2005 stated that the "traditional way of life" – "an amalgamation of . . . intergenerational knowledge transfer, subsistence harvesting, and food sharing" – had been injured by the spill. *Information Synthesis* 18-15.

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[5] In addition to the native Alaskans, about 13,000 residents in the affected areas held subsistence permits. *See Information Synthesis* 18-1.

The broader psychic disruption brought about by the oil spill was significant. As the district court noted, for example, "commercial fishermen not only suffered economic losses but also the emotional distress that comes from having one's means of making a living destroyed." Pet. App. 123a. Crime in the city of Seward jumped 100 percent; in Kodiak and Homer, mental health admissions grew by 72 and 177 percent, respectively. *See State Report* 116. Studies revealed a positive correlation between exposure to the oil spill and increases in drinking and drug abuse, and increased rates of generalized anxiety disorder, post-traumatic stress disorder, and depression. *See* Supp. JA 444sa-447sa.

C. Lingering effects of the spill

Even today, almost 20 years after the spill, Alaska is not fully healed. A comprehensive study in 2001 revealed at least 56 tons of lingering subsurface *Exxon Valdez* oil in 78 separate locations. Significant surface oil also remained on Prince William Sound beaches. *See* U.S. Dep't of Justice & Alaska Dep't of Law, *Comprehensive Plan for Habitat Restoration Projects Pursuant to Reopener for Unknown Injury* 2-3 (June 2006).[6]

The oil industry, moreover, has not changed its behavior. In March 2006, British Petroleum Exploration (Alaska) ("BP") discovered a leak in one of its oil transit lines in Alaska. An estimated 200,000 gallons of oil leaked onto the tundra before BP noticed and stopped the leak. *See* Plea Agreement at 8-9, 14,

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[6] On August 31, 2006, Alaska and the United States submitted to Exxon a letter demanding $92 million for cleanup of lingering oil under a "reopener" provision in the 1991 consent decree.

United States v. BP Exploration (Alaska), Inc., No. 07-cr-125 (D. Alaska filed Oct. 25, 2007) ($20 million criminal fine). BP had deferred for eight years a routine and relatively inexpensive maintenance procedure that would have prevented the spill. *See id.* at 11. In December 2007, Conoco discovered an apparently similar leak that resulted in the discharge of more than 4,200 gallons of oil. *See* Wesley Loy, *Crews Clean Up Spill on North Slope*, Anchorage Daily News, Dec. 18, 2007, at B1. Almost 20 years after the *Exxon Valdez* spill, oil companies operating in Alaska continue to behave negligently (if not recklessly) and require the continued close supervision of federal and state law enforcement authorities.

D. The 1991 plea agreement and consent decree

Alaska and the United States brought civil and criminal actions to punish Exxon for harming the environment and to recover the cost of environmental cleanup and restoration. Contrary to Exxon's suggestion, *see* Pet. Br. 4-6, Alaska did not intend for the settlements of these actions to occupy the field of punishment and deterrence. Given the enormity of the harms catalogued above, Alaska intended that Exxon would be punished for harming the *people* through private litigation brought by those people.

In October 1991, Exxon pleaded guilty to criminal violations of the Clean Water Act and agreed to pay a fine of $25 million and restitution to Alaska and the United States of $100 million. *See* Pet. App. 125a. At the plea hearing, the United States made clear that "[t]his oil spill was . . . an environmental crime. The criminal remedy should likewise, in substantial part, be environmental in nature." JA 1518. And the Attorney General of Alaska consistently focused his remarks on the need to remedy *pollution* harms and "to give pause to those who do not show the proper regard for the Alaska *environment*." JA 1532 (emphasis added).

Alaska (and the United States) also sued Exxon "on behalf of itself and as public trustee of natural resources within the State of Alaska" for damages relating to the loss of natural resources resulting from the oil spill. Complaint at 1, *Alaska v. Exxon Corp.*, No. A91-083 CIV (D. Alaska filed Mar. 15, 1991). The suit sought "all costs or expenses incurred by the State of Alaska in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge." *Id.* at 10; *see also* Governments' Memorandum in Support of Agreement and Consent Decree at 3, *United States and Alaska v. Exxon Corp.*, Nos. A91-082 CIV & A91-083 CIV (D. Alaska filed Oct. 8, 1991) ("*Memorandum*").[7]

Exxon and the governments entered a consent decree to settle those suits. Exxon paid $900 million to help restore damaged natural resources. *See* Agreement and Consent Decree at 7-8, *United States and Alaska v. Exxon Corp.*, Nos. A91-082 CIV & A91-083 CIV (D. Alaska filed Oct. 9, 1991) ("*Consent Decree*"). Alaska entered the decree without the benefit of full discovery, which would have shed more light on the full extent of Exxon's culpability and the amount of damages the State's environment and natural resources suffered. Instead, the governments chose to end the litigation to ensure that "the restoration of Prince William Sound . . . [would] not await years of legal battles" (JA 55-56) and prove to be too late. *See Memorandum* at 21.

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[7] Alaska also brought suit in state court seeking, *inter alia*, punitive damages for harm to those natural resource and environmental interests. Alaska dismissed that suit as part of the global settlement. Although Alaska compromised *its* punitive damages claim to achieve the federal settlements, that choice had no effect on *citizens'* punitive damages claims.

The State left recovery and punishment for non-environmental harms to the private litigation. "The Exxon agreement d[id] not purport to settle any private claims." App., *infra*, 3a. Indeed, several aspects of the settlement were specifically designed to preserve and enhance the ability of private parties to bring their own suits. As the governments made clear in a letter to native Alaskan plaintiffs, the *Consent Decree* and a related settlement expressly did not "impair, diminish or compromise the rights of Alaska Native[s] . . . to bring any private claims for injuries resulting from the oil spill." *Id.* at 4a; *see Consent Decree* at 15-16.

Alaska also reached an agreement "to give the private plaintiffs" in this case "access to the scientific information gathered by the Governments in their ongoing natural resource damage assessment." *Memorandum* at 9. As Alaska argued in urging approval of the *Consent Decree*, that action was intended "to protect third party interests" (*id.* at 32) and to "clear the way for more expeditious resolution" of the private claims (*id.* at 9).

These measures were necessary to quell the public outcry that arose when news of the initial settlement broke in March 1991. Indeed, the original agreement's failure to grant the private plaintiffs access to government scientific data "was one reason the legislature rejected" the original agreement. George Frost, *2nd Spill Settlement Looks Like the 1st; Exxon*

Agrees to $125 Million Criminal Fine for 1989 Oil Spill, Anchorage Daily News, Oct. 1, 1991, at A1.

SUMMARY OF ARGUMENT

I. The punitive damages award in this case is consistent with maritime law and policy.

A. The maritime law of punitive damages has preserved all three of its traditional purposes – punishment, deterrence, and, in appropriate cases, compensation. Historically, punitive damages were available when particularly outrageous conduct – on land or at sea – gave rise to injuries that were not compensable under the existing tort law. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001). As civil law has expanded the range of wrongs for which tort victims may recover compensatory damages, however, maritime law has retained its traditional restrictions on consequential economic and other damages. *See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). Unlike in land-based cases, then, the award in this case can be justified in part to fill the gaps left by the numerous compensatory damages claims that plaintiffs could not recover solely because the reckless conduct occurred at sea.

B. Maritime law also recognizes that shipowners may be liable for punitive damages for the reckless acts of their masters at sea. Vicarious liability for negligence or recklessness is common throughout the general maritime law, and there is no reason why vicarious liability for punitive damages ought not to apply when a master's conduct is particularly reprehensible. This Court did not hold otherwise in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818). At most, the Court suggested in dicta a rule consistent with other contemporaneous maritime cases – that the owner had to be blameworthy in some respect to be liable for punitive damages. The modern managerial agent rule satisfies that requirement because ships' masters occupy positions of sufficient responsibility that they "represent[] the corporation." *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 114 (1893). The managerial agent rule – or even full vicarious liability – is the land-based common law norm, and there is no reason why modern seafaring corporations should be treated differently. Indeed, to the extent the states hold owners liable for their masters' egregious conduct in inland or territorial waters, uniformity favors the managerial agent rule.

C. The size of the award here is supported by the evidence and satisfies the purposes of maritime punitive damages. Exxon's plea that its cleanup costs, compensatory payments, and civil and criminal settlements were punishment enough has no merit. Compensatory damages alone could not achieve optimal deterrence because they failed to account for the full costs of Exxon's wrongful conduct. Public and private punishments are complementary, and there is no reason to restrict the latter solely because of the former. Alaska never intended for its settlements with Exxon to preclude further punishment in the form of punitive damages for respondents' claims. Given that Exxon's criminal fine of $25 million was the only amount devoted exclusively to punishment, the jury acted within its discretion in deciding that Exxon's previous payments to clean up the spill or to remediate natural resource damages were not enough to punish and deter. Exxon has not articulated any coherent rationale for imposing other limits on the size of the award. The award therefore should stand.

II. The Clean Water Act ("CWA") does not preclude this punitive damages award. This case presents neither of the two circumstances in which statutory enactments trump the ordinary presumption that all available remedies accompany an established cause of action.

First, the CWA does not preempt the private suits for damages against oil spillers. Unlike the nuisance actions that the Court held preempted in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), this action turns solely on Exxon's reckless conduct and does not require a court to determine whether the CWA's effluent standards are inadequate.

Second, unlike the statutes at issue in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), there is no indication that Congress intended the CWA to prescribe a comprehensive recovery regime for maritime torts that involved spilled oil. Congressional imposition of civil punishments cannot, without more, preclude punitive damages in an expressly preserved private action.

ARGUMENT

I. THE DAMAGES AWARD HERE IS CONSISTENT WITH MARITIME LAW AND POLICY

A. Punitive Damages In Maritime Law Serve Compensatory, Deterrence, And Punishment Functions

The punitive damages award here vindicates not only the purposes of deterrence and punishment common to land-based and maritime torts, but also the classic maritime law purpose of providing additional, uncompensated remedies to persons harmed by Exxon's egregious misconduct. All of those rationales justify the award in this case.

1. As this Court has recognized, punitive damages at common law "frequently operated" not only to punish and deter malfeasance, but also "to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus.*, 532 U.S. at 437 n.11. In maritime cases in particular, punitive damages "filled th[e] gap[s]" left by the absence of compensation for "pain, humiliation, and other forms of intangible injury." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting); *see* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 86 (1997). Early decisions often awarded additional damages as "punishment" *and* "compensation" in cases where "wanton injustice" resulted in otherwise uncompensable harms like "mental sufferings." *Chamberlain v. Chandler*, 5 F. Cas. 413, 414-15 (Story, Circuit Justice, C.C.D. Mass. 1823) (No. 2,575); *see also Ralston v. The State Rights*, 20 F. Cas. 201, 209-10

(D.C.E.D. Pa. 1836) (No. 11,540); Robertson, 28 J. Mar. L. & Com. at 88-95.

Unlike modern civil tort law, maritime law still precludes compensatory damages for many common types of harm. The rule in *Robins Dry Dock* limited the scope of compensatory damages in maritime cases. *See* 275 U.S. at 308-09. That rule has "stood against a sea of change in the tort law," *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc), and to this day precludes recovery for "purely economic losses arising from a tort, but unaccompanied by physical injury." *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 625 (1st Cir. 1994). The same rule applies to many claims of emotional distress. *See, e.g.*, *Gaston v. Flowers Transp.*, 866 F.2d 816, 820-21 (5th Cir. 1989). And recovery for loss of society or consortium is limited, at best. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-16, at 242-43 (4th ed. 2004).

Because the maritime law maintains anachronistic views about compensatory remedies for harms now commonly perceived to warrant them in the land-based civil law realm, maritime punitive damages continue to serve an important role in "fill[ing] th[e] gap[s]" (*Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting)) for uncompensated "intangible injuries" and other harms (*Cooper Indus.*, 532 U.S. at 437 n.11). Of course, maritime punitive damages are reserved only for conduct that is the most "wanton" (*The Yankee v. Gallagher*, 30 F. Cas. 781, 784 (C.C.N.D. Cal. 1859) (No. 18,124)) and "reckless" (*CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995)). But once authorized by a tortfeasor's reckless acts, punitive damages may be justified – in part – as additional compensation for those egregious wrongs.

2. Following the prevailing maritime law compensatory damages principles, the district court barred many of the plaintiffs' compensatory damages claims. Commercial fishermen could not recover for price diminution in fisheries that were not closed altogether or for the lost value of their permits and vessels, absent a sale. *See* JA 118-26, 127-31. Nonfishing businesses in the City of Cordova that "constitute[d] the entire econom[y] of [the] coastal communit[y]" (JA 142) could not recover for their economic losses unless oil physically damaged their property. *See* JA 144. Owners of unoiled property, the value of which also plummeted, were denied compensation. *See* JA 1368-75. Native Alaskans could not recover compensation for the damage done to their culture or subsistence way of life. *See* JA 149-61. And no plaintiff could recover compensation for the profound emotional distress and dramatic decline in quality of life that the spill caused. *See* JA 1384-90.

It would therefore be inappropriate for this Court to view the entire $2.5 billion punitive damages award in this case as serving solely the "State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). Based on this record, a substantial portion of the punitive damages award here may be justified as additional compensation for Exxon's wanton conduct that caused vast harms to the plaintiffs – harms for which Exxon would have had to pay damages if the oil spill had occurred on land.

B. Maritime Law Holds Employers Liable For Punitive Damages For The Reckless Acts Of Their Managerial Agents

Numerous maritime law principles support the imposition of punitive damages upon shipowners for the reckless acts of masters.[8]

1. Vicarious liability is a well-established and frequently applied principle of maritime law. As this Court stated more than a century ago, it is "elementary" that, "under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of *respondeat superior*." *Workman v. Mayor of New York*, 179 U.S. 552, 565 (1900).

Today, shipowners are responsible for a wide variety of reckless or negligent acts undertaken by the masters in their employ. Seamen may recover against shipowners for the negligent conduct of a master (or any other crew member) under both statutory and general maritime law. The Jones Act, 46 U.S.C. § 30104, allows an injured seaman to bring a negligence action against his employer, including for the negligence of fellow employees like masters. *See De Zon v. American President Lines*, 318 U.S. 660, 665-69 (1943). Similarly, the doctrine of unseaworthiness draws no distinction "between the ship's equipment, on the one hand, and its personnel, on the other," *Waldron v. Moore-McCormack Lines, Inc.*,

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[8] For the reasons stated in respondents' brief (at 36-39), Exxon was independently reckless, and the jury was adequately instructed on that independent ground for imposing punitive damages.

386 U.S. 724, 726 (1967), and holds owners liable for negligent orders of the crew, *see id.* at 728.

Cruise lines have long been liable for the negligent acts of their crew that result in injury to passengers. *See, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959); *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 904-05 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 548 (2005). When a third party is injured as a result of negligent pilotage of a vessel, the shipowner is vicariously liable if the pilot was an employee, or even if the pilot was an independent contractor that the owner voluntarily took aboard. *See* 2 Schoenbaum § 13-6, at 80 & n.1. Vicarious liability is thus "well ingrained in the general maritime law." *Stoot v. D & D Catering Serv., Inc.*, 807 F.2d 1197, 1199 (5th Cir. 1987).

Given the other remedies imposed against shipowners who are vicariously liable for the wrongful acts of their masters, there is no basis for excluding punitive damages in cases of egregious conduct, particularly in light of the compensatory role that punitive damages continue to play in maritime cases and the "traditional presumption" that courts may grant "all appropriate relief" when a party has a right of action. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69 (1992); *see Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946).

2. Maritime law itself has long acknowledged that a shipowner can be held vicariously liable for punitive damages. This Court first acknowledged the possibility of such liability in *The Amiable Nancy*. In that case, the Court stated in dicta – the plaintiff not having sought punitive damages – that "vindictive damages" would not be available because the shipowner was "innocent of the demerit of th[e] transaction, having neither directed it, nor countenanced it, nor participated in it *in the slightest degree.*" 16 U.S. at 559 (emphasis added). Exxon is mistaken when it argues that *The Amiable Nancy* established a rule that "[p]unitive damages may not be awarded against a shipowner based solely on the conduct of a ship's master." Br. 18. Not only is the quoted passage dicta, but it is also specific to policies concerning *privateers* – state-employed private vessels charged with damaging other nations' ships. *See* 16 U.S. at 559. The case says nothing about a corporation or a managerial agent.

The better interpretation of *The Amiable Nancy* is that it required "*some* level of culpability for the misconduct" on the part of the owner. *CEH,* 70 F.3d at 705. Many 19th-century decisions following *The Amiable Nancy* allowed full vicarious liability, thus limiting this Court's dicta to its facts. *See, e.g., The City of Carlisle*, 39 F. 807, 817 (D. Or. 1889); Robertson, 28 J. Mar. L. & Com. at 121 & n.269. Some imposed vicarious liability for punitive damages where there was some showing that the owner was blameworthy. In *Ralston v. The State Rights*, for example, the court granted "exemplary" damages against an owner who was "too inattentive to the manner in which [the master] was using the authority [the owner] had committed to him." 20 F. Cas. at 210.[9]

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[9] Exxon mistakenly claims that, in *Ralston*, the court "refused vicarious punitive damages." Br. 19. *Ralston* allowed vicarious liability for "exemplary" damages for the owner's "inattent[ion]," but refused further "vindictive" damages. 20 F. Cas. at 210. Although these terms had somewhat different

When this Court returned to the subject in *Lake Shore*, a non-maritime case, it stated that punitive damages "can only be awarded against one who has participated in the offense." 147 U.S. at 107.[10] But the Court did not define the requisite level of "participat[ion]." As the First Circuit more recently observed, those cases indicate that punitive damages may properly be awarded against a corporate defendant for the vicarious acts of its agents when, although "not guilty of *direct* participation, authorization or ratification in his agent's egregious conduct, nevertheless *shares blame* for the wrongdoing." *CEH*, 70 F.3d at 705 (emphases added).

The jury in this case was authorized to award punitive damages against Exxon for the "reckless act" of a "managerial officer" in "the course and scope of the performance of his duties." Pet. App. 301a. That managerial agent rule is consistent with the maritime decisions described above.

A ship's master is no ordinary agent. The record establishes that Hazelwood was not only captain of the *Exxon Valdez*, but effectively the head of a business unit of Exxon Shipping Corp. *See* Supp. JA 65sa, 285sa-290sa. Exxon's expert at trial described the captain of a supertanker as "a CEO." Tr. 3866. Hazelwood had as much responsibility as the "president and general manager, or . . . vice president," that *Lake Shore* believed "may well be treated as so far representing the corporation" to justify awarding

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meanings at the time, both were a species of "punitive" damages. *See Haslip*, 499 U.S. at 16.

[10] *But cf. American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982) (acknowledging that *Lake Shore* "may have departed from the trend of late 19th century decisions").

vicarious punitive damages for his wrongful acts. 147 U.S. at 114. In such circumstances, the corporation shares the blame for the acts of those it sees fit to employ as managers. And punitive damages deter "the employment of unfit persons for important positions." Restatement (Second) of Torts § 909 cmt. b (1979); *see also Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1386-87 (9th Cir. 1985); *The City of Carlisle*, 39 F. at 817.

Exxon cites (at 20) two appellate court decisions reaching a different result, but neither is persuasive when applied to the facts of this case. In *P & E Boat Rentals, Inc. v. Ennia General Insurance Co.*, 872 F.2d 642 (5th Cir. 1989), the court held only that vicarious liability for punitive damages does not apply "for the wrongful acts of the simple agent or *lower echelon employee*." *Id.* at 652 (emphasis added). And, in *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), the court found that the master's conduct was not reckless. *Id.* at 1147.

The court in *Fuhrman* (407 F.2d at 1147) and Exxon here (at 24) suggest that the unique position of corporate ship captains, away at sea beyond the supposed reach of their employers, makes it unfair to hold corporations responsible for their decisions. However true that may have been in the 19th century, modern technology has rendered the concern moot and has eliminated most practical distinctions between land-based and seafaring corporations. *See Protectus Alpha*, 767 F.2d at 1386; Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 10-24, at 884, 894 (2d ed. 1975).

Indeed, Hazelwood was in constant contact with his superiors at Exxon. He used the ship's satellite phone to confer with Exxon officials in San Francisco about whether to attempt to dislodge the ship. *See* JA 354-55, 872-76. At all relevant times, Exxon was able to communicate with and monitor Hazelwood and the ship. *See* Supp. JA 249sa.

Finally, the common law also supports the punitive damages award here. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996) ("courts sitting in admiralty may draw guidance from . . . the extensive body of state [tort] law"). In 2003, Alaska adopted the managerial agent rule, *see* Alaska Stat. § 09.17.020(k), which the Alaska Supreme Court had previously described as a modern "complicity rule." *Laidlaw Transit, Inc. v. Crouse*, 53 P.3d 1093, 1098 n.8 (Alaska 2002). Similarly, almost every state that allows punitive damages authorizes their award against a corporation for (at least) the reckless acts of a managerial agent. *See* 2 John C. Kircher & Christine M. Wiseman, *Punitive Damages Law & Practice* § 24:5 (2d ed. 2005). Many states go farther and allow punitive damages for the reckless acts of *any* employee; this Court has held it constitutional to do so. *See Haslip*, 499 U.S. at 12-15. The Restatements of Torts and Agency also follow the managerial agent rule. *See* Restatement (Third) of Agency § 7.03 cmt. e (2006); Restatement (Second) of Torts § 909(c).

3. Maritime law's traditional concern with uniformity weighs against excising the managerial agent rule from the general maritime law. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 738-39 (1961). To the extent that state law may provide the rule of decision in maritime tort cases within inland or territorial waters, *see, e.g.*, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 214-15 (1996), most coastal states either follow the managerial agent rule or allow full vicarious liability for punitive damages. A shipowner therefore will be subject to uniform liability regardless of how far from shore a tort occurs.

Even if state law would not apply in inland or territorial waters – a decision the Court need not make in this case – Alaska has a deep and abiding interest in ensuring proper punishment and deterrence for companies operating off its shores. Given tidal patterns, reckless acts within federal maritime jurisdiction can have a devastating impact on coastal states. The Court should uphold a general maritime rule that is consistent with the considered judgments of most coastal states concerning the appropriate scope of liability for corporate wrongdoers.

C. The Punitive Damages Award Should Not Be Further Reduced As Excessive

1. Maritime law utilizes the same legal framework to review awards of punitive damages that this Court approved as a matter of due process in *Haslip*. *See Lake Shore*, 147 U.S. at 107. In both admiralty and civil cases, "the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is *reasonable*." *Haslip*, 499 U.S. at 15 (emphasis added).

The amount of punitive damages "has been always left to the discretion of the jury." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852); *see Barry v. Edmunds*, 116 U.S. 550, 565 (1886). The jury is best suited to express the community's "moral condemnation" of conduct that is sufficiently odious to justify punitive damages. *Cooper Indus.*, 532 U.S. at 432; *see also Haslip*, 499 U.S. at 16-17 (citing early cases); *BMW*, 517 U.S. at 600 (Scalia, J., dissenting) ("[P]unitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved.").

The trial court reviews the jury's punitive damages award only to ensure that it is "reasonable in [its] amount and rational in light of [its] purpose" (*Haslip*, 499 U.S. at 21) and supported by "substantial evidence" (*Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994)). The appellate court's task is circumscribed further still. "If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination under an abuse-of-discretion standard." *Cooper Indus.*, 532 U.S. at 433 (internal quotation marks omitted).

Early maritime courts reviewing punitive damages awards followed those procedures. *See, e.g.*, *The Yankee*, 30 F. Cas. at 785 (upholding award of punitive damages because no "injustice has been done in the assessment of damages by the district court"); *see also* Robertson, 28 J. Mar. L. & Com. at 99-108 (describing early cases). Modern cases are substantially in accord. *See, e.g.*, *Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424, 464-65 (7th Cir. 2006).

2. Under those settled principles, Exxon's (and its *amici*'s) attempt to recast the factual record in its favor is inappropriate. "Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not lightly overturn the concurrent findings of the two lower courts." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (internal quotation marks omitted); *see Exxon*, 517 U.S. at 840-41 (refusing, in an admiralty case, to reject "concurrent findings of fact by two courts below in the absence

of a very obvious and exceptional showing of error") (internal quotation marks omitted). The lower courts' conclusions on the sufficiency of the evidence – for example, that Hazelwood was drunk at the time of the accident, *see* Pet. App. 87a, 255a-257a – therefore should be affirmed.[11] *See id.* at 86a-90a (reviewing sufficiency of evidence).

3. The award of punitive damages in this case is justified by the facts and the purposes of punitive damages under the general maritime law. As an initial matter, the award must be understood in light of the traditional maritime purpose of providing additional compensation for emotional and consequential economic harms that result from especially reckless conduct and that might otherwise go uncompensated. *See supra* pp. 16-17. The plaintiff class members suffered significant economic and emotional harms for which they could not recover pursuant to the *Robins Dry Dock* rule. These harms were not compensable, but they were punishable. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (noting that "a higher ratio [of compensatory to punitive damages] might be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine") (internal quotation marks and emphasis omitted).

Exxon's primary submission to the contrary is that the civil and criminal fines paid and cleanup costs incurred by Exxon were punishment and deterrence enough. *See* Br. 47-50. But the jury also had before it substantial evidence to conclude otherwise.

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[11] *Amici* American Petroleum Institute *et al.* ("API") assert (at 2), without citation, that courts reviewing punitive damages awards ought to "independently evaluate" the evidence at trial. That assertion is directly contrary to *Cooper Industries* and has no basis in law.

First, Exxon's conduct was reprehensible. As this Court has noted, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. The court of appeals found that "Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound." Pet. App. 22a, 89a. Exxon's reckless conduct was all the worse because it was fully aware of the risks involved in transporting highly toxic oil across environmentally and economically fragile waters, and was recklessly indifferent in the manner in which it attempted to contain the spill.

Second, Exxon draws upon law and economics literature to suggest that "[t]he obligation to pay compensatory damages" provides "sufficient" deterrence. Br. 54; *see* API Br. 23-27. But that presumes compensatory damages are set optimally. That is plainly not the case in maritime law, which precludes a court from awarding compensatory damages for numerous classes of injuries. The sheer volume of uncompensated harms in this case means that compensatory damages alone could not force Exxon to internalize the full costs of its wrongdoing and achieve optimal deterrence.

In any event, although Exxon and its *amici* portray corporations as purely rational profit-maximizers, Exxon did not act rationally in this case to replace

Hazelwood with a sober captain "at a small cost when compared to the risk." Pet. App. 233a & n.11; *see id.* at 170a. Indeed, the oil industry's post-spill conduct demonstrates that it still is not taking low-cost measures to reduce the risk of oil spills, providing further evidence that economic incentives are not properly aligned merely by the potential cost of cleaning up after oil spills.

Third, Exxon's and its *amici*'s focus on deterrence also fails to appreciate that the "imposition of punitive damages is an expression of [the jury's] moral condemnation." *Cooper Indus.*, 532 U.S. at 432. Exxon's argument that criminal and civil penalties administered by the state occupy the field of punishment (*see* Br. 47-50, 51-52) denies this well-established role for civil juries. The civil and criminal justice systems are complementary, and punitive damages are allowed in a wide variety of circumstances where the tortfeasor may also be criminally liable. *See* Restatement (Second) of Torts § 908 cmt. a.

In particular, the civil and criminal settlements in this case were addressed only to environmental harms, a small subset of the enormous damage that Exxon caused. The settlement documents co-signed by Alaska and the United States expressed no intent to preclude punitive damages in this litigation. *See supra* pp. 11-12. As the district court stated, "[t]he criminal penalty did not have the all-inclusive nature of the mandatory punitive damages class and did not comprehend the enormity of the harm or number of people adversely [a]ffected by the spill." Pet. App. 242a-243a. The record, therefore, contained "substantial evidence" from which the jury could conclude that "the criminal penalty alone did not sufficiently punish Exxon." *Id.* at 243a.

Fourth, the sums that Exxon already expended on cleanup and fines do not undermine the punitive damages award here. Exxon has paid only $25 million devoted exclusively to punishment. Exxon's other payments to the United States and Alaska were for environmental cleanup and restoration, a responsibility of any spiller. The jury could well have found, as the district court did, that those payments were inadequate to punish and deter Exxon fully. Similarly, Exxon's expenses for cleaning up Alaska's shoreline – a task Exxon performed poorly – were not punishment but the minimal obligation of a polluter to clean up its mess. And, although Exxon spent significant sums on the cleanup effort, its flawed response to the spill compounded rather than ameliorated the effects of its recklessness.

Finally, Exxon's other suggested limitations on the award have no merit. In particular, Exxon's argument that punitive damages should be limited to the amount of compensatory damages (*see* Br. 52-53) draws support only from dicta in *State Farm*, 538 U.S. at 425. Although some states have capped punitive damages at a certain ratio to compensatory damages, no state has enacted a one-to-one limit; more importantly, Exxon has not articulated any rationale for this Court to make such a legislative determination. Particularly in the maritime context, in which punitive damages also serve a compensatory role, a higher ratio of punitive to compensatory damages is appropriate.

II. THE CLEAN WATER ACT DOES NOT PRECLUDE THE PUNITIVE DAMAGES AWARD

If the Court reaches Exxon's belatedly asserted claim that the general maritime law must yield to the Clean Water Act ("CWA"),[12] it should reject that claim. This case presents neither of the circumstances in which this Court has found that statutory enactments preclude remedies normally available under maritime law: first, when the substantive cause of action interferes with and is effectively preempted by a legislative scheme, *see, e.g.*, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); and, second, when Congress has functionally codified the general maritime law and expressed an intent to preclude certain remedies, *see, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

A. The Clean Water Act Does Not Preempt Private Suits For Damages Against Spillers

In the Clean Water Act in effect at the time of the *Exxon Valdez* oil spill, Congress put in place an administrative scheme to penalize "[t]he discharge of oil . . . into or upon the navigable waters of the United States . . . in such quantities" as determined by the President to be "harmful to the public health or welfare." 33 U.S.C. § 1321(b)(3), (4) (1988). Violators who discharge more oil than is permissible under the CWA are subject to civil fines, *see id.* § 1321(b)(6), and are required to reimburse the government for any costs the government might incur in cleaning up an oil spill, *see id.* § 1321(f). The CWA expressly preserves private remedies for damages resulting from oil spills. *See id.* § 1321(*o*).

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[12] *See* Resp. Br. 39-44 (arguing waiver of Exxon's CWA argument).

Exxon does not contend that the CWA preempts private maritime tort actions sounding in negligence or recklessness. Nor could it. By its terms, the CWA's savings clause makes clear that it does not "affect or modify in any way the obligations" of a shipowner "under any provision of law for damages to . . . property" as a result of an oil spill. *Id.* § 1321(*o*)(1).

The plaintiffs' action here also does not conflict with the CWA's administrative scheme, because a determination that Exxon owes compensatory and punitive damages does nothing to interfere with federal oil pollution enforcement. Exxon's citations to *City of Milwaukee* and *Sea Clammers* are therefore beside the point. In those cases, the plaintiffs sought relief on a nuisance theory, claiming that a level of pollution authorized in the CWA nonetheless constituted a common law nuisance. *See City of Milwaukee*, 451 U.S. at 310; *Sea Clammers*, 453 U.S at 4. Because "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the [CWA]," *City of Milwaukee*, 451 U.S. at 320, the Court held that "the federal common law of nuisance in the area of water pollution [was] entirely pre-empted" by the CWA. *Sea Clammers*, 453 U.S. at 21-22. This case – sounding in reckless disregard rather than nuisance – does not call upon any court to alter the standards of conduct set forth in the CWA.

B. The Clean Water Act Does Not Codify The Maritime Common Law Of Negligence For Oil Spills

Congress also has the power to enact legislation that replaces the general maritime law with a "comprehensive tort recovery regime to be uniformly applied." *Yamaha Motor*, 516 U.S. at 215. Such legislation functionally codifies (and modifies) the previously existing maritime law cause of action or creates an entirely new cause of action. In either case, the statute "announces Congress' considered judgment" on the relevant elements and remedies of the cause of action, such as "the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Mobil Oil*, 436 U.S. at 625. The CWA is not such a statute.

The CWA is silent about private actions for recklessness. Instead, it addresses only the obligations of polluters *to the government* for violating the statute. It does not detail the elements of a private maritime tort claim or any other attribute of that potential action. Congress, therefore, did not in the CWA displace the common law in any comprehensive fashion.

In fact, § 1321(*o*)'s savings clause suggests just the opposite. That clause preserves "the obligations of any [ship] owner . . . under *any provision of law* for damages to . . . property." 33 U.S.C. § 1321(*o*) (emphasis added). Exxon argues (at 37-38) that this provision applies only to compensatory damages because punitive damages are not "obligations" or "damages to . . . property." Regardless of whether a plaintiff has a "right" to a punitive damages award, the defendant has an "obligation" to pay it once awarded as authorized by the law underlying the claim. The general maritime law authorizes punitive damages for torts that involve damage to property. *See supra* pp. 16-17.

This case, therefore, is nothing like those that Exxon cites in which this Court has found that Congress precluded certain types of damages. Whereas the CWA did not create the plaintiffs' right of action here, the Court held in *Mobil Oil* that the Death on the High Seas Act ("DOHSA") "creat[ed]" the cause of action "in admiralty for wrongful deaths." 436 U.S. at 620. The Court then found that the statute's authorization of damages only for "pecuniary" losses indicated Congress's intent to preclude non-pecuniary damages. *Id.* at 625-26. In *Miles*, the Court held that the Jones Act's preclusion of damages for loss of society resulting from a seaman's negligent death evinced Congress's intent similarly to preclude such damages in a strict liability regime. *See* 498 U.S. at 32-33. And, in *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998), the Court turned back an effort to "expand the class of beneficiaries" under DOHSA. *Id.* at 123. A congressional intent to punish does not preclude further private law punishments absent an express indication to the contrary. The CWA contains no such limitations on private remedies.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

[Seal omitted]

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RE: United States v. Exxon Corp. et al., State of Alaska v. Exxon Corp. et al., Chenega Bay et al. v. United States and State of Alaska

Dear Counsel:

This letter is intended to resolve any confusion or questions you might have regarding certain provisions of the Agreement and Consent Decree settling United States v. Exxon Corp. et al., Civ. Action No. A91-082 CIV; and State of Alaska v. Exxon Corp. et al., Civ. Action No. A91-083 CIV ("Exxon agreement"), entered into between the United States, the State of Alaska ("Governments") and Exxon, and approved on October 8, 1991, and the proposed Consent Decree and Stipulation of Dismissal settling Chenega Bay et al. v. United States and State of Alaska, Case No. A91-454 CIV ("Chenega Bay agreement") between the Governments and the proposed settlement classes of Native entities ("Native Interests") pending in the United States District Court for the District of Alaska. Neither of these settlement agreements impairs or diminishes private claims available to Alaska Native Villages or Corporations for injuries resulting from the Exxon Valdez oil spill, including those private claims based upon injuries to publicly owned or controlled natural resources.

In the proposed Chenega Bay agreement, the Native Interests and the Governments agreed to a division of claims which distinguishes the Governments' claims on behalf of the public for natural resource damages from the Native Interests' private damage claims for private harms resulting from the oil spill. The term "natural resources" is defined specifically in the Chenega Bay agreement to mean resources "belonging to, managed by, held in trust by, appertaining to or otherwise controlled" by either or both Governments, and "natural resource damages" is defined to mean any compensatory or remedial relief recoverable by the Governments in their capacity as trustees on behalf of the public for injury to, destruction of or loss of natural resources. (Chenega Bay agreement, pars. 4(d) and (f)). Thus, the Chenega Bay agreement specifically preserves the rights of the Native Interests to make any additional claims not encompassed by the natural resource damage claims brought by the Governments in their capacity as trustees, i.e., any private claims.

The Exxon agreement settles natural resources damage claims brought by the Government in their capacity as trustees on behalf of the public, and defines those claims in precisely the same way as the Governments' natural resource damage claims are defined in the Chenega Bay agreement. (See Exxon agreement, pars. 6(c) and (d)). The Exxon agreement does not purport to settle any private claims. In settling with Exxon, the Governments preserved the rights of the Native Interests to bring any private claims for injuries resulting from the oil spill. This is reflected in the language of paragraphs 13(c) and (d) of the Exxon agreement, which corresponds closely to the language in paragraphs 7 and 8 of the Chenega Bay agreement. There is no substantive difference between the private claims preserved in the Chenega Bay agreement and the private claims preserved in the Exxon agreement.

Any difference between language appearing in the Exxon agreement and that of the Chenega Bay agreement should not be construed as limiting the ability of Native Interests to bring any private claims resulting from the oil spill. Indeed, the Exxon agreement could in no way compromise the rights of the Native Interests to bring any available private claims for injuries resulting from the oil spill, even if paragraphs 13(c) and (d) were omitted. The inclusion of paragraphs 13(c) and (d) in the Exxon agreement merely emphasizes the fact that the Exxon agreement does not impair the Native Interests' rights to bring private claims. Thus, the language of paragraphs 13(c) and (d) neither creates nor limits the private claims that may be available to the Native Interests, and any difference between that language and the language of paragraphs 7 and 8 of the Chenega Bay agreement can have no effect on the Native Interests' rights.

In sum, the Exxon agreement settles the Governments' natural resource damage claims. The Exxon agreement does not impair, diminish or compromise the rights of Alaska Native Villages or Corporations to bring any private claims for injuries resulting from the oil spill.

Sincerely,

FOR THE UNITED STATES:

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AMICUS
CURIAE
BRIEF

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No. 07-219

IN THE

Supreme Court of the United States

81

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ALASKA LEGISLATIVE COUNCIL, ON BEHALF OF THE ALASKA STATE LEGISLATURE, AND FORMER ALASKA GOVERNORS WALTER HICKEL, ANTHONY KNOWLES, STEVE COWPER, AND WILLIAM SHEFFIELD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Alaska Legislative Council is a permanent committee of the Alaska State Legislature, composed of the President of the Senate, the Speaker of the House of Representatives, and twelve other Representatives and Senators. The Alaska Legislative Council has authority to act on behalf of the Alaska State Legislature when the legislature is not in session. *See* Alaska Stat. § 24.20.010. It submits this brief on behalf of the Alaska State Legislature.

Amici include all the living former Governors of the State of Alaska. The Honorable Walter Hickel served as Governor of Alaska from 1966 to 1969 and from 1990 to 1994, and from 1969 to 1970 served as Secretary of the United States Department of the Interior. The Honorable William Sheffield served as Governor of Alaska from 1982 to 1986. The Honorable Steve Cowper served as Governor of Alaska from 1986 to 1990. The Honorable Anthony Knowles served as Alaska Governor from 1994 to 2002.

Amici have a vital interest in this case because it addresses the availability of damages to thousands of Alaska residents as a result of the EXXON VALDEZ oil spill, an unprecedented disaster that occurred in Alaskan waters and greatly disrupted the Alaskan economy. The State of Alaska encouraged the construction of the Trans-Alaska Pipeline based on repeated assurances by the oil industry that the pipeline would be constructed and operated with the highest possible standards of care in order to protect Alaska's natural resources, which form the backbone of the regional economy. In essence, the Trans-Alaska Pipeline resulted from a broad agreement between Alaska and the oil industry, under which Alaska agreed to allow the development of its North Slope oil reserves in return for the oil industry's adherence to the highest possible standards of care to protect Alaska's resources, most especially its marine resources.

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and their letters of consent have been filed with this Court.

INTRODUCTION AND SUMMARY

The validity of the punitive damages award against Exxon for the EXXON VALDEZ oil spill cannot be resolved without carefully examining the history of the Trans-Alaska Pipeline System (TAPS) and the Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. 93-153, 87 Stat. 584, codified in part at 43 U.S.C. §§ 1651-55 (TAPAA).[2] TAPAA specifically addresses the liability of ship owners for spills of oil transported through the Trans-Alaska Pipeline and thereby represents the federal law that specifically governs the EXXON VALDEZ oil spill. Until its partial repeal in 1990, TAPAA imposed strict liability on ship owners for any spills of TAPS oil, while expressly preserving existing remedies under state and federal law. At the time that TAPAA was enacted, punitive damages were a well-recognized remedy under federal maritime law. As a result, TAPAA expressly preserves the availability of punitive damages for spills of TAPS oil.

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[2] In 1990, portions of TAPAA, including the provision addressing ship owners' liability for oil spills, were repealed by the Oil Pollution Act, Pub. L. No. 101-380, 104 Stat. 484, § 8102 (OPA). *See* historical notes following 43 U.S.C. § 1653. This brief cites TAPAA as it existed at the time of the EXXON VALDEZ oil spill. The relevant provisions of TAPAA are set forth in the Appendix.

In its opening brief, Exxon fails to come to terms with the fact that TAPAA establishes the federal law governing the EXXON VALDEZ oil spill. Exxon's entire discussion of TAPAA is contained in two misleading sentences:

> In 1973 Congress passed the Trans-Alaska Pipeline Authorization Act, directing the construction of the Pipeline, 43 U.S.C. §1653(a), and, to deal with the well-known risk of a spill, establishing a special liability regime, the Trans-Alaska Pipeline Liability Fund, to pay prompt and adequate compensation, *id.* § 1653(c). With the firm support of the State of Alaska, Congress thus made the political judgment that the risks of tanker traffic through Prince William Sound were worth taking, for reasons of national security and national energy policy.

Exxon Br. at 2. Exxon makes no attempt to explain why TAPAA, which specifically addresses spills of oil transported through the Trans-Alaska Pipeline and which preserves existing federal and state remedies, does not control the availability of punitive damages. Indeed, the district court in this case held that TAPAA "expressly preserves other remedies," including punitive damages claims. JA 103 (emphasis supplied by the district court). Exxon did not appeal that ruling and cannot challenge it here.

Not only does Exxon neglect to discuss the role that TAPAA should play in resolving the questions it asks this Court to address, Exxon's meager description of TAPAA is deeply flawed. The State of Alaska and Congress did not support construction of the Trans-Alaska Pipeline simply because they concluded that the risks of tanker traffic were worth taking. On the contrary, the State of Alaska and Congress authorized construction of the pipeline because the oil industry had repeatedly vowed to employ the highest possible standards of care to reduce the risk of oil spills, and the oil companies were willing to be subjected to increased damages if a spill occurred. Indeed, TAPAA effectuated a basic agreement, a social compact as it were, between the State of Alaska and the oil industry. Under this social compact, the oil companies were encouraged to develop North Slope oil reserves and construct the Trans-Alaska Pipeline in exchange for their agreement to adhere to heightened standards of care, the imposition of strict liability, and the preservation of existing state and federal remedies.

The basic terms of the social compact underlying TAPAA were aptly described by Representative Morris Udall, a member of the TAPAA Conference Committee:

> [TAPAA] is admittedly forcing a tougher liability standard on Alaskan oil than exists for other oil, but the House has consistently maintained that the environmental risks of transporting this oil were significantly greater. The oil companies have, in turn, consistently promised that both the pipeline and the sea

> leg were safe. We are doing no more than holding them to this promise.

119 Cong. Rec. 36,606 (Nov. 12, 1973).

By knowingly allowing a relapsed alcoholic to serve as ship master on the EXXON VALDEZ, Exxon violated the social compact it had entered into with the State of Alaska. The catastrophic harm that resulted from Exxon's recklessness was as bad as expected.[3] TAPAA preserves existing state and federal remedies precisely to ensure that damages would be adequate and available for oil spills. Punitive damages are appropriate here because Exxon acted recklessly and violated its solemn vow to the people of Alaska to protect Alaska's marine ecology and marine-based economy. Exxon should not now be heard to challenge the basic terms of the deal under which it and other oil companies were authorized to construct and operate the Trans-Alaska Pipeline and deliver the oil by tankers.

ARGUMENT

I. TAPAA Authorized Construction of the Trans-Alaska Pipeline While Imposing Strict Standards of Care and Liability to Prevent Oil Spills

The decision to authorize construction of a 789-mile pipeline running from Prudhoe Bay to Valdez involved two competing sets of interests—the interest in developing Alaska's oil reserves and the interest in protecting Alaska's natural resources, most prominently its marine resources and the marine-based economy. In the years following the discovery of major oil reserves in Alaska's North Slope, the State of Alaska and the oil industry supported construction of the Trans-Alaska Pipeline precisely because they agreed that these competing concerns could best be addressed by allowing the oil companies to extract and deliver the oil while imposing strict standards of care to protect the environment to the maximum extent possible. Based on the oil companies' repeated assurances that they would abide by strict controls in the management of oil and would be subject to heightened liability and increased damages, the people of Alaska, through their elected representatives, agreed to support the pipeline. In enacting TAPAA, Congress blessed this basic agreement.

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[3] *See, e.g.* Plaintiffs Exhibit 2 (to be lodged with the Court) (statement of Exxon U.S.A. President Stevens) (stating that the magnitude of harm from the EXXON VALDEZ spill was "pretty well as much as envisioned").

A. Background to TAPAA

In March 1968, the Atlantic Richfield Company (ARCO) and Humble Oil and Refining Company (a predecessor to Exxon Mobil Corp.) announced the discovery of large petroleum reserves on land owned by the State of Alaska in Prudhoe Bay in Alaska's North Slope. Later that year, several oil companies, including ARCO, Exxon, and British Petroleum, formed an unincorporated agent, the Trans Alaska Pipeline System (TAPS), later incorporated as the Alyeska Pipeline Service Co., to develop plans to transport the oil to markets in the lower 48 states. *Wilderness Soc'y v. Morton*, 479 F.2d 842, 848-849 (D.C. Cir. 1973). Alyeska proposed to construct a 48-inch diameter pipeline to extend 789 miles from Prudhoe Bay to the Port of Valdez. *Id.* at 849. The pipeline would be capable of carrying 2,000,000 barrels of crude oil per day. Oil arriving at Valdez would be loaded onto tankers for shipment to ports in the western United States. *Id.*

In 1969, Alyeska's predecessor submitted a request to the Department of the Interior to obtain rights-of-way to construct the pipeline. *Id.* In May 1972, after numerous hearings and a lengthy investigation, the Secretary of the Interior granted Alyeska's request. The decision was accompanied by a 9-volume Final Environmental Impact Statement.[4] Several environmental groups challenged the Secretary's decision. In February 1973, the United States Court of Appeals for the D.C. Circuit ruled that the Mineral Leasing Act did not authorize the Secretary of the Interior to grant federal rights-of-way of the size needed for the pipeline. *Id.*, 479 F.2d at 847-848. With the D.C. Circuit's ruling, the decision whether to authorize the Trans-Alaska Pipeline moved to Congress.

In 1973, the House and Senate Committees on Interior and Insular Affairs held 17 days of hearings on whether to authorize the proposed Trans-Alaska Pipeline.[5] The committees heard from 110 witnesses, including over 20 representatives of the oil industry, as well as many witnesses representing the Department of the Interior, the State of Alaska, environmental groups, Native Alaskans, and fishermen. Four committee reports were issued in support of TAPAA.[6] TAPAA was debated on the floor of the House and Senate over 10 days.[7] The legislative history of TAPAA comprises over 3,500 pages.

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[4] United States Department of the Interior, Final Environmental Impact Statement: Proposed Trans-Alaska Pipeline [hereinafter "FEIS"].

[5] *See Oil and Natural Gas Pipeline Rights-of-Way*, Hearings Before the Subcomm. on Public Lands of the House Interior and Insular Affairs Comm., 93d Cong., 1st Sess. (1973) [hereinafter "House Hrg."]; *Rights-of-Way Across Federal Lands: Transportation of Alaska's North Slope Oil,* Hearings Before the Sen. Comm. on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973) [hereinafter "Sen. Hrg."].

In those 3,500 pages of hearings, testimony, committee reports, and floor debates, there is absolutely no suggestion that the oil companies sought protection from punitive damages under federal maritime law or any other source of law. Nor is there the remotest suggestion that Congress intended to offer such protection or even considered it. On the contrary, the history of TAPAA demonstrates that the oil companies agreed to abide by heightened standards of care in the shipping of oil. TAPAA imposed a heightened standard of care to protect against oil spills and created new remedies, while preserving existing remedies. In short, under TAPAA, the expansion of liability for oil spills was the price the oil companies paid for authorization to construct and operate the Trans-Alaska Pipeline.

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[6] S. Rep. No. 207, 93d Cong., 1st Sess. (1973) [hereinafter "Sen. Comm. Rpt."]; H. Rep. No. 414, 93d Cong., 1st Sess. (1973) [hereinafter "House Comm. Rpt."]; H. Conf. Rep. 617, 93d Cong., 1st Sess. (1973); H. Conf. Rep. 624, 93d Cong., 1st Sess. (1973) [hereinafter "Conf. Comm. Rpt."]

[7] *See* 19 Cong. Rec. 22795-22840 (July 9, 1973); 19 Cong. Rec. 22978-23019 (July 10, 1973); 19 Cong. Rec. 23312-23356 (July 11, 1973); 19 Cong. Rec. 23543-23621 (July 12, 1973); 19 Cong. Rec. 23746-23783, 23801-23801, 23854, 23858-23860, 23863-23864 (July 13, 1973); 19 Cong. Rec. 23873-23894, 23909-23910, 23954-23955 (July 14, 1973); 19 Cong. 24076-24130 (July 16, 1973); 19 Cong. Rec. 24294-24330 (July 17, 1973); 19 Cong. Rec. 27625-27720 (Aug. 2, 1973); 19 Cong. Rec. 36595-36620 (Nov. 12, 1973); 19 Cong. Rec. 36808-36820 (Nov. 13, 1973).

B. The Oil Industry Repeatedly Promised to Employ the Strictest Possible Controls to Protect Against Oil Spills

Concerns about the possibility of a catastrophic oil spill played a central role in the debates over whether to authorize the Trans-Alaska Pipeline. The Senate Interior and Insular Affairs Committee identified oil spills as a "major issue" needing to be addressed to authorize the pipeline.[8] Opponents of the pipeline supported an overland route through Canada primarily to avoid the need to have oil transported by supertankers.[9]

Proponents of the pipeline never denied that a large oil spill would cause devastating environmental and economic harms. Indeed, when Congress authorized construction of the Trans-Alaska Pipeline, it was universally recognized that a large oil spill off the Alaska coast would be devastating to the marine ecology and marine-based economy. As the Department of the Interior declared: "The existing pristine quality of the environment from Valdez through Prince William Sound would be threatened with severe disturbance from the proposed tanker activity. The major threat would come from oil spills which could affect the total biotic relationships of the area."[10] Fisheries were especially threatened by oil spills because "[t]he economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities."[11] Native Alaskan communities faced even greater risks: "The greatest threat to Native subsistence resources would come from potential oil spillage."[12]

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[8] Sen. Comm. Rpt., *supra* note 6, at 18-19.

[9] *Id.* at 19 (proponents of the Canadian pipeline emphasize "the danger of marine pollution stemming from the ocean leg of the oil transportation system"); Sen. Hrg., *supra* note 5, at 10 (Sen. Mondale) ("[A] trans-Alaskan pipeline would mean massive oil spills resulting from the trans-shipment of oil from Valdez to American ports."); House Hrg., *supra* note 5, at 385 (Rep. Aspin) ("The Alaska pipeline crosses a bad zone of earthquakes and necessitates moving oil by tankers . . . enormous ones which, when they run aground there are going to be enormous oil spills.").

It was well understood, moreover, that effective cleanup would be impossible. The Department of the Interior concluded that, due to the remote location of Prince William Sound, less than 20% of oil spilled from a tanker grounding could be recovered.[13]

The oil companies repeatedly vowed, however, that they would reduce or even eliminate the risk of a catastrophic oil spill by adhering to the highest possible standards of care. Long before the congressional hearings, the oil industry had launched a public relations campaign to assure the American people and their elected representatives that the oil companies would adhere to strict measures to protect the fragile Alaskan environment. In 1970 and 1971, Alyeska placed advertisements in major newspapers touting the pipeline as "[t]he most expensive single project ever undertaken by industry."[14] As one of the ads declared:

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[10] FEIS Vol. 1 at 150 (1972); *see also id.*, Vol. 2 at 216; *id.*, Vol. 4 at 213; 319; JA 1436-41, 1475-94.

[11] FEIS Vol. 3 at 370; *see also id.*, Vol. 2 at 152-153, 400; *id.*, Vol. 3 at 370; *id.*, Vol. 4 at 432-436; JA 1439-43, 1475-82.

[12] *See* FEIS Vol. 1 at 218.

[13] FEIS Vol. 1 at 224-225 ("[S]tate-of-the-art equipment and techniques for containing and recovering spilled oil can recover less than 20 percent of oil spilled."); *see also id.*, Vol. 1 at 174-175; *id.*, Vol. 4 at 303; *id.*, Vol. 4 at 484 ("Large spills in Prince William Sound would be more difficult to contain, clean up, and restore because of the distances from sources of ships and cleanup gear and the generally limited available manpower in the region."); *id.*, Vol. 4 at 581.

> What we have learned about the Arctic leads us to believe that there is nothing inherently dangerous to the environment provided the line is designed, built and operated in a manner that is considerate of and responsible to the environment. . . . On this you have our pledge: the environmental disturbances will be avoided where possible, held to a minimum where unavoidable, and restored to the fullest extent.[15]

Alyeska thus pledged to design, build, and operate the pipeline in the most careful manner possible to protect the Alaskan environment.

In the congressional hearings, witnesses on behalf of Alyeska and the oil industry repeated Alyeska's vow to exercise the highest degree of care to reduce the risks of oil spills. The president of Alyeska testified that, with the exercise of proper care, "the likelihood of tankers grounding or colliding is remote."[16] The president of ARCO likewise

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[14] Mary Clay Berry, THE ALASKA PIPELINE 145 (Indiana University Press 1975).

[15] *Id.* at 146.

[16] House Hrg., *supra* note 5, at 1705; *see also* FEIS Vol. 4 at 294 (quoting Alyeska statement) ("[E]nvironmental requirements dictate that the natural scenic beauty of the area and the high water quality standards, which result in sport and commercial fishing and tourism, be maintained . . . Maintaining them would be a responsibility which Alyeska, the tanker owner companies, the State of Alaska, and various federal agencies would have to bear cooperatively.").

testified that "no dollar savings could possibly justify wreaking irretrievable damage on the fragile Alaskan environment. And that is not going to happen. Since the pipeline was originally conceived, its cost has increased by millions of dollars to insure that the stringent challenges of the Alaskan wilderness will be met."[17] Standard Oil Co. submitted a 40-page report, which assured Congress that it had established design standards and imposed standards of care that would "insure that the marine segment of TAPS will have a minimal impact on the environment."[18]

The State of Alaska supported the construction of the pipeline based on the oil industry's repeated promises to employ heightened standards of care to protect the Alaskan environment.[19] Alaska was convinced that the project did not threaten the marine ecology and marine-based economy because the oil companies had promised "unprecedented" attention to protecting against oil spills. As Alaska's Governor William Egan concluded: "The navigational safety aids and procedures planned for the tanker segment of the route proposed for transporting Alaska's North Slope oil to the nation are extensive and impressive. Careful and detailed planning is going into this part of the planned operation and I am convinced that attention to environmental protection on the tanker route will be unprecedented."[20] As a result of the unprecedented care promised by the oil companies, Alaska expected the oil companies' practices in Alaska "to be first, not last or average, in world trade in their respect for safety and ecological standards."[21]

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[17] Sen. Hrg., *supra* note 5, at 392.

[18] *Id.* at 215; *see also id.* at 219.

[19] *Id.* at 125 ("The State of Alaska wants to make absolutely certain that the environmental aspect of the project, from the standpoint of safety and ecology, environmental safety and the ecology of that area, will be a model for the rest of the Nation and the world itself to look at.").

As with the State of Alaska, the Department of the Interior supported construction of the pipeline based on the oil companies' assurances "that operation of the maritime leg [would] be safer than any other maritime oil transport system now in operation."[22] As a witness for the U.S. Geological Survey testified, "What we have asked for is something beyond the state of the art, the so called sophisticated stage that can go beyond the state of the art."[23] Alyeska had assured the government that it would meet such high standards.[24]

Congress accepted the oil companies' willingness to be subjected to strict standards in transporting the oil. As the Senate Committee on Interior and

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[20] Gov. William A. Egan, "Alaska's Oil and Sea – Antipollution Plans," *reprinted in* 119 Cong. Rec. 22828 (July 9, 1973).

[21] JA 1474 (statement of Gov. Egan to the Dept. of the Interior).

[22] House Hrg., *supra* note 5, at 155 (statement of Secretary of the Interior Rogers C.B. Morton).

[23] *Id.* at 1645.

[24] *See id.* at 1648-1649 (statement of Jack Turner, Bureau of Land Management) ("As far as Alyeska, . . . they have either demonstrated or assured us that they will in fact meet these [environmental requirements]."); *id.* at 1651 (statement of Jared Carter, Deputy Undersecretary of the Department of the Interior) ("[W]e have insisted at all times that the burden of establishing the safety and environmental acceptability of the pipeline in accordance with the stipulations is on the company, on Alyeska, and in cases where we have dealt with them in dealing with specific problems, we have found a willingness on their part to go out and get independent expert assistance to meet that burden.").

Insular Affairs concluded, "the risk of environmental damage from development of North Slope oil and its transportation to markets in the 'Lower 48' has been substantially lessened as a result of the stricter environmental stipulations" that the oil companies had accepted as the price for constructing the pipeline.[25] As Senator Henry Jackson, the lead sponsor of TAPAA, declared: "Damage to the ocean environment by the discharge of petroleum products and contaminated sea water need not take place. It can be prevented. Insofar as the movement of needed oil from Alaska to the markets in the United States is concerned, any risk of damage will be prevented or minimized. . . ."[26] Congress was convinced that, with adherence to the strict safety measures and heightened standards of care promised by the oil companies, "the maritime leg of the Alaskan route will be operated more safely than any other marine transport system functioning to date."[27]

C. TAPAA Authorized the Trans-Alaska Pipeline While Protecting Against Oil Spills by Imposing Strict Standards and Heightened Liability

TAPAA embodies a basic agreement to allow the development of Alaska's North Slope oil while requiring the protection of Alaska's natural resources, particularly its marine resources. On the one hand, TAPAA specifically directs the Secretary of the Interior to issue all necessary rights-of-ways and any other permits necessary for the construction and operation of the Trans-Alaska Pipeline System. TAPAA § 203(b), 43 U.S.C. § 1652(b). TAPAA also exempts the decision to authorize the pipeline from further review under the National Environmental Policy Act. TAPAA § 203(c), 43 U.S.C. § 1652(c).

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[25] Sen. Comm. Rpt., *supra* note 6, at 18.

[26] 119 Cong. Rec. 22838 (July 9, 1973).

[27] 119 Cong. Rec. 22810 (July 9, 1973) (Sen. Fannin); *see also* 119 Cong. Rec. 24296 (July 17, 1973) (Sen. Stevens) ("The trans-Alaska pipeline will be constructed and operated in accordance with the strictest safeguards ever developed for any pipeline.").

On the other hand, TAPAA imposes strong measures to prevent oil spills. TAPAA directs the Secretary of Transportation to adopt standards regarding tanker design and directs the Coast Guard to establish a vessel traffic control system for Prince William Sound. TAPAA §§ 401, 402. TAPAA establishes a new liability scheme applicable only to spills of oil transported through the Trans-Alaska Pipeline. It provides:

> Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) . . . shall be strictly liable without regard to fault in accordance with this subsection for all damages, including clean-up costs, sustained by any person or entity. . . as the result of discharges of oil from such vessel.

TAPAA § 204(c)(1), 43 U.S.C. § 1653(c)(1). To pay compensation for damage caused by oil spills, TAPAA establishes a liability fund of $100 million, created out of fees on oil transported through the pipeline. TAPAA § 204(c)(3), 43 U.S.C. § 1653(c)(3). Under TAPAA's strict liability scheme, the owner of any ship that causes damages through the discharge of oil is strictly liable for the first $14 million of any damages claim, and the liability fund is responsible for additional damages, up to a total of $100 million. *Id.* For claims exceeding $100 million, TAPAA expressly preserves state and federal remedies: "The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law." *Id.* In addition to preserving state and federal remedies for claims exceeding $100 million, TAPAA also expressly preserves existing state authority to impose increased liability for oil spills. TAPAA § 204(c)(9), 43 U.S.C. § 1653(c)(9).

II. TAPAA, Not the Clean Water Act, Governs the EXXON VALDEZ Oil Spill

In its brief to this Court, Exxon argues that the Clean Water Act displaces federal maritime law because it "specifically addresses the problem of both negligent and intentional maritime oil spills." Exxon Br. 31. That argument can be rejected out of hand because it fails to acknowledge that TAPAA specifically addresses spills of oil transported through the Trans-Alaska Pipeline, and TAPAA expressly preserves existing federal remedies, including punitive damages under federal common law.

As the courts of appeals have agreed, TAPAA establishes "a comprehensive liability scheme applicable to damages resulting from the transportation of trans-Alaska pipeline oil."[28] While it is surely true that the Clean Water Act specifically addresses maritime oil spills, *see* 33 U.S.C. § 1321, TAPAA even more specifically addresses maritime spills of oil transported on the Trans-Alaska Pipeline.

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[28] *In re Glacier Bay*, 944 F.2d 577, 580-581 (9th Cir. 1991); *see also In re Tug Allie-B, Inc.*, 273 F.3d 936, 947 (11th Cir. 2001) ("TAPAA's purpose, in part, was to establish a comprehensive liability scheme applicable to damages to natural resources resulting from the transportation of trans-Alaska pipeline oil.").

As this Court has repeatedly recognized, "the specific governs the general."[29] That principle applies most strongly in this context because TAPAA, the more specific statute, is also the more recent statute. As this Court has stated, "a specific policy embodied in a later federal statute should control" over a general policy adopted in an earlier statute.[30]

TAPAA itself makes it perfectly clear that Congress intended TAPAA, not the Clean Water Act, to govern liability for private harm caused by spills of oil pumped through the Trans-Alaska Pipeline. The two statutes impose different standards of liability for oil spills, and TAPAA's standards are plainly higher. The Clean Water Act does not establish a private liability scheme for oil spills like that found in TAPAA, which allows recovery in strict liability up to $100 million and preserves existing state and federal remedies for larger claims. As the Ninth Circuit correctly observed, "Congress consciously and purposefully subjected Alaskan oil to tougher liability standards than other oil."[31]

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[29] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *see also Simpson v. United States*, 435 U.S. 6, 15 (1978).

[30] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *cf.* 2B Norman J. Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 186-87 (6th ed. 2000). Indeed, a specific statute governs a later-enacted general one. *See Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence.").

The legislative history of TAPAA confirms that Congress specifically intended to impose a stricter liability standard for oil spills of Alaskan oil than oil covered only by the Clean Water Act. As the Conference Committee Report explains, TAPAA "provides, for vessels that transport North Slope oil in the coastal trade, liability standards that are much stricter than those that apply to vessels that transport other oil in the coastal or foreign trade."[32]

Moreover, the district court in this case specifically addressed the central role played by TAPAA and Exxon chose not to appeal that ruling. The district court recognized that TAPAA "is certainly a comprehensive, remedial statute." JA 103. In the district court, Exxon moved to dismiss the punitive damages claim on the ground that TAPAA displaces federal common law remedies. JA 60. The district court rejected Exxon's motion, ruling that TAPAA "expressly preserves" existing federal remedies, including punitive damages under federal maritime law. JA 103 (emphasis supplied by the district court). Having chosen not to appeal the district court's ruling that TAPAA is the controlling federal statute and that TAPAA expressly preserves a federal common law punitive damages remedy, Exxon cannot challenge it here. Pet. App. 73a.

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[31] *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992).

[32] Conf. Comm. Rpt., *supra* note 6, at 28, *reprinted in* 1973 U.S.C.C.A.N. 2417, 2523, 2530.

III. TAPAA Preserves Existing Remedies for Oil Spills, Including Punitive Damages Under Federal Common Law

While TAPAA establishes the federal statute that governs the EXXON VALDEZ oil spill, it preserves rather than displaces federal common law remedies, including punitive damages. *See* TAPAA § 204(c), 43 U.S.C. § 1653(c). As the text and legislative history of TAPAA make clear, Congress intended TAPAA to expand ship owners' liability for oil spills without in any way limiting that liability. The district court's unappealed ruling that TAPAA preserves the availability of punitive damages is plainly correct and fatally undermines Exxon's argument that the Clean Water Act displaces punitive damages.

A. When TAPAA Was Enacted, Punitive Damages Were a Well-Established Remedy Under Federal Maritime Law

When Congress enacted TAPAA in 1973, punitive damages had long been available as a matter of federal maritime law. As the First Circuit has explained, "[a]lthough rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others."[33] Punitive damages were plainly available when ship owners recklessly hired incompetent ship masters. As the Sixth Circuit stated in 1969: "Punitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him."[34] Congress, of course, must be presumed to know this common law background against which it enacted TAPAA.[35]

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[33] *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995) (listing cases).

B. In Enacting TAPAA, Congress Concluded that Existing Compensatory Damages Provided Inadequate Compensation for Oil Spills Off the Alaska Coast

In 3,500 pages of congressional hearings and debates leading to the enactment of TAPAA, there are precisely zero references suggesting that oil companies should be immunized against punitive damages for oil spills under federal maritime law. On the contrary, Congress was gravely concerned about the possibility of oil spills and sought to increase the standard of care applicable to the shipment of oil and to increase liabilities for oil spills. Congress did so by imposing strict liability against oil companies for oil spills, while preserving existing remedies under state and federal law for claims exceeding $100 million. TAPAA § 204(c), 43 U.S.C. § 1653(c).

Congress imposed strict liability for oil spill damages because it concluded that maritime law might not ensure the availability of compensatory damages. As the Conference Report declared: "The

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[34] *U.S. Steel Corp v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969).

[35] *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law . . . principles."); *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."); *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

Conferees concluded that existing maritime law would not provide adequate compensation to all victims . . . in the event of the kind of catastrophe which might occur. Consequently, the Conferees established a rule of strict liability for damages from discharges of the oil transported through the trans-Alaska Pipeline up to $100,000,000."[36] Specifically, Congress was concerned that, under maritime law, compensatory damages might be limited to the value of the ship and its cargo.[37] Limitations on compensatory damages might render them insufficient for a catastrophe resulting from an oil tanker spill. As the Conference Committee explained, "Oil discharges from vessels of this size could result in extremely high damages to property and natural resources, including fisheries and amenities, especially if the mishap occurred close to a populated shoreline area."[38]

To ensure that sufficient damages would be available for persons injured by oil spills, TAPAA imposes liability without fault for any oil spills involving oil transported on the Trans-Alaska pipeline. TAPAA § 204(c)(1), 43 U.S.C. § 1653(c)(1). That standard is tougher than the common law standard.[39] As Congress concluded, the liability regime established by TAPAA, which imposes strict liability with existing federal and state law serving as a backup, "would provide an incentive to the owner or operator to operate the vessel with due care."[40]

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[36] Conf. Comm. Rpt., *supra* note 6, at 28, *reprinted in* 1973 U.S.C.C.A.N. at 2530.

[37] *See* 119 Cong. Rec. 24296 (July 17, 1973) (Sen. Hathaway) (describing the need "to revise existing laws limiting the liability of the owner of a vessel to the value of the vessel and cargo at the time of the accident").

[38] Conf. Comm. Rpt., *supra* note 6, at 28, reprinted in 1973 U.S.C.C.A.N. at 2530.

[39] *See Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992) ("Congress consciously and purposefully subjected Alaskan oil to tougher liability standards than other oil."); *In re*

C. TAPAA Preserves Existing Remedies, Including Punitive Damages Under Federal Maritime Law

By its express terms, TAPAA expands the availability of compensatory damages for oil spills while preserving existing remedies under state and federal law. Section 204(c) provides that claims not paid by the $100 million liability fund "may be asserted and adjudicated under applicable Federal or state law." TAPAA § 204(c)(3), 43 U.S.C. § 1653 (c). TAPAA further expressly preserves state authority to impose "additional requirements." *Id.* § 204(c)(9), 43 U.S.C. § 1653(c)(9).

Notwithstanding the plain language of TAPAA, Exxon argued in the district court that TAPAA establishes a comprehensive regulatory scheme that should be construed to extinguish common law remedies, including punitive damages under federal maritime law. JA 60-93. The district court correctly ruled that the text of TAPAA "expressly preserves," rather than displaces, the availability of punitive damages under federal maritime law: "TAPAA is not intended to occupy the entire field of trans-Alaskan oil spills. TAPAA is certainly a comprehensive,

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Glacier Bay, 944 F.2d 577, 582 (9th Cir. 1991) ("This strict liability provision ensures that trans-Alaska oil spill victims receive prompt compensation without resort to prolonged litigation.").

[40] Conf. Comm. Rpt., *supra* note 6, at 29.

remedial statute. However, TAPAA was intended to provide plaintiffs with a new strict liability remedy." JA 103 (citations omitted).[41]

As the district court correctly found, oil spills were a primary environmental concern Congress sought to address in enacting TAPAA. It would make little sense to read TAPAA to preclude existing common law remedies for oil spills, given the clear congressional intent to expand existing. As the district court explained: "Congress, in enacting TAPAA, was expanding recovery, not restricting recovery. . . . Congress dispensed with fault, but Congress did not intend to limit the liability of vessel owners and operators." JA 105 (citations omitted). The legislative history clearly bears this out.[42]

Exxon chose not to appeal the district court's ruling that the plain text of TAPAA preserves punitive damages. Pet. App. 73a. Exxon cannot challenge it here.

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[41] *See also In re Glacier Bay*, 741 F. Supp. 800, 804 (D. Alaska 1990), *aff'd*, 944 F.2d 577 (9th Cir. 1991) ("Congress was concerned with the source of funding for oil spill damage claim compensation, rather than with limiting the liability of vessel owners and operators.").

[42] *See, e.g.*, 119 Cong. Rec. 26821 (Nov. 13, 1973) (Sen. Magnuson) ("Section 204(c) should considerably enhance the availability of compensation to injuries parties *without disrupting existing Federal law, State law, or international treaties.*") (emphasis added). TAPAA thus also refutes the claims of certain of Exxon's *amici* that congressional maritime policy uniformly favors the limitation of ship owners' liability. *See* Brief of Amici Curiae Transportation Institute at 13-19. TAPAA expanded (rather than limited) ship owners' liability due to the grave threat that oil spills posed to Alaska's rich marine environment.

IV. The Jury's Award of Punitive Damages Is Appropriate Because Exxon's Recklessness Violated the Fundamental Terms of the Social Compact Embodied in TAPAA

The oil companies gained authority to develop Alaska's oil reserves based on their repeated promises to the people of Alaska that they would take every possible precaution to protect against oil spills. Those vows were a central trade-off in the social compact embodied in TAPAA, which expressly preserves existing remedies, including punitive damages.

It is clear that Exxon breached its promise. Far from taking every possible precaution against oil spills, Exxon recklessly gave command of a loaded oil tanker to a known, relapsed alcoholic. As the Ninth Circuit explained:

> Here the jury found that the corporation, not just the employee, was reckless. The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies.

Pet. App. 83a. Furthermore:

> There was substantial evidence . . . that Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez*

> through the icy and treacherous waters of Prince William Sound.

Pet. App. 89a.[43]

Punitive damages are appropriate in these circumstances. As has long been established, "punitive damages may be awarded in maritime tort actions where defendant's actions were intentional, deliberate or so wanton and reckless as to demonstrate a conscious disregard of the rights of others."[44] Punitive damages are warranted against a corporation where harm occurs as a result of its reckless hiring. As the New York Court of Appeals declared well over a century ago:

> If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages.[45]

This Court quoted that language with approval in *Lake Shore & M.S.R. Co. v. Prentice,* 147 U.S. 101, 116 (1893), and it remains good law today.

Punitive damages are appropriate here because Exxon recklessly put at risk Alaska's marine resources and marine-based economy after it and the other oil companies solemnly vowed to protect them. Having profited from the terms of the social compact underlying TAPAA, Exxon should not be heard to challenge those terms.

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[43] *See also* Pet App. 29a, 64a, 121a-122a, 154a-157a.

[44] *Muratore v. M/S Scotia Prince,* 845 F.2d 347, 354 (1st Cir. 1988).

[45] *Cleghorn v. New York Central & Hudson River R.R. Co.,* 56 N.Y. 44, 47-48 (1874).

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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January 15, 2008

APPENDIX

APPENDIX

Selected Provisions of the Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. 93-153, 87 Stat. 584, codified in part in Title 43 of the United States Code

Sec. 202, codified at 43 U.S.C. § 1651

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country.

Section 203, codified at 43 U.S.C. § 1652

(a) Congressional declaration of purpose

The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto.

(b) Issuance, administration, and enforcement of rights-of-way, permits, leases, and other authorizations

The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate Federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. The route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection.

* * *

Section 204, codified at 43 U.S.C. § 1653, repealed by the Oil Pollution Act of 1990

* * *

(c)(1) Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from vessel.

(2) Strict liability shall not be imposed under this subsection if the owner or operator of the vessel, or the Fund, can prove that the damages were caused by an act of war or by the negligence of the United States or other governmental agency. Strict liability shall not be imposed under this subsection with respect to the claim of a damaged party if the owner or operator of the vessel, or the Fund, can prove that the damage was caused by the negligence of such party.

(3) Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed. Financial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control act, as amended (33 U.S.C. 1321(p)) before the oil is loaded. The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

(4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name. The Fund shall be administered by the holders of the trans-Alaska pipeline right-of-way under regulations

prescribed by the Secretary. The fund shall be subject to an annual audit by the Comptroller General, and a copy of the audit shall be submitted to the Congress.

(5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel a fee of five cents per barrel. The collection shall cease when $100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below $100,000,000.

(6) The collections under paragraph (5) shall be delivered to the Fund. Costs of administration shall be paid from the money paid to the fund, and all sums not needed for administration and the satisfaction of claims shall be invested prudently in income-producing securities approved by the Secretary. Income from such securities shall be added to the principal of the Fund.

(7) The provisions of this subsection shall apply only to vessels engaged in transportation between the terminal facilities of the pipeline and ports under the jurisdiction of the United States. Strict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States.

(8) In any case where liability without regard to fault is imposed pursuant to this subsection and the damages involved were caused by the unseaworthiness of the vessel or by negligence, the owner and operator of the vessel, and the Fund, as the case may be, shall be subrogated under applicable State and Federal laws to the rights under said laws of any person entitled to recovery hereunder. If any subrogee brings an action based on unseaworthiness of the vessel or negligence of its owner or operator, it may recover from any affiliate of the owner or operator, if the respective owner or operator fails to satisfy any claim by the subrogee allowed under this paragraph.

(9) This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.

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BRIEF

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Supreme Court, U.S.
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JAN 29 2008
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44 pgs No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

On Writ Of Certiorari to the
United States Courts of Appeals
for the Ninth Circuit

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American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980)....................21

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Breshears v. River Marine Contractors, Inc., Civ. A. No. 92-1850, 1992 WL 245656 (E.D. La. Sept. 10, 1992)....................22

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CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995)....................11, 30

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Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 27

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Conner v. Aerovox, Inc., 730 F.2d 835 (1st Cir 1984) 24

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Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 17

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 27

Gallagher v. The Yankee, 9 F. Cas. 1091 (N.D. Cal.) (No. 5,196), *aff'd*, 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (No. 18,124) 11

Gamma-10 Plastics, Inc. v. American President Lines Ltd., 32 F.3d 1244 (8th Cir. 1994) 30

Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495 (9th Cir. 1995) 22

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). 13

Hendrickson v. Kingsbury, 21 Iowa 379, 391 (1866). 12

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). 17

Hurtado v. California, 110 U.S. 516 (1884); 31

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Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) 24

Jensen v. Sattler, 696 N.W.2d 582 (Iowa 2005) 28

Kansas v. Colorado, 206 U.S. 46 (1907). 16

Kelly v. Robinson, 479 U.S. 36 (1987) 13

Lake Shore Ry. v. Prentice, 147 U.S. (40 Davis) 101 (1893) 31

Matter of Oswego Barge Corp., 664 F.2d 327 (2d Cir. 1981)..........16, 24

McGuire v. The Golden Gate, 16 F. Cas. 141 (C.C.N.D. Cal. 1856) (No. 8,815)..........11

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)..........28

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)....16, 19, 23

Miles v. Apex Marine Corp., 498 U.S. 19 (1990)..........9, 18, 19, 20, 21, 22

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)..........18, 19, 20, 22

Monell v. Department of Social Services, 436 U.S. 658 (1978)..........31

Moragne v. States Marine Lines, 398 U.S. 375 (1970)..........19

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976)..........22

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New York Times Co. v. Sullivan, 376 U.S. 254 (1964)..........9

Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811 (2001)..........15, 18

Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77 (1981)..........18

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)..........9, 13, 31

Philadelphia, Wilmington & Baltimore R.R. v. Quigley, 62 U.S. (21 How.) 202 (1858)..........31

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Ralston v. The States Rights, 20 F. Cas. 201 (E.D. Pa. 1836) (No. 11,540). 11

Ridenour v. Holland America Line Westours, Inc., 806 F. Supp. 910 (W.D. Wash. 1992) 22

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 16

Scott v. Donald, 165 U.S. 58 (1897) 32

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), ... 21

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) ... 19

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Smith v. Wade, 461 U.S. 30 (1983) 32

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Taber v. Hutson, 5 Ind. 322 (1854) 9

Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 22

The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818). 10

The Harrisburg, 119 U.S. 199 (1886) 20

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 33

United States v. Dixie Carriers, Inc., 627 F.2d 736 (5th Cir. 1980) 29

United States v. Halper, 490 U.S. 435 (1989) 9

United States v. Szilvagyi, 398 F. Supp. 2d 842 (E.D. Mich. 2005) 27

United States v. Texas, 507 U.S. 511 (1993). 24

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996)....................21

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33 U.S.C. §1321(o)(1)....................26

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46 U.S.C. App. § 688 (Jones Act) 18, 20

46 U.S.C. §§ 761-67 (DOHSA) 18, 20

OTHER AUTHORITIES

A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Comm. Print 1973) 26

Annot., "Intoxication of Automobile Driver as Basis for Awarding Punitive Damages," 33 A.L.R.5th 303 (1995)....................12

Colby, Thomas B., *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583 (2003)....................11

Freifield, Samuel, *The Rationale of Punitive Damages*, 1 Ohio St. L.J. 5 (1935)....................13

Friendly, Henry J., *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964)....................17

Ghiardi, James D. and John J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE (1989) 8

Hale, William B., HANDBOOK ON THE LAW OF DAMAGES (1896) 31

H.R. Rep. No. 92-911 (1972) 26

Morris, Clarence, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 (1931)..................................13

Restatement (Second) of Torts § 908, cmt. a 9

Robertson, David W., ADMIRALTY AND FEDERALISM (1970)..18

Robertson, David W., *Punitive Damages In American Maritime Law*, 28 J. of Mar. L. and Comm. 73 (1997)..11, 30

Schlueter, Linda & Kenneth Redden, PUNITIVE DAMAGES (2d ed. 1989) 9

S. Rep. No. 92-414 (1972)..26

Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess...26

Young, Ernest A., *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273 (1999)...18

IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice ("AAJ") and Public Justice, P.C. respectfully submit this brief as *amici curiae*. The parties have filed letters of consent to the filing of amicus briefs.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. AAJ, through its Admiralty Law Section, has championed the remedies that courts have traditionally made available under general maritime law. Those remedies would be undermined by this Court's adoption of Petitioners' proposed new rules to govern punitive damages in maritime cases.

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating in the federal and state courts, Public Justice prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. In 1989, Public Justice, on behalf of a coalition of environmental groups, sued Petitioners over the environmental harms caused by the oil spill at issue in this case. Through its work, Public Justice helped to document the full effects of the disastrous spill and prompted a major increase in the government's recovery for environmental damage. Although Public Justice does not have any role or monetary interest in the outcome of this case, it remains committed to ensuring that Exxon is adequately punished for the disastrous impact of its wrongful conduct.

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[1] Pursuant to Rule 37.6, Amici disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than Amici Curiae, their members, or counsel make a monetary contribution to its preparation.

SUMMARY OF THE ARGUMENT

1. Exxon's second Question Presented asks whether the criminal and civil penalties in the Clean Water Act preclude an award of punitive damages in this maritime tort action. That question has long been settled.

a. Every state that permits punitive damages, permits them for misconduct that may also result in criminal or civil penalties. Federal courts, including this Court, have indicated that punitive damages may be imposed in maritime actions for reckless or willful wrongdoing that is also subject to criminal sanction. Indeed, this Court looks to the criminal or civil penalties applicable to a defendant's misconduct as an indicium of the reprehensibility of the conduct.

Criminal and civil penalties further the same purposes of punishment and deterrence, but they do not overlap entirely with punitive damages. Criminal and civil fines paid to the government are designed to punish a harm that is separate from the harm punished by awarding punitive damages awarded to the victim of misconduct. Moreover, penalties established in the abstract by the legislature may not provide sufficient punishment or deterrence in a particular case. For that reason, punitive damages have long been viewed as a needed supplement to the criminal law. That rationale is applicable in this case, where statutory penalties were plainly insufficient punishment and deterrence for widespread destruction of environmental resources by America's largest and most profitable publicly traded corporation.

b. Exxon, however, urges an exception for oil spill cases such as this one. Exxon proposes that punitive damages under general maritime law be barred whenever Congress has addressed the same subject in a statute, here, the Clean Water Act. The intent of Congress in enacting the statute, in Exxon's view, is irrelevant.

The only support Exxon has found for its "same subject" rule consists of two decisions by this Court which do not deal with maritime law, but with the specialized application of federal common law to resolve interstate disputes. In that context, federal common law is interstitial; it necessarily gives way whenever Congress provides statutory law governing the dispute at hand.

On the other hand, development of federal common law outside that context – and general maritime law in particular – more closely resembles a shared venture between Congress and the judicial branch. This Court has on occasion supplemented statutory remedies with additional judge-made remedies. For example, the Court has recognized new rights of action for wrongful death under general maritime law, although Congress has addressed the same subject in legislation. The interstate common law decisions supporting Exxon's "same subject" rule are simply inapposite to this case.

Where a remedy is provided both by a statutory right of action and a judge-made right of action, as in maritime wrongful death, this Court has limited claimants to the types of damages "affirmatively and specifically" enacted by Congress. These decisions are also inapposite to this case. The Clean Water Act provides no private cause of action at all for damages caused by oil spills. In such circumstances, this Court has repeatedly held that the damages traditionally recoverable under general maritime law remain available.

c. Whether punitive damages that have generally been recoverable in maritime tort actions have been displaced by the Clean Water Act turns on the intent of Congress. Exxon bears the burden of proving that Congress so intended. On this question, express provisions of the statute which explicitly preserve common law remedies are conclusive.

33 U.S.C. § 1365(e) of the Act states that the section allowing citizens to sue to enforce pollution standards, which is the only private action provided by the Act, does not restrict "any right" that any person may have "to seek any other relief." Any uncertainty that this provision preserves the remedy for plaintiffs in this case is clarified by the legislative history.

In addition, 33 U.S.C. §1321(o)(1) provides that enforcement of pollution standards does not affect or modify "the obligations of any owner or operator of any vessel, . . . under *any provision of law for damages*" caused by a discharge of oil.

Despite these statutory provisions explicitly preserving Respondents' remedies in this case, Exxon insists that the Clean Water Act is "comprehensive" legislation that leaves no room for non-statutory remedies. Even accepting that the Act provides a comprehensive regime for setting pollution standards and authorizing the government to recoup its cleanup costs, the statute makes no provision for – and does not even address – the recovery by private parties for harm caused by oil spills. This Court has interpreted Congress's silence on private causes of action as legislative intent that traditional judicial remedies remain available.

Finally, Exxon asserts that awarding punitive damages for reckless misconduct would upset the balance struck by Congress in the Clean Water Act between protecting the environment and protecting vessel owners. Implications of intent, of course, do not control over the express provisions of the legislation. Moreover, the balance Congress struck is far different than the one Exxon describes. As the legislative history makes clear, Congress balanced competing interests by imposing strict liability for cleanup costs on vessel owners up to a limit that was insurable. But Congress specifically imposed unlimited liability on vessel owners who are guilty of reckless or willful conduct resulting in oil spills.

2. In response to the third Question Presented, Amici submit that the excessiveness review of punitive damages under general maritime law is no more restrictive than the standards established by this Court for reviewing such awards under due process.

Although this Court has not had occasion to address standards of excessiveness in maritime actions, the traditional course followed by the Court has not been to concoct new principles that have never applied to punitive damages before. Instead, the Court has looked to familiar applicable common-law standards.

The longstanding recognition that punitive damages are recoverable in maritime tort actions is entitled to great respect. Exxon certainly has offered no persuasive reason to abandon the common-law approach that this Court has repeatedly approved.

That approach depends upon the wisdom and common sense of juries to tailor an award of punitive damages to the particular facts and circumstances of an individual case. Although this Court has modified this emphasis on the jury's prerogative, it has not abandoned the precept that an individualized assessment of the misconduct must remain the touchstone for a proper punitive damage award.

Exxon, however, proposes standards that have no anchor in the common law. Instead, it seeks to measure the appropriate size of an award on the basis of one-size-fits-all standards based on ill-fitting factors relating to congressional preference, compensatory damages, illicit profits from the misconduct, and prohibiting consideration of a defendant's wealth.

This Court has rejected such arbitrary approaches in favor of a proportionality test that looks to the enormity of the harm, including harm that may not be quantified and reflected in the compensatory damages award.

The careful repeated analysis of the courts below, faithful to a substantial factual record and to this Court's refined due process analysis of punitive damages, has sustained an award in this case that fully comports with the principles of maritime law, common law and constitutional law.

ARGUMENT

I. NEITHER THE EXISTENCE OF STATUTORY CRIMINAL AND CIVIL PENALTIES FOR CAUSING THE EXXON VALDEZ OIL SPILL, NOR EXXON'S CONVICTION AND PAYMENT OF A CRIMINAL FINE, PRECLUDES AN AWARD OF PUNITIVE DAMAGES IN THIS MARITIME TORT ACTION.

Plaintiffs are a class of 32,677 commercial and subsistence fishermen and other individuals and businesses whose lives and livelihoods were disrupted, some permanently, when oil spilled from the Exxon Valdez and spoiled a long stretch of Alaska's coast. The harm to fishing resources resulted not only in economic loss to commercial fishermen and others, but also widespread depression and psychological disorder. Native Alaskans for whom subsistence fishing is a way of life, suffered similar serious harms. Pet. App. 151a, 160a-163a.

Petitioners ["Exxon"] were prosecuted for unlawful discharge of a pollutant under the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1), and other criminal offenses. Upon a plea of guilty, Exxon paid a criminal fine of $25 million and was ordered to pay $100 million as restitution. In addition, Exxon agreed to repay the state of Alaska and the United States approximately $900 million over ten years in clean-up and restoration costs. The consent decrees provided that the payments were compensatory and remedial, rather than punitive, and that "nothing in this agreement, . . . is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement." Pet. App. 71a.

Exxon's second Question Presented states:

> 2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law expand the penalties Congress provided by adding a punitive damages remedy?

This question has long been answered and settled.

A. Criminal and Civil Penalties Do Not Preclude Punitive Damages in a Private Civil Action Arising Out of the Same Misconduct.

1. It is well settled that the imposition of criminal fines or civil penalties does not preclude an award of punitive damages.

Punitive damages in private civil actions serve similar purposes of punishment and deterrence as criminal penalties. Nevertheless, every state that permits punitive damages allows them in civil actions to punish and deter conduct that also violates a criminal law. Even if defendant has been convicted and has paid a criminal fine, the universal rule is:

> The same act which exposes a defendant to civil liability and possibly to punitive damages may also expose the defendant to criminal liability.

James D. Ghiardi and John J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE § 5.32 (1989); *see also*

Linda Schlueter & Kenneth Redden, PUNITIVE DAMAGES § 5.4(E) (2d ed. 1989) (similar) (citing authorities).[2] *See also* Restatement (Second) of Torts § 908, cmt. a:

> The awarding of punitive damages is not prevented by a prior criminal conviction for the same act, which is relevant only to the amount of the award; nor does the granting of punitive damages prevent a subsequent criminal conviction.

This Court should not adopt, in the exercise of its admiralty powers, a rule "that is disfavored by a clear majority of the States." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990).[3]

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[2] The sole exception, for a time, was Indiana. *Taber v. Hutson*, 5 Ind. 322 (1854), held that punitive damages for conduct that is subject to criminal punishment would amount to double jeopardy. This Court has since made clear that "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties" and do not "preclude[] a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment." *United States v. Halper*, 490 U.S. 435, 451 (1989). The Indiana legislature itself abolished the bar on punitive damages for criminal violations. *See Cheatham v. Pohle*, 789 N.E.2d 467, 472 n.2 (Ind. 2003).

[3] Many of the punitive damage awards reviewed by this Court have involved criminal misconduct. E.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (fraud); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 262 (1984) (criminal violations of Atomic Energy Act); *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (criminal libel). Indeed, the Court has deemed statutory penalties

This Court has similarly rejected the argument advanced by Exxon that statutory civil penalties preclude a punitive damages award. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court upheld an award of punitive damages under state law for harm caused by plutonium contamination at a federally licensed nuclear facility.

> The United States, as amicus curiae, contends that the award of punitive damages in this case is preempted because it conflicts with the federal remedial scheme, noting that the NRC is authorized to impose civil penalties on licensees when federal standards have been violated. . . . However, the award of punitive damages in the present case does not conflict with that scheme.

Id. at 257. The Court found it not "inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards," including recovery of punitive damages. *Id.* at 258.

No different rule obtains in maritime cases. In *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818), this Court stated that the vessel's crew, which robbed and plundered a neutral vessel at sea, could be held liable under maritime law "in the

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relevant, not as a bar to punitive damages, but as an indicium of the reprehensibility of the defendant's misconduct. *BMW of North America v. Gore*, 517 U.S. 559, 583 (1996). *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003) ("The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action.").

shape of exemplary damages, the proper punishment which belongs to such lawless misconduct." 16 U.S. at 558-59. The vessel owner, if involved, might also be subject to punitive damages. *Id.*

Historically, federal courts have imposed punitive damages in maritime actions for conduct punishable under the criminal law. *See, e.g., Ralston v. The States Rights*, 20 F. Cas. 201, 209 (E.D. Pa. 1836) (No. 11,540) (defendants' crew deliberately rammed plaintiff's boat); *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856) (No. 8,815) (assault on passengers); *Gallagher v. The Yankee*, 9 F. Cas. 1091 (N.D. Cal.) (No. 5,196), *aff'd*, 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (No. 18,124). (kidnapping). More recently, *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), upheld punitive damages awarded a vessel owner and captain for willful destruction of plaintiff's lobster traps. *See also* David W. Robertson, *Punitive Damages In American Maritime Law*, 28 J. of Mar. L. & Comm. 73 (1997) (compiling and discussing federal cases awarding or indicating the availability of punitive damages under general maritime law).

2. The rationale for the general rule, that punitive damages supplement the criminal law, is applicable in this case.

The general rule is based largely on the recognition that "punitive damages are punishment, not for the improper act in the abstract, or the wrong that the defendant caused to society, but for the legal wrong to the individual plaintiff." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 622 (2003). The Iowa Supreme Court, for example, concluded that under "the clear weight of authority" punitive damages are imposed "as a punishment for the wrong done to the individual" and "have no necessary relation to the penalty incurred for the wrong done to the public." *Hendrickson v. Kingsbury*, 21 Iowa 379, 391 (1866).

The Ninth Circuit correctly relied upon this same reasoning, stating that the criminal penalty imposed on Exxon "is for damage to public resources, enforceable by the United States," which is distinct from injury to private interests, such as the losses inflicted on commercial fishermen. Pet. App. 77a. It is well settled, for example, that the criminal fine paid by a driver for driving under the influence does not address the harm addressed by awarding punitive damages to the person injured by the drunk driver. Annot., "Intoxication of Automobile Driver as Basis for Awarding Punitive Damages," 33 A.L.R.5th 303, 345 (1995). *See also Philip Morris v. Williams*, 127 S. Ct. 1057, 1063-64 (2007) (punitive damages punish plaintiff's individual harm, not harm to non-parties or to the general public).

In addition, the availability of punitive damages enlists the involvement of civil juries in the enforcement of the law and the tailoring of punishment to fit the offense. This Court has stated:

> The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the rights of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed

> by acts or practices not cognizable in *or not sufficiently punished by the criminal law.*

Haslip, supra, at 8 n.4 (emphasis added).

Legislatures must prescribe criminal punishments in advance and in the abstract, anticipating the possible violations and violators. Criminal penalties are "often calculated without regard to the harm the defendant has caused," and may lack "precise deterrent effect." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1987). Consequently, punitive damages have traditionally been viewed as a necessary supplement to criminal penalties. *See* Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1195-98 (1931); Samuel Freifield, *The Rationale of Punitive Damages*, 1 Ohio St. L.J. 5, 8-9 (1935).

The California court of appeal, upholding a large punitive award against the maker of the Ford Pinto, rejected the argument Exxon makes here:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices.

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981).

The United States Attorney, at the criminal sentencing stage following Exxon's guilty plea, informed the court that "the government's evidence would have shown, the discharge of nearly 11 million gallons of crude oil was directly related to criminally negligent conduct by Exxon Shipping." Government's Memorandum in Aid of Sentencing, JA 50. Pointing out that the purpose of criminal sanctions is to send a message deterring similar conduct by defendant and others, the government bluntly stated that imposition of the statutory fines that would apply here "would utterly fail to send that message." *Id.*

In short, this is precisely the case in which an award of punitive damages can serve as a needed supplement to legislatively set criminal penalties.

B. This Court's Decisions According Deference To Congress In Matters Involving Interstate Disputes and Wrongful Death Do Not Warrant Eliminating Punitive Damages In This Case.

Exxon proposes an oil-spill exception to the general rule permitting punitive damages and criminal penalties for the same misconduct. For support, Exxon stitches together statements regarding the judicial role in lawmaking, cribbed from disparate and inapposite opinions of this Court. These relate to: (1) the limited authority of courts under "new federal common law" relating to interstate disputes, and (2) the self-imposed limits on allowing certain types of damages in non-statutory actions for wrongful death that Congress has specifically rejected by statute. Neither set of decisions warrants this Court's departure from the traditional rule permitting punitive damages and criminal penalties for the same conduct.

1. The rule that federal common law is displaced whenever Congress legislates on the same subject applies in the context of interstate

disputes, and is inapposite to this maritime case.

Exxon asserts that the second Question Presented in this case implicates "basic separation of powers principles," Exxon Br. at 27, pitting the judicial branch against Congress as to "which branch of the Federal Government is the source of federal law." *Id.* at 29.

The conflict described by Exxon is largely imagined. As Justice Ginsburg has correctly stated, "development of the law in admiralty [is] a shared venture in which 'federal common lawmaking' does not stand still, but 'harmonize[s] with the enactments of Congress in the field.'" *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 821 (2001) (Ginsburg, J., concurring), quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994). That "shared venture," as amici discuss in part C, *infra*, is informed by the intent of Congress.

Exxon, however, proposes a "same subject" rule to replace any inquiry into congressional intent. Its view is that the federal courts' lawmaking power "is strictly circumscribed, if not displaced outright, where Congress has already addressed the problem." Exxon Br. at 28. Under such a rule, the intent of Congress to displace judge-made remedies is not relevant at all. *Id.* at 29. Instead, Exxon urges upon the Court a "rule that federal common-law remedies applicable to a given subject are displaced when Congress has addressed the same subject." *Id.* at 34.

For support, Exxon looks to *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Neither is an admiralty case. *City of Milwaukee*, where a state sued a political subdivision of another state to abate water pollution, was governed by "non-maritime federal common law." *Matter of Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). In *Sea Clammers*, plaintiff association brought suit against New York, New Jersey, and federal officials for pollution damage to fishing, based on federal common law.[4]

Neither case represents a typical application by the Court of judge-made remedies. Instead, both cases involve the unique enclave of federal law this Court has called "interstate common law." *Kansas v. Colorado*, 206 U.S. 46, 98 (1907). They typify only the "unique role federal common law plays in resolving disputes between one State and the citizens or government of another." *City of Milwaukee*, 451 U.S. at 334 (Blackmun, J., dissenting).

Following this Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), "federal common law" has referred to those enclaves of judicial lawmaking serving peculiarly federal interests, including, most notably, interstate disputes where it would be "inappropriate that the law of either state should govern." Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 408 n.119 (1964).

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[4] Exxon mistakenly characterizes *Sea Clammers* as applicable to maritime tort actions. Exxon Br. at 34. This Court granted certiorari in that case on the limited question: "Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. § 1331." 449 U.S. 917 (1980). Because a claim based on maritime law does not arise under the laws of the United States within the meaning of § 1331 jurisdiction, *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Court was addressing only federal common law.

Indeed, the very day Justice Brandeis declared for this Court, "there is no federal general common law," *Erie*, 304 U.S. at 78, the Court issued an opinion, also authored by Justice Brandeis, resolving an interstate dispute over water apportionment, as "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

With respect to the law governing interstate disputes, "federal common law is 'subject to the paramount authority of Congress.'" *City of Milwaukee*, 451 U.S. at 313-14, quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931). That paramount authority is called forth by our system of federalism. The States are represented in Congress, not by the judicial branch. *Id.* at 317 n.9. To the extent the Court has any lawmaking role at all, it is as the practical default authority: where Congress has not provided legislation governing an interstate dispute, it falls to the Court to act interstitially. *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 & n.9 (1972). When Congress has addressed the subject, "the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee*, 451 U.S. at 314, and "the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines, Inc. v. Transport*

Workers Union of America, AFL-CIO, 451 U.S. 77, 107 n.34 (1981).

In such a case, the Court need not inquire whether Congress specifically intended to displace judge-made law. That law is displaced because "[t]here is no 'interstice' here to be filled by federal common law." *City of Milwaukee*, 451 U.S. at 323.

The judge-made law governing this case differs from that specialized interstate common law. Maritime law is a "federal corpus of law which is in no sense interstitial." David W. Robertson, ADMIRALTY AND FEDERALISM 140-41 (1970). See also Ernest A. Young, *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273, 282 (1999) (admiralty law is a "free-standing corpus, rather than a set of interstitial principles intended to flesh out the meaning of a federal statutory scheme."). The Court's role is not one of subservience where Congress has addressed the same subject. Instead, it is more aptly characterized as a "shared venture," as Justice Ginsburg suggested in *Norfolk Shipbuilding, supra*, where the Court seeks to harmonize common-law remedies with the congressional intent expressed in statutory provisions.

Thus, despite the fact that Congress has addressed the subject of maritime wrongful death in the Jones Act, 41 Stat. 1007, as amended, 46 U.S.C. App. § 688, and in the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-67, this Court has acted with respect to the same subject to "supplement these statutory remedies." *Miles*, 498 U.S. at 27; *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (same). Thus, in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), the Court created a non-statutory wrongful death remedy under general maritime law.[5]

To the extent that this Court in *City of Milwaukee* and *Sea Clammers* required that judge-made federal common law give way when Congress has addressed the same subject, those decisions are addressed to the unique specialized role of federal common law in interstate disputes. They have no bearing on maritime law cases such as this one.

2. This Court's deference to statutory restrictions on wrongful death damages when providing for non-statutory actions does not preclude punitive damages under a traditional maritime law remedy.

Exxon relies on *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), for the proposition that, because Congress did not authorize imposing punitive damages on vessel owners under the Clean Water Act, such damages may not be awarded in private causes of action under general maritime law. Exxon also cites *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116 (1998), where the Court held that the beneficiaries of passenger killed in an airline crash, who were entitled under DOHSA to recover only for "pecuniary loss," could not recover under general maritime law for decedent's pain and suffering, because allowing such damages would contradict the expressed will of Congress. *Id.* at 123. Those cases, however, speak to an entirely different issue.

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[5] Moragne was a longshoreman killed aboard a vessel and treated as a seaman for purposes of the Jones Act under *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Court confirmed that "there is a general maritime cause of action for the wrongful death of a [true] seaman." *Id.* at 30.

Prior to 1970, at common law and in admiralty, there existed no remedy for wrongful death. *The Harrisburg*, 119 U.S. 199 (1886). Congress in 1920 enacted statutory remedies for wrongful death of a seaman in the Jones Act, 41 Stat. 1007, as amended, 46 U.S.C. App. § 688, and for wrongful death outside territorial waters in DOHSA, 46 U.S.C. §§ 761-767 (1976).

This Court has determined that Congress intended that claimants under both statutes be limited to recovery of pecuniary damages. *Miles*, 498 U.S. at 31-32 (Jones Act); *Higginbotham*, 436 U.S. at 622-24 (1978) (DOHSA).

This Court has stated that in situations where plaintiff could bring either a statutory cause of action or a non-statutory one, it would be guided by the limits on the types of damages Congress "has *affirmatively and specifically* enacted." *Id.* at 625 (emphasis added). *See also Miles*, 498 U.S. at 31 (explicit limitation of statutory recovery to "pecuniary" loss forecloses recovery for non-pecuniary loss in non-statutory remedy). Thus, "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action . . . than Congress has allowed." *Id.* at 32-33.

This case does not present the Court with such a conflict.

The Clean Water Act does not "affirmatively and specifically" proscribe recovery of punitive damages. Indeed, the Act does not make any provision for any remedy providing any type of damages to private parties for pollution-caused harms. Exxon concedes as much, stating that the CWA "is not addressed to compensation for private harms, but instead prescribes a comprehensive, calibrated scheme of public enforcement," of effluent standards. Exxon Br. at 40.

Thus, in cases where the statute at hand did *not* provide a remedy for plaintiff's harm, as is the case with the Clean Water Act here, this Court has not limited plaintiff's relief to those types of damages enumerated in the statute. For example, in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), involving the death of a longshoreman in territorial waters, plaintiff could not have brought an action under either the Jones Act or DOHSA. Consequently, those statutes had no preclusive effect on the damages available under plaintiff's non-statutory remedy. *See Miles*, 498 U.S. at 31; *see also American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980) (allowing damages for loss of society in cases of non-fatal injuries occurring in state territorial waters not provided for in federal statutes); *cf. Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (loss of consortium recoverable in state cause of action for wrongful death of a nonseafarer in state territorial waters for which federal law provides no remedy).

Thus, courts have concluded, where the remedy provided by the general maritime law "has no statutory analogue," there is no statutory constraint or limit on that remedy, including the right to recover punitive damages for breach of a duty created by the general maritime law. *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995) (allowing punitive damages in a maritime tort action claiming willful failure to pay maintenance and cure); *Breshears v. River Marine Contractors, Inc.*, Civ. A. No. 92-1850, 1992 WL 245656, at *2 (E.D. La. Sept. 10, 1992) (actions for failure to pay maintenance and cure "are grounded in the general maritime law and have no counterpart in the tort provisions of DOHSA and the Jones Act." *Miles* is "therefore, inapposite to the determination of whether punitive damages are available."); *Ridenour v. Holland America Line Westours, Inc.*, 806 F. Supp. 910, 911 (W.D. Wash. 1992) (same).

In this case, the Clean Water Act provides a remedy only for the government to recover its cleanup costs. Plaintiffs' action for negligence causing their commercial losses has no analog or counterpart in the Clean Water Act. *Miles* and *Higginbotham* are therefore inapposite.

Absent an explicit congressional declaration to the contrary, this Court has repeatedly stated that a right under common law or maritime law "is not to be abrogated 'unless it be found that the preexisting right is so repugnant to the statute'" as to "render its provisions nugatory." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976), quoting *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). *See also Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 255 ("Congress assumed traditional principles of state tort law would apply with full force" including awards of punitive damages, "unless they were expressly supplanted.").

In this case, the only inference that can be drawn from the absence of any provision in the Clean

Water Act for the recovery of punitive damages is that Congress intended such traditional forms of relief to remain available to those harmed by oil spills.

C. Congress Did Not Intend the Clean Water Act to Alter the General Rule Permitting Punitive Damages Under General Maritime Law.

1. It is Exxon's burden to prove Congress intended the Clean Water Act to preclude relief traditionally available under general maritime law.

Exxon argues that the intent of Congress is irrelevant to answering the second Question Presented. Rather, judge-made law must give way "whenever it can be said that Congress has legislated on the subject." Exxon Br. at 29-30.

Such a position is plainly untenable. Assume for a moment a federal statute that directly addresses the same subject as general maritime law. Yet, the legislation also includes a savings provision that expressly preserves the existing judge-made rule. Under Exxon's proposed rule, the general maritime remedy would be eliminated, despite Congress's expressed contrary intent, under the banner of deference to the legislative branch and separation of powers.

One point of agreement between the majority and dissent in *Sea Clammers* was that the party asserting that the judge-made law is displaced by a statute bears the burden of proving that Congress so intended. Justice Powell stated for the Court, "we do not suggest that the burden is on a plaintiff to demonstrate congressional intent to preserve [other] remedies." 453 U.S. at 21 n.31. The question is "whether Congress intended to withdraw that right of action." *Id.* at 27 n.11 (Stevens, J., dissenting).

Indeed, as this Court has repeatedly stated:

> Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); *United States v. Texas,* 507 U.S. 511, 534 (1993).

Thus, it is Exxon's burden to prove Congress intended to eliminate punitive damage awards to private plaintiffs. In fact, Congress expressly preserved Plaintiffs' right to seek that relief.

2. Congress in the Clean Water Act expressly preserved plaintiffs' private tort actions for harm caused by oil spills, including the availability of punitive damages.

In discerning whether Congress intended the Clean Water Act to eliminate judge-made private rights of action under maritime law for oil spills, including the damages traditionally available under that remedy, "[a]ny terms of the statute explicitly preserving or preempting judge-made law are of course controlling." *Matter of Oswego Barge Corp.,* 664 F.2d at 338; *Conner v. Aerovox, Inc.,* 730 F.2d 835, 840 (1st Cir 1984). Punitive damages, as earlier noted, have historically been deemed available in maritime tort actions on proof of willful or reckless misconduct. *See* p. 11, *supra.* In several provisions of the Clean Water Act, Congress has expressly preserved this remedy.

First, 33 U.S.C. § 1365(e) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.

Exxon argues that § 1365(e) is ineffective because it provides only that nothing in "this section," regarding citizen suits, revokes other remedies, but does not "mean that the Act as a whole does not supplant formerly available federal common-law actions." Exxon Br. at 39, quoting *City of Milwaukee,* 451 U.S. at 328-29.

This argument is in error. In *City of Milwaukee,* the State of Illinois brought a federal common-law action for abatement of a nuisance to halt the city's discharge of sewage into Lake Michigan. This Court held that the CWA "as a whole" provided for comprehensive regulation of such pollution using standards set by EPA, leaving no room for courts to impose their own higher standards. *Id.* at 328.

This case, by contrast, involves a private cause of action for damages. *None* of the provisions of the Act pertains to a remedy seeking damages. Section 1365 is the *only* section that permits a private cause of action, and it expressly preserves the private claimant's right "to seek any other relief." It cannot be argued that the Clean Water Act "as a whole" leaves no room for a private cause of action for damages under other law.

Any uncertainty as to the meaning of the statutory text is removed by the legislative history. The House Report explains that this section "provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected." H.R. Rep. No. 92-911, at 134 (1972), *reprinted in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 821 (Comm. Print 1973).

The Senate Report states that this section "*would specifically preserve any rights, or remedies under any other law*. Thus, if damages could be shown, other remedies would remain available." S. Rep. No. 92-414, at 81, *reprinted in* 2 A Legislative History, *supra*, at 1499.

Significantly, Congress considered and rejected a proposal to preempt the common law and make citizen suits under § 1365 "the sole and exclusive method [by] which citizens may participate in this kind of litigation." Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess., Pt. 1, at 724 & 730-31, *reprinted in* 1 Legislative History, *supra*, at 1071-77.

Second, in the section providing for the enforcement of pollution standards and imposing penalties on vessel owners for non-compliance, Congress has provided:

> Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, . . . under *any provision of law for damages* to any publicly owned or privately owned property resulting from a discharge of any oil.

33 U.S.C. §1321(o)(1) (emphasis added). Contrary to Exxon's contention that this provision preserves only

compensatory damages, Exxon Br. at 37, Congress has clearly preserved plaintiffs' maritime cause of action for damages, including all relief traditionally recoverable under that remedy.[6]

This Court has often stated that the question of what relief is available to plaintiffs under a federal private right of action "is 'analytically distinct' from the issue of whether such a right exists in the first place." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 65-66 (1992) (citation omitted). Where plaintiffs have a valid right of action, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise," a principle which, the Court stated, "has deep roots in our jurisprudence." *Id.* at 66. That principle requires that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Amici suggest that the same principle extends to non-statutory rights of action.[7]

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[6] This Court has recognized that common law causes of action constitute "obligations imposed under state law," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992), so that preemption of state requirements "easily encompass[es] obligations that take the form of common-law rules." *Id.* at 521.

[7] Exxon also argues that "provision of law" is limited to clauses in statutes or contracts and does not include common law claims. Exxon Br. at 38 n.14. *See also id.* at 39. In fact, courts often deem "provision of law" to include the common law. *See, e.g.*, *United States v. Szilvagyi*, 398 F. Supp. 2d 842, 846 (E.D. Mich. 2005) ("notwithstanding

Despite these express savings provisions, Exxon argues that the Clean Water Act is "comprehensive" legislation that leaves no room for non-statutory remedies. Exxon Br. at 34. The necessary question is: comprehensive as to what domain? Even accepting that the CWA provides a comprehensive regime for effluent discharge permits and providing legal authority for the government to recover its cleanup costs, the statute makes no provision whatever for private claims for harms caused by oil spills or the damages recoverable in such claims. As this Court stated: "Shrimp, clam, oyster and scallop beds may be destroyed, and ruined and the livelihood of fishermen imperiled. The Federal [Clean Water] Act takes no cognizance of those claims but only of costs to the Federal Government, if it does the cleaning up." *Askew v. American Waterways Operators Inc.*, 411 U.S. 325, 333-34 (1973).

If Congress intended to eliminate private causes of action for those harms, "its failure even to hint at it is spectacularly odd." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 491 (1996). As the Court stated in *Silkwood*, "Congress' failure to provide any federal remedy for persons injured" by illegal conduct

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any other provision of law" encompasses common law doctrine of collateral estoppel); *Jensen v. Sattler*, 696 N.W.2d 582, 588 (Iowa 2005) (savings clause preserving liability "created by another provision of law" includes common-law claims); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1181, 1183 (C.D. Cal. 2003) (where releases are exempt from strict liability under CERCLA, plaintiffs "must assert their claims under some other provision of law, including common law").

suggests that Congress did not intend to eliminate judicial recourse. 464 U.S. at 251.

Finally, Exxon asserts that the CWA "involves an explicit balance of Congress's twin goals of protecting the environment and limiting the liability of shipowners and other carriers so as not to impair commerce." Exxon Br. at 32.

As the Fifth Circuit has pointed out, Congress struck that balance in a much different manner than Exxon suggests. The legislative history plainly indicates that Congress's aim was "to protect the taxpayers from potential cleanup costs" from oil spills but not unfairly imposing "crushing liability" on vessel owners. *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739-40 (5th Cir. 1980). The compromise reflected in the CWA imposes strict liability for cleanup costs on vessel owners up to limits that Congress deemed insurable, but allows unlimited cleanup liability for oil spills resulting from willful or reckless conduct. *Id.*

This "balanced and comprehensive remedial scheme . . . precludes recovery by the government under additional legal theories." *Id.* at 740. It does *not* preclude recovery by private parties for economic harm caused by oil spills, a subject that was not at all a factor in the legislative balance.

II. MARITIME LAW IMPOSES NO GREATER LIMITS ON PUNITIVE DAMAGES THAN DOES DUE PROCESS

The Third Question Presented asks:

> Was this $2.5 billion award within the limits permitted by federal maritime law?

Exxon's argument that the punitive damages assessed here exceed those permitted under maritime law erroneously treats the issue as a matter of first impression, faulting the court below for failing "to articulate, based on the policies of maritime law, the rules that should govern punitive damages, and to reduce the award accordingly." Exxon Br. at 44. While it is true that there exists no maritime law principle establishing a limited range of permissible punitive damages, the traditional approach to such a supposed vacuum is not to concoct new principles but to apply such "traditional common-law rules, modifications of those rules, and newly created rules" as can be "[d]rawn from state and federal sources." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986) (footnote omitted).

Exxon does not disagree that punitive damages in maritime cases must be evaluated under the same considerations that govern the common-law review of punitive damages. *See* Exxon Br. at 46. However, the company attempts to articulate new standards that have never governed punitive damage decisions in maritime cases – or any other type of case – before.

The common law decisively rejects Exxon's first argument that public policy precludes *any* punitive damages in maritime cases. Not only have punitive damages long been a "well-established principle of the common law," *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), but were equally well recognized as a matter of maritime law. *See CEH*, 70 F.3d at 699 (collecting cases); *Gamma-10 Plastics, Inc. v. American President Lines Ltd.*, 32 F.3d 1244, 1254 (8th Cir. 1994); David W. Robertson, *Punitive*

Damages In American Maritime Law, 28 J. of Mar. L. & Comm. 73 (1997).

This longstanding recognition of punitive damages in maritime law is entitled to great respect. This Court has recognized that its "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Hurtado v. California*, 110 U.S. 516, 530 (1884); Still, and quite appropriately, "[t]his Court traditionally has been hesitant to overrule prior constructions of statutes or *interpretations of common-law rules," absent "countervailing considerations." Monell v. Department of Social Services*, 436 U.S. 658, 708 (1978) (emphasis added). Neither Exxon nor its amici provide this Court with any developments or other rationales that would require reexamination. Instead, all their briefs continue to argue against punitive damages in maritime cases as though the common law were as fungible as the ever-changing dictates of fashion.

Under the common law, there were few restraints on punitive damages. *See* William B. Hale, HANDBOOK ON THE LAW OF DAMAGES § 86, at 212-13 (1896) (it "is the province of the jury to determine whether or not [exemplary] damages should be awarded" and that the "amount of exemplary damages is limited only by the sound discretion of the jury," except where such damages are excessive due to the jury's "passion, prejudices, or corruption"). In other words, the prerogative to assess punitive damages had to be exercised intelligently so as to reflect the "peculiar circumstances of each case." *Day v. Woodworth*, 54 U.S. at 371, *cited with approval in Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991). *See also Philadelphia, Wilmington &*

Baltimore R.R. v. Quigley, 62 U.S. (21 How.) 202, 213 (1858); *Lake Shore Ry. v. Prentice*, 147 U.S. (40 Davis) 101, 107 (1893); and *Scott v. Donald*, 165 U.S. 58, 86 (1897). In *Smith v. Wade*, 461 U.S. 30, 34 (1983), this Court flatly declared that it "has repeatedly approved that common-law method for assessing punitive awards."

While the jury's prerogative on punitive damages has shifted somewhat more recently, *see Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001), this Court has adhered to the notion that an individualized assessment of the misconduct must remain the touchstone for a proper punitive damage award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("The precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct.").

Contrary to these principles, the standards proposed by Exxon have no anchor in the common law. Instead, Exxon would have this Court variously transfer the authority to determine the size of a punitive damage award in any particular case to unarticulated and fanciful imaginings of congressional preference, Exxon Br. at 51, to the jury's determination of compensatory damages as if that established a common-law maximum,[8] Exxon Br. at 52, to limiting punitive damages to any illicit profit, as if that were the only legitimate consideration, Exxon Br. at 54, as well as prohibiting consideration of a defendant's wealth, Exxon Br. at

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[8] This Court has categorically rejected any mathematical bright-line limits on punitive damages. *See State Farm*, 538 U.S. at 424-25.

55, which has always been a standard consideration under the common law. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 n.28 (1993) ("Under well-settled law, however, factors such as these are typically considered in assessing punitive damages.").

Instead of these one-size-fits-all arbitrary approaches, the common law, like the constitutional considerations this Court employs, reflect an acknowledgement that an appropriate punitive award reflects "'the enormity of the offense.'" *BMW*, 517 U.S. at 575 (1996) (quoting *Day*, 54 U.S. at 371). The Court has found *this* proportionality principle "'deeply rooted and frequently repeated in common law jurisprudence.'" *Id.* at 575 n.24 (citation omitted). Moreover, the compensatory damages awarded here only encompassed certain economic harms. Pet. App. 166a-167a. Because the noneconomic harms visited upon the plaintiffs could not be quantified or valued, *id.*, this Court has recognized that a larger award may be merited. *See State Farm*, 538 U.S. at 425 (justifying larger awards when "the monetary value of noneconomic harm might have been difficult to determine").

For that reason, among others, the careful, repeated analysis of the courts below – involving an enormous record and taking place over a long period of time as this Court refined the due process analysis of punitive damages – should be credited with having sustained a punitive damage assessment that comports with all criteria that can be devised as a function of maritime, common and constitutional law.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of The United States

EXXON SHIPPING COMPANY, et al.,

Petitioners,

- against -

GRANT BAKER, et al.,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF OF *AMICUS CURIAE* AMERICAN MARITIME SAFETY, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, American Maritime Safety, Inc. (hereinafter "AMS") is a non-profit corporation established in 1988 to facilitate maritime industry compliance with the Oil Company's International Marine Forum's Chemical Testing Guidelines (hereinafter "OCIMF"), the United States Department of Transportation (hereinafter "DOT") chemical testing regulations, and the United States Coast Guard (hereinafter "Coast Guard") drug and alcohol testing regulations.[1] The AMS consortium administers a drug and alcohol testing program for the vast majority of U.S.-flag deep sea vessel operators, and over 400 member companies participate in the AMS chemical testing program.

INTRODUCTION

AMS submits this amicus brief in response to Plaintiffs' argument in its Conditional Cross-Petition for Writ of Certiorari that Exxon was appropriately assessed punitive damages because its "knowledge of Hazelwood's relapse rendered its own conduct reprehensible." (Plaintiffs, Grant Baker, et al., Conditional Cross Petition for Writ of Certiorari, at 9). In fact, the reinstatement of known substance abusers to safety sensitive positions, upon successful completion of rehabilitation, was consistent with both existing maritime industry practices and the policies promoted by the relevant federal regulatory agencies.[2]

---

[1] The parties have consented to the filing of this brief. Counsel of record for all parties filed notices with the Court consenting to the filing of an *amicus curiae* brief by any entity. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or their counsel made a monetary contribution to its preparation or submission.

AMS also submits this amicus brief in response to the Plaintiffs' argument that Exxon's conduct was reprehensible due to the company's failure to subject Captain Hazelwood to an aggressive individualized testing program. During the relevant time period, however, such a program would have been legally problematic and was certainly not the industry standard.

ARGUMENT

I.

Reinstatement of Known Substance Abusers Upon Successful Completion of Rehabilitation was Consistent with Existing Maritime Industry Practices and the Policies Promoted by the Relevant Federal Agencies

On November 21, 1988, the Department of Transportation (DOT) published an interim final rule that established drug testing procedures applicable to drug testing for transportation employees under six DOT regulations.[3] This interim final rule, codified at 49 C.F.R. Part 40 effective January 2, 1990, imported its drug testing regime virtually intact from the model developed by the Department of Health and Human Services (DHHS) for federal employees.[4] Under the DOT testing program, DHHS and its subagency – the National Institute for Drug Abuse (NIDA) – continued to play a major role, which included the development of testing protocols, the certification and inspection of laboratories, and the promotion of private industry Employee Assistance Programs (EAPs).

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[2] Exxon has already addressed the countervailing legal considerations presented by the Rehabilitation Act and the Americans with Disabilities Act; therefore, the AMS submission will focus primarily on industry practices and agency policy.

[3] These six regulations were published on the same day by the Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, United States Coast Guard, Urban Mass Transportation Administration, and Research and Special Programs

Throughout the 1980's DHHS and NIDA actively discouraged employers from responding to employee substance abuse with punitive disciplinary policies. This policy was incorporated into a series of video presentations developed shortly before the implementation of transportation industry substance abuse testing. AMS reproduced and distributed these video presentations to its member companies in order to familiarize them with DHHS/NIDA expectations.

In one video presentation, NIDA's Director of Workplace Initiatives, Dr. J. Michael Walsh, asserted that testing was "a very small part" of any substance abuse program and that the purpose of testing was to "identify substance abusers and get

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Administration. *Procedures for Transportation Workplace Drug Testing Programs*, 54 Fed. Reg. 49854 (December 1, 1989).

[4] 54 Fed. Reg. 49854 (December 1, 1989) ("The interim final rule (49 CFR Part 40) followed closely the Department of Health and Human Services (DHHS) regulation entitled 'Mandatory Guidelines for Federal Workplace Drug Testing Programs.'").

them into treatment as early as possible." NIDA also took the position that:

> Testing works best in combination with counseling, rehabilitation, and education. It is a strategy that cannot stand alone.

Drug Testing: Handle With Care (The National Institute of Drug Abuse 1989). Significantly, the video presentation addressed safety sensitive personnel in transportation industries, including the trucking and airline industries.

In a companion video production, NIDA Director Dr. Walsh stated:

> The idea of what am I going to do with this employee or any employee I find to be using drugs has to be one of the first questions any policymaker asks himself.
>
> We feel that the right thing to do with an employee who uses drugs is get them into treatment. So provisions must be made for an Employee Assistance Program.

Getting Help: Employer Version (The National Institute of Drug Abuse 1988). This video presentation featured individuals whose employers had kept faith with them through multiple relapses. Interviewed employees credited their employers' humanitarian concern as having saved their lives. Employees seeking help with substance abuse problems are reassured: The "Employee Assistance Program (EAP) is not going to kick you out just because you're dealing with relapse issues. But we're going to offer the employee the services of EAP as long as they show that they are trying."

The Coast Guard's consideration of the issue in its July 8, 1988, Notice of Proposed Rulemaking (NPRM) also reflected a broad assumption that, even in the context of illegal drug use, rehabilitation would be available:

> The NPRM proposes four different options concerning the circumstances under which employees would or would not be given an opportunity to seek rehabilitation. Under the first option, an employee who comes forward voluntarily or tests positive for drugs for the first time would be eligible for rehabilitation rather than be discharged. . . . Once rehabilitated, the employee could be reinstated into his or her prior position. The second option would give rehabilitation rights to employees who come forward voluntarily or who are identified as drug users during periodic or random tests, but would not require that the same opportunity be afforded to drug users identified in reasonable cause or post-accident tests; those not afforded the right to rehabilitation could be discharged. In the third option, only volunteers could claim rehabilitation rights. Anyone testing positive for drugs could be fired immediately. In the fourth option, employers would not be required to offer an opportunity for rehabilitation. However, the employers could voluntarily offer a rehabilitation program. In all cases, employers would be free to offer more rehabilitation options than the minimum proposed. For example, an employer could voluntarily offer two chances for rehabilitation rather than one, however,

> drug use following rehabilitation would subject an individual's license, certificate of registry, or merchant mariners document to revocation proceedings. **Employees who undergo rehabilitation, whether voluntary or mandatory, and want to retain or regain their position would have to meet the requirements of this rule to complete the program and receive a recommendation for reinstatement.**

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel, 53 Fed. Reg. 25926, 25936 (July 8, 1988) (emphasis added). Notably, the only limitation the Coast Guard sought to impose on rehabilitation – even multiple opportunities for rehabilitation – was that the seafarer be required to complete the requisite program and receive a recommendation for reinstatement.

The Coast Guard's final rule deleted any agency-mandated rehabilitation requirement from its text on the grounds that "rehabilitation of an employee is not directly related to the safety of the vessel." *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064, 47069 (November 21, 1988). The Coast Guard determined that the availability of rehabilitation "should be a decision of the employer or agreed upon between labor and management during the collective bargaining process." *Id.*

As discussed further below, the deep sea maritime industry's success in implementing the Coast Guard-mandated drug testing program depended on the full cooperation of the maritime unions that effectively controlled the industry's qualified labor pool through their respective hiring halls. The unions were adamant that seafarers who tested positive for drugs be permitted to retain seniority and, following rehabilitation, continue to bid for positions through the hiring hall.

II.

During the Relevant Time Period, Aggressive Individualized Testing Programs Would Have Been Legally Problematic and Were Not the Maritime Industry Standard.

We understand that the Plaintiffs have also suggested that Exxon's conduct was reprehensible due to the company's failure to subject Captain Hazelwood to an aggressive individualized testing program. During the relevant time period, however, such a program would have been legally problematic and was certainly not the industry standard. As a general rule, testing in excess of federal mandated requirements presented serious obstacles on at least three fronts: 1) the federal regulatory agencies, 2) labor unions and individual employees, and 3) state and local laws.

It is important to remember that, at the time of the accident, the legality of government-mandated substance abuse testing for employee groups without a demonstrated history of substance abuse was, in fact, a fairly close call. The Supreme Court approved such government-mandated testing by a bare five to four majority just eight days before the Exxon Valdez accident occurred. *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (March 2, 1989) (hereinafter "*Von Raab*"). The *Von Raab* decision effectively overturned circuit court precedent finding that random testing, even for those employees holding safety sensitive positions, was unconstitutional. *Lovvorn v. City of Chattanooga,* 846 F.2d 1539 (6th Cir. 1988); *Penny v. Kennedy,* 846 F.2d 1563 (6th Cir. 1988); *Railway Labor Exec. Ass'n v. Burnley,* 839 F.2d 575 (9th Cir. 1988), rev'd 489 U.S. 602 (1989). In his dissent in *Von Raab,* Justice Scalia condemned the Customs Service drug testing program in the following terms:

> The Court agrees that this constitutes a search for purposes of the *Fourth Amendment* – and I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity.
>
> * * *
>
> In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

489 U.S. at 680-81.

The United States Department of Transportation's Final Rule governing testing procedures[5] provided that an employer could include alcohol or other controlled substances in its testing protocols "only pursuant to DOT agency approval, if testing for those substances is authorized under agency regulations and if the DHHS has established an approved testing protocol and positive threshold for each such substance." 49 C.F.R. § 40.219(b). The DOT adhered to the view that its success in legally defending its testing regime depended on private employers' strict adherence to the program's specific scope and testing protocols:

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[5] The Coast Guard's final rule on substance abuse testing required that testing be conducted in accordance with the procedures set forth in the Department of Transportation's final rule – 49 C.F.R. Part 40.

> A number of comments objected to this provision, noting that other substances (e.g., barbiturates, benzodiazapines, alcohol) are abused and can cause safety problems. Some comments said that employers were already testing for these additional substances (often stating that they tested for nine or ten drugs currently), and that the rule would either make them scale back existing programs or increase their testing costs. Under the approach that most of these comments appeared to favor, an employer, where its authority to do so was not otherwise constrained (e.g., by state law or union contract), could ask the laboratory to test the "DOT sample" for any additional substances the employer chose.
>
> When the Federal government requires an employer to conduct drug tests, it seems clear from court decisions that the fourth amendment applies to the testing that the employer conducts in response to the Federal requirement. Fourth amendment considerations would arguably apply to any testing resulting from a urine sample collection required by the Federal government, including discretionary employer testing piggybacked onto the DOT-mandated collection. The employers' discretionary testing would also probably be reviewed by the courts as part of the courts' consideration of the overall validity of DOT drug testing rules.

In determining whether a testing requirement passes fourth amendment muster, courts typically have tried to balance governmental interests underlying the testing requirement and the privacy interests of employees. One of the factors examined by the courts in determining the strength of the governmental interest is the safety necessity of testing. Another factor examined is the extent to which testing procedures protect the privacy interest of employees, thereby limiting the intrusion on rights protected by the fourth amendment.

Courts have upheld Federally-mandated drug testing for the five drugs under the DHHS Guidelines (see for instance *Skinner v. Railway Labor Executives Association Skinner [sic], 109 S.Ct. 1402 (1989)).*[6] Testing for additional drugs increases the privacy intrusion of testing. Therefore, a change in this respect may make court approval of DOT-required testing more difficult.

DHHS-approved testing protocols and positive thresholds for drugs beyond the five for which testing is now required do not exist. DHHS certification of laboratories does not extend to testing of any of the additional drugs. Consequently, the uniform standards crucial to the accuracy and integrity of the testing process, which courts have relied upon in upholding Federally-required drug

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[6] *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989) ("*Skinner*").

> **testing, are not now in place for the additional drugs.** This absence of uniform standards could also make defense of the DOT regulations in court more difficult.

Procedures for Transportation Workplace Drug Testing Programs, 54 Fed. Reg. 49854, 49854 (December 1, 1989) (emphasis provided).

The Coast Guard echoed the DOT's position and emphasized that employers had the option of testing for alcohol on a reasonable cause basis:

> In the case of alcohol, present urine testing technology only permits a rough estimation of alcohol concentration levels in an individual's blood. For this reason, **this proposal does not require urine testing for alcohol.** The rule could be modified if there are advances in urine testing in the future.
>
> This does not mean the Coast Guard condones abuse of alcohol. The Coast Guard has issued a Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, *52 FR 47526*, December 14, 1987) that prohibits an individual from consuming alcohol on-duty or performing duties while intoxicated. Off-duty use is limited and subject to the restrictions contained in the final rule. **With reasonable cause**, testing to determine blood alcohol levels can be directed.

53 Fed. Reg. 25926, 25928 (July 8, 1988) (emphasis added).

Even in the narrow context of reasonable cause, alcohol testing was – and still is to this day – permissive rather than mandatory. *Operating a*

Vessel While Under the Influence of Alcohol or a Dangerous Drug, 33 C.F.R. § 95.035 (2007). Moreover, the Coast Guard was openly skeptical that alcohol testing was an adequate substitute for direct observation:

> While the behavioral standard may be used as a reasonable basis to test a person for drugs or alcohol, **the behavioral standard is also intended to be an independent basis for determining intoxication. The Coast Guard has determined that a behavioral standard independent of a BAC standard is essential.** There may be individuals with a susceptibility to alcohol or drug/alcohol combinations such that they are seriously impaired at levels lower than the BAC standards. Whatever the cause, the objective is to remove dangerously impaired operators from vessels to which *46 U.S.C. 2302* applies.

Operating a Vessel While Intoxicated, 52 Fed. Reg. 47526, 47528 (December 14, 1987) (emphasis added).

> Section 94.035 outlines who may direct a chemical test, when reasonable cause exists to direct the taking of a chemical test, and some general testing requirements. Since marine employers are most likely to be in a position to recognize the need for testing an employee, the Coast Guard continues to permit those employers to require chemical testing for reasonable cause. The acceptability of a particular test required by a marine employer will be established during an administrative or judicial proceeding.

Id. at 47530 (December 14, 1987) (emphasis added). Both in the late 1980's, and to the present date, the Coast Guard only **requires** alcohol testing in the aftermath of a serious marine incident. *Marine Casualties and Investigations,* 46 C.F.R. Part 4 (2007).

Maritime labor unions presented a second formidable obstacle to non-mandatory alcohol testing. They shared Justice Scalia's view that substance abuse testing constituted an assault on their members' civil liberties. The unions' conviction was strengthened by the Coast Guard's admission that it could not "specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage," and that its data was "sparse and are not conclusive." 53 Fed. Reg. 25926, 25927 (July 8, 1988). Moreover, at least with respect to the deep sea industry, the safety rationale suffered from a glaring defect – because the program applied only to U.S. flag vessels, it had no application to approximately 97% of the ships entering American ports.[7] The major maritime labor unions united in a sustained legal attack that succeeded in enjoining the Coast Guard's random testing program almost six months after the Exxon Valdez accident. *Transportation Institute v. United States Coast Guard,* 727 F. Supp. 648 (D.D.C 1989).

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[7] Exxon's drug and alcohol policy guidelines exceed both OCIMF and Coast Guard standards, and Exxon requires that any party contracting to do business with it must adhere to this heightened drug and alcohol testing protocol. Therefore, these Exxon contracting practices have been an important means for extending U.S. safety standards to a large portion of the international maritime industry.

The formidability of the unions' opposition to non-mandatory alcohol testing was attributable to two independent factors – their administrative power and their rights under federal labor law. The American maritime industry has historically been characterized by a strong presence of organized labor. Moreover, with respect to the deep sea segment of the industry, most maritime employers were, and continue to be, heavily dependent on union-controlled hiring halls for the staffing of their vessels. Consequently, full union cooperation in the implementation of the industry's substance abuse testing program was beyond critical – it was indispensable.

It was a delicate task to obtain the unions' cooperation in the implementation of a program that they considered destructive of their members' civil liberties. In order to obtain this cooperation, AMS took the extraordinary step of inviting the largest maritime union – the Seafarers International Union (SIU) – to participate in the joint selection of specimen collection contractors, a NIDA-certified testing laboratory, and a medical review officer organization. Much to the unions' discomfort, their hiring halls and medical facilities became the means for achieving industry compliance.

A key consideration for the unions' agreement to facilitate the implementation of federally mandated substance abuse testing was the employers' willingness to make the program no more intrusive than what was then required by the United States Coast Guard. Indeed, the National Labor Relations Board ("NLRB") held that, irrespective of the Supreme Court's Fourth Amendment determinations in *Skinner* and *Von Raab*, drug testing of current employees constituted a mandatory subject of bargaining. *Johnson-Bateman Co.,* 295 N.L.R.B. 180 (June 15, 1989); *Star Tribune,* 295 N.L.R.B. 543 (June 15, 1989).[8] In fact, the NLRB held that even where drug testing is required under federal regulations, employers were obligated to negotiate regarding the discretionary interstitial issues.

In a 1991 General Counsel Memorandum, the NLRB addressed an employer's refusal to bargain over the implementation of a drug testing program pursuant to Department of Transportation and Federal Highway Administration specifications contained in 49 C.F.R. Part 391 and 49 C.F.R. Part 40. *United Telephone,* 1991 NLRB GCM LEXIS 70 (January 31, 1991). Since the drug testing program was mandated by federal regulations, the employer considered it to be "non-bargainable." *Id.* at *7. The NLRB disagreed and concluded that the employer was obligated to bargain with the union concerning the discretionary issues associated with implementation of the drug testing program.

> Although the Employer properly recognized that it was subject to the Federal regulations . . . requiring the implementation of a drug

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[8] In *Star Tribune,* the NLRB ordered the employer to revoke the unilaterally instituted drug and alcohol testing policy and cease and desist from unilaterally instituting any future drug and alcohol testing programs without first bargaining with the unions. Furthermore, the employer was ordered to remove all notices, reports or memoranda from employee files that resulted from the unilaterally implemented drug and alcohol policy, to rescind any discipline imposed on employees as a result of the drug and alcohol policy and to "make such employees whole for any losses they may have suffered." *Star Tribune,* 295 N.L.R.B. at 551.

> testing program, we nonetheless conclude that the Employer violated Section 8(a)(5) and (1) by refusing to bargain with the Union. It is well settled that an employer is excused from the duty to bargain over that which it is legally compelled to do. **The duty to bargain is completely obviated, however, only where an employer has no discretion as to the execution of the legally compelled activity.**

Id. at *12. (emphasis added).

In the late 1980's, the exclusive goal of AMS was to achieve industry compliance with United States Coast Guard substance abuse testing regulations. Due to the absolute necessity of unions' administrative cooperation, and the legal strictures of the National Labor Relations Act, the pursuit of a more ambitious substance abuse testing regime would have risked the collapse of the maritime industry's deep sea compliance program altogether.

An independent reason for restricting the maritime industry's substance abuse testing compliance program to actual Coast Guard requirements was the industry's ability to avail itself of the Supremacy Clause of the United States Constitution. In the 1980's, many jurisdictions were deemed to be hostile to employer drug and alcohol testing programs. For example, in early 1990, a California appellate court held that:

> [T]he right of privacy in the California Constitution protects Californians from actions of private employers as well as government agencies. Accordingly, when a private employee is terminated for refusing

> to take a random drug test, he may invoke the public policy exception to the at-will termination doctrine to assert a violation of his constitutional right to privacy.

Semore v. Pool, 217 Cal. App. 3d 1087, 1092 (Cal. Ct. App. 1990). While the California Court of Appeal recognized that certain safety concerns may justify "intrusive drug testing of categories of employees under Fourth Amendment analysis," the Court went on to note that "this is **only one factor to be weighed** in the balancing test" to determine whether "the employer's need to assure safe and efficient operation of its plant outweighs the employee's legitimate expectation of privacy." *Id.* at 1098 (emphasis added). Therefore, the fact that an employee may have occupied a safety sensitive position was not, by itself, enough to insulate an employer from liability resulting from intrusive drug or alcohol testing.

The availability to employees of a private cause of action against intrusive employment-based substance testing was a very real concern for employers looking to implement a drug and alcohol testing program in the late 1980's and early 1990's. *Luck v. Southern Pacific Transportation Co.*, 267 Cal. Rptr. 618 (Cal. Ct. App. 1990), *cert. denied*, 498 U.S. 339 (1990) (Affirming a $485,000 award against an employer for wrongfully discharging an employee who refused to provide a urine specimen for screening and finding that urinalysis "intrudes upon reasonable expectations of privacy," and is permissible only if "justified by a compelling interest.").

During this same time period, plaintiffs had also prevailed in similar causes of actions in other states. For example, in New Jersey, in the late 1980's, a safety-sensitive employee working at an oil refinery was discharged after a random drug test showed that he tested positive for marijuana. The trial court granted the plaintiff employee summary judgment on his wrongful discharge claim and found a "clear mandate of public policy against private random drug testing in the search-and-seizure provision of New Jersey's Constitution." *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 12 (N.J. 1992).

As these cases demonstrate, during the late 1980's and early 1990's, private employer liability under state law for intrusive drug and alcohol testing programs was a serious concern. In addition, local governments were also getting involved in similar legislative efforts. For example, San Francisco enacted an ordinance placing restrictions on an employer's ability to implement a drug and alcohol testing program in the workplace, including a blanket prohibition on random testing. *Prohibition of Employer Interference*, San Francisco, Cal., Police Code Art. 33A. Furthermore, section 3300A.8 of the San Francisco Code established a private cause of action that could be brought by individuals for special and general damages, attorneys' fees and costs for a violation of the ordinance.

There was wide expectation, during this time period, that maritime companies would soon be inundated with litigation by seafarers who either refused to be tested or tested positive for drugs and/or alcohol. AMS consistently described the Coast Guard regulations to its members as a federal shield that protected maritime employers from claims based on inconsistent state or local law. As a corollary, AMS warned its members that going beyond the border of this shield – i.e., exceeding compliance requirements – would expose the maritime employer to a plethora of lawsuits based on state and local law. The policy of not exceeding the Coast Guard requirements was deemed particularly appropriate in view of the fact that the U.S. industry's competitors – the international flag carriers constituting 97% of vessel traffic in and out of U.S. ports – generally had no substance abuse testing programs or programs that were limited to pre-employment testing.

Due to the conditions that prevailed in 1989 – including the hostility of federal agencies, labor unions, and state authorities – it was unquestionably the maritime industry standard practice to limit substance abuse testing to the strict requirements of the Coast Guard's regulations. The development of an individualized testing regime for Captain Hazelwood would have been a risky departure from this standard.

Furthermore, the suggestion that Exxon should have been involved in the aggressive monitoring of Hazelwood's shoreside conduct was also alien to the Coast Guard's program during the relevant time period. Indeed, the Coast Guard's regulations emphasize that the diminution of an individual's Fourth Amendment rights under the federal program was based on his shipboard activities:

> *"Crewmember"*, as used in this part, is an important term as it defines vessel personnel to whom the regulations of this part apply. The intent of these regulations is to chemically test all individuals engaged or

> employed aboard a vessel who perform duties which directly affect the safety of the vessel or its operations. This definition states that anyone aboard a vessel who is acting under the authority of a license, certificate of registry, or merchant mariner's document issued under this subchapter, whether or not a member of the vessel's crew, is subject to the requirements of this part.

53 Fed. Reg. 47064, 47073 (November 21, 1988). From the inception of its drug and alcohol testing program, Coast Guard personnel consistently advised AMS that the program's reasonable cause testing component applied only to conduct that occurred on the vessel.[9] Consequently, AMS supervisory training seminars have always included the admonition that maritime employers have no authority under Coast Guard regulations to initiate a reasonable cause drug or alcohol test based on shoreside conduct. As discussed above, such testing outside the mandates dictated by the Coast Guard subjected maritime employers to privacy-based litigation based on state, local, and federal labor law.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court not base any award of punitive damages against Exxon either on its policy of reinstating individuals to safety sensitive positions upon successful completion of rehabilitation or its non-implementation of testing that would have exceeded the scope of mandatory Coast Guard testing requirements.

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[9] As the Coast Guard stated in the preamble to its Final Rule: "Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees." 53 Fed. Reg. 47064, 47066 (November 21, 1988)

December 26, 2007

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No. 07-219

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In the Supreme Court of the United States

EXXON SHIPPING CO. ET AL.,

Petitioners,

v.

GRANT BAKER ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN TORT REFORM ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE WESTERN STATES PETROLEUM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the third question presented: whether the $2.5 billion punitive award is excessive.

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TABLE OF AUTHORITIES—continued

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Lane v. *Hughes Aircraft Co.*,
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Moreno v. *Consol. Rail Corp.*,
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Nesselrode v. *Executive Beechcraft, Inc.*,
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Pac. Mut. Life Ins. Co. v. *Haslip*,
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Pearson v. *Chung*, No. 05-CA-4302-B
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Philip Morris USA v. *Williams*,
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Pichler v. *UNITE*,
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Planned Parenthood of Columbia/Willamette, Inc. v. *Am. Coal. of Life Activists*,
422 F.3d 949 (9th Cir. 2005), cert. denied,
547 U.S. 1111 (2006) 20

TABLE OF AUTHORITIES—continued

Page(s)

Read v. *Reppert*, 190 N.W. 32 (Iowa 1922) 11
Romo v. *Ford Motor Co.*,
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Rosado v. *Santiago*,
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Rowlett v. *Anheuser-Busch, Inc.*,
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Simon v. *San Paolo U.S. Holding Co.*,
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Smith v. *Wade*, 461 U.S. 30 (1983) 24
Solem v. *Helm*, 463 U.S. 277 (1983) 16
State Farm Mut. Auto. Ins. Co. v. *Campbell*,
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Swain v. *383 W. Broadway Corp.*,
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Tellabs, Inc. v. *Makor Issues & Rights, Ltd.*,
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TXO Prod. Corp. v. *Alliance Res. Corp.*,
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Udac v. *Takata Corp.*, Civ. No. 02-1-0260
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White v. *Ford Motor Co.*, CV-N-95-0279-DWH,
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grounds, 500 F.3d 963 (2007) 17
Williams v. *ConAgra Poultry Co.*,
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Zhang v. *Am. Gem Seafoods, Inc.*,
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TABLE OF AUTHORITIES—continued

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42 U.S.C. § 1981 10

42 U.S.C. § 1983 10

46 U.S.C. § 2114 10

MISCELLANEOUS

1 Dan B. Dobbs, LAW OF REMEDIES (2d ed. 1993) 25

Compliance and Enforcement Annual Results: FY2007 Air Case Highlights, http://cfpub.epa.gov/compliance/resources/reports/endofyear/fy2007/airhighlights/#1236 30

Environmental Protection Agency, *Regional Newsrooms*, http://www.epa.gov/newsroom/newsrooms.htm 29

1 Steven F. Friedell, BENEDICT ON ADMIRALTY (7th rev. ed. 2007) 8

Lisa Litwiller, *From* Exxon *to* Engle: *The Futility of Assessing Punitive Damages As Against Corporate Entities*, 57 RUTGERS L. REV. 301 (2004) 23

Jill Rakoff Loxsom, *Admiralty*, 5 SUFFOLK TRANSNAT'L L.J. 251 (1980) 8

Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931) 25

David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997) 7

TABLE OF AUTHORITIES—continued

Page(s)

Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV. 133 (1982) 25

Steven Shavell, *On the Proper Magnitude of Punitive Damages*: Mathias v. Accor Economy Lodging, Inc., 120 HARV. L. REV. 1223 (2007) 25, 26

Cass R. Sunstein *et al.*, PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) 15

INTEREST OF THE AMICI CURIAE[1]

Amici are five associations (described with particularity in the Appendix) that collectively represent a broad swath of the American business community. Their members are regularly targeted with suits seeking massive amounts of punitive damages. Accordingly, *amici* have a strong interest in this Court's continued development of principles to control the imposition of excessive amounts of punitive damages.

Amici have a particularly strong interest in the third question on which review was granted—whether the punitive award against Exxon is excessive. Although the issue arises under maritime law, the Court's resolution of that issue can be expected to influence the lower courts' excessiveness analysis outside the maritime context. Accordingly, *amici* will endeavor to set forth in this brief a coherent approach to resolving excessiveness challenges that can be applied not just in this case, but in all cases raising an excessiveness issue.

SUMMARY OF THE ARGUMENT

The starting point for the analysis should be uncontroversial: ***A punitive award is excessive (whether under maritime law or otherwise) if it is greater than reasonably necessary to accomplish the governmental interests in deterrence and retribution***. This Court has both articulated and applied that principle repeatedly in its recent punitive damages cases. Moreover, this rule has deep roots in American common law. And it also makes perfect sense: A punitive award that exceeds the amount that is reasonably necessary to accomplish deterrence and retribution by definition serves no legitimate purpose, and an award that serves no valid purpose is necessarily excessive.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

A number of considerations are generally pertinent to determining whether a punitive award exceeds the amount reasonably necessary to deter and punish. Although they may vary somewhat from case to case, the principal questions that courts should ask in most cases are:

- ***What is the conduct that is being punished?*** It is impossible to determine whether a punitive award exceeds the amount that is reasonably necessary to punish and deter without first clearly identifying the conduct that is being punished. In making that determination, courts should not simply accept the inferences that the plaintiff asked the jury to draw, as the Ninth Circuit did here. Instead, absent an express finding by the jury, courts should independently evaluate the evidence when identifying the punishable conduct. Here, for example, the Ninth Circuit's assumption that Exxon knowingly put a relapsed alcoholic in charge of a tanker in dangerous waters is untenable as a matter of both logic and evidence. The jury was permitted to impose punitive damages against Exxon if it found that ***Hazelwood*** was reckless, so there is no reason to suppose that it found anything more than that. But even putting this obvious flaw in the Ninth Circuit's analysis aside, the only reasonable conclusion from the evidence is that Exxon was guilty of nothing more than entrusting Captain Hazelwood with command of the Exxon Valdez notwithstanding his diagnosis of "alcohol abuse–episodic."

- ***How wrongful was the conduct?*** This consideration entails determining the level of moral opprobrium that should attach to the defendant's conduct, placing particular weight on the defendant's state of mind. Here, for example the decision not to terminate an employee with a diagnosis of "alcohol abuse–episodic" was not morally repugnant. Tempting though it is to demonize Exxon because of the damage that befell Prince William Sound, Exxon did not deliberately contaminate that ecosystem; nor did it knowingly put that ecosystem at risk in a callous effort to save money. Objectively viewed, the decision to retain Captain Hazelwood, if wrongful at all, falls on the low end of the spectrum of reprehensibility—paling in comparison to virtually every other tort for which punitive damages are awardable. A $2.5 billion exaction cannot possibly be justified as necessary to punish and deter conduct that is this low on the reprehensibility spectrum.

- ***Who committed the conduct?*** Companies can act only through their employees and management. Yet a punitive award against a company is borne by its shareholders, its workforce, and ultimately consumers of its products or services. Hence, it is both misguided and counterproductive to treat the company itself as the wrongdoer whose conduct needs to be punished. The right question instead is: "What is the amount of punitive damages needed to deter the person(s) within the company who perpetrated the tortious conduct?" Here, the decision to retain Hazelwood was made by the president of Exxon Shipping. He may rank high in the corporate hierarchy, but there is little reason to think that a $2.5 billion exaction against the corporate parent's shareholders is necessary to change the conduct of the subsidiary's president.

- ***To what extent do compensatory damages, fines, and other costs borne by the defendant as a result of its conduct already satisfy the goals of deterrence and retribution?*** It is a matter of common sense—and has been recognized by this Court, other courts, and commentators—that conduct can be deterred and punished by means of compensatory damages, awards of attorneys' fees, fines, injunctions, and other costs (such as reputational harm) borne by a defendant as a result of its conduct. The present case is the best imaginable illustration of the point. Exxon incurred over $3.4 ***billion*** in damages, settlements, remediation costs, and fines as a result of the spill. It also took a massive reputational beating. When these costs of the decision to allow Hazelwood to continue commanding oil tankers are considered, the conclusion should be self-evident that anything more than a nominal amount of punitive damages exceeds the amount necessary to deter and punish.

- ***What penalties have the expert regulatory agencies determined to be appropriate to punish and deter the same or similar conduct?*** Another important indicium of whether a punitive award is greater than reasonably necessary to punish and deter is the penalties that expert regulatory agencies (and/or prosecutors) have imposed for the same or similar conduct. These agencies have the funding, expertise, investigative tools, knowledge of the law, and familiarity with the range of punishable conduct and with the consequences of overdeterrence to make a well-informed determination of the proper amount of punishment for particular conduct. Absent evidence of corruption or fraud on the agency, a punitive award that exceeds the fines imposed by the expert agencies (and/or prosecutors) for the same or similar conduct generally should be deemed to exceed the amount that is reasonably necessary to deter and punish. Here, the punitive damages set by the Ninth Circuit exceed the fines collectively agreed on and imposed by the United States and the State of Alaska by $2.375 billion. That is a compelling indication that the punitive award exceeds (by billions) the amount necessary to punish and deter.

- ***How does the punitive award compare to prior punitive awards for comparable or more egregious conduct?*** Courts also should compare the punitive award to exactions imposed for comparable or more egregious conduct. If a punitive award is materially higher than punishments for similar or more egregious conduct, that is a powerful indication that it exceeds the amount necessary to punish and deter. That is certainly the case here. This punitive award is $1.3 billion greater than the prior record holder, which was imposed in a class action alleging kidnapping, torture, and murder.

- ***Is the punitive award disproportionate to the harm to the plaintiff(s)?*** This Court has consistently observed that, when compensatory damages are not "small," a punitive award that is a substantial multiple of the harm or potential harm to the plaintiff is presumptively excessive. *Amici* agree, but note that the converse is not necessarily true: Even if a punitive award is a small multiple or (even a fraction) of the harm to the plaintiff, the factors discussed above may still indicate that it is excessive. This case is a perfect example. A punitive award that is equal to the harm to the plaintiff class (as measured by the Ninth Circuit)—*i.e.*, $504.1 million—would still be excessive because such an exaction would far exceed the amount that is reasonably necessary to punish and deter, given the non-iniquitous nature of the conduct, the massive costs already borne by Exxon, the fines that state and federal prosecutors deemed appropriate, and other factors discussed above.

- ***If the tortfeasor is an individual, what is his or her financial condition?*** It is well accepted that it takes a higher punitive award to deter and punish a wealthy individual than to deter and punish an impecunious one. Accordingly, the wealth of an ***individual*** is a relevant factor. However, for reasons explained in the brief of a different *amicus*, the same is not true for organizational defendants. Accordingly, Exxon's large net worth cannot justify the $2.5 billion exaction.

Unfortunately, the Ninth Circuit failed to consider most of the relevant factors. And the ones that it did consider, it misapplied. The root cause of its error was its failure to understand the ultimate inquiry—whether a more modest sanction would have achieved the governmental interests in retribution and deterrence. There can be only one answer to that question: A $2.5 billion exaction far exceeds the amount that is reasonably necessary to punish and deter under the circumstances of this case. Indeed, the costs already borne by Exxon ***independent of any punitive award*** more than accomplish those goals by themselves.

ARGUMENT

In addressing whether the $2.5 billion punitive award is excessive under federal maritime law, the Court will essentially be writing on a blank slate: This Court "has never affirmed an award of punitive damages in an admiralty case" (*Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1508 n.11 (5th Cir. 1995) (en banc)), much less discussed the standards for determining whether such an award is excessive. Nor is there much learning to be derived from the lower courts, because there are "very few" maritime cases actually awarding punitive damages. *Ibid.*; see also David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 162 (1997) ("[t]here are not all that many reported decisions in which punitive awards were actually made"). Among these "very few" cases, even fewer have addressed the amount of punitive damages, and those that have are "uncertain precedent due to the historical circumstances of their decisions and the singular nature of their facts." Jill Rakoff Loxsom, *Admiralty*, 5 SUFFOLK TRANSNAT'L L.J. 251, 254-55 (1980).

Because there is essentially no law governing the circumstances under which a punitive award in the maritime context will be found to be excessive, the Court can and should look to cases and commentary addressing excessiveness in other contexts. See, *e.g.*, *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 388-93 (1970); 1 Steven F. Friedell, BENEDICT ON ADMIRALTY § 112, at 7-49 to 7-50 (7th rev. ed. 2007). These sources are useful in ascertaining not only a standard for excessiveness, but also the considerations relevant to that inquiry. As we explain in Section A, the standard is straightforward: A punitive award is excessive (whether under maritime law or otherwise) when it exceeds the amount that is reasonably necessary to satisfy the governmental interests in retribution and deterrence. And as we explain in Section B, a number of factors are useful in determining whether a particular punitive award is excessive in relation to the governmental interests in retribution and deterrence, virtually all of which compel the conclusion that the $2.5 billion punitive award in this case cannot stand.

A. A Punitive Award Is Excessive If It Is Greater Than Reasonably Necessary To Satisfy The Governmental Interests In Retribution And Deterrence.

The Ninth Circuit lost its bearings at the very beginning of its journey. Though tasked with determining whether the jury's punitive award (as modestly reduced by the district court) was excessive, the court never asked the relevant question. Had it done so, it could never have come to the conclusion that a $2.5 billion punitive award is permissible under the circumstances of this case.

We submit that the inquiry is a straightforward one that applies whether the award is being challenged as excessive under maritime law, federal common law, state law, or the Due Process Clause. As this Court recognized almost 17 years ago, the question is "whether [the] particular award is greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991).

Since *Haslip*, the Court has twice invoked this standard, holding a $2 million punitive award to be unconstitutionally excessive in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and a $145 million exaction to be unconstitutionally excessive in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003).

The Court began its analysis in *BMW* by noting that "the federal excessiveness inquiry begins with an identification of the state interests that a punitive award is designed to serve"—"punishing [the defendant] and deterring it from future misconduct." 517 U.S. at 568. After exploring the relevant considerations, the Court ultimately concluded:

> The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the ques-

> tion whether a lesser deterrent would have adequately protected the interests of Alabama consumers.

Id. at 584.

In *State Farm,* the Court again emphasized that the legitimate purposes of punitive damages are "deterrence and retribution" (538 U.S. at 416) and went on to hold that "a more modest punishment for [the defendant's] reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further" (*id.* at 419-20).

Though perhaps enjoying somewhat greater leeway, courts evaluating whether punitive awards imposed under federal statutes are excessive ask the same basic question. See, *e.g.*, *Allahar* v. *Zahora*, 59 F.3d 693, 696 (7th Cir. 1995) (an award of punitive damages under 42 U.S.C. § 1981 should be set aside "if it exceeds an amount necessary to achieve the objective of punishment and deterrence"); *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 206-07 (1st Cir. 1987) (same); *Gaffney* v. *Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 464 (7th Cir. 2006) (same under 46 U.S.C. § 2114), cert. denied, 127 S. Ct. 933 (2007); *Bogan* v. *Stroud*, 958 F.2d 180, 185 (7th Cir. 1992) (same under 42 U.S.C. § 1983).

Similarly, courts have engaged in this inquiry when evaluating punitive awards for excessiveness under state common law See, *e.g.*, *DeRance, Inc.* v. *Painewebber Inc.*, 872 F.2d 1312, 1328 (7th Cir. 1989) (under Wisconsin law, "'we must reject the amount of a jury's award if it exceeds what was required to serve the objectives of deterrence and punishment'"); *Aldrich* v. *Thomson McKinnon Sec., Inc.*, 756 F.2d 243, 249 (2d Cir. 1985) ("[punitive] damages should not be permitted to go beyond that amount reasonably necessary to secure the purposes of such awards, and thus to become in part a windfall to the individual litigant").

The same basic inquiry also has long determined when compensatory awards are excessive. See, *e.g.*, *Blunt* v. *Little*, 3 F. Cas. 760 (D. Mass. 1822) (Story, J.) (holding that courts have a duty to set aside "damages [that are] excessive in relation to the person or the injury"); *Read* v. *Reppert*, 190 N.W. 32, 36 (Iowa 1922) (ordering remittitur of $3,000 verdict to $2,000 because "damages in the amount of $2,000 would be sufficient to fully compensate plaintiff for the injury suffered"); *Nesselrode* v. *Executive Beechcraft, Inc.*, 707 S.W.2d 371, 386 (Mo. 1986) (en banc) ("awarding a plaintiff something in excess of just compensation constitutes an act falling outside the purpose of compensatory damages"); *Swain* v. *383 W. Broadway Corp.*, 216 A.D.2d 38, 38-39 (N.Y. App. Div. 1995) (remanding for new trial on damages because the jury's award "went beyond making plaintiff whole, amounting to a windfall").

Moreover, as a matter of first principles, this approach makes perfect sense: Whether punitive or compensatory, if a damages award goes beyond the amount necessary to serve the State's legitimate interests, it is by definition illegitimate and excessive. As we next discuss, that is precisely the case here.

B. Multiple Relevant Considerations Compel The Conclusion That $2.5 Billion Is Far More Than Needed For Retribution And Deterrence.

Because the Ninth Circuit never asked the right question—whether the punitive damages exceed the amount reasonably necessary to punish and deter—it also failed to identify and apply the factors relevant to that inquiry. Instead, it simply sought to apply the three excessiveness "guideposts" identified by this Court in *BMW* (though essentially treating the third guidepost as a nullity). The *BMW* guideposts can be very useful ***if*** applied with the understanding that they are merely tools for helping determine whether a punitive award exceeds its legitimate purposes. But courts all too often treat them as an exclusive checklist, working through each guidepost without any apparent appreciation of the purpose for which these guideposts exist and without consideration of other constraining factors that may be pertinent. In short, the lower courts, including the Ninth Circuit, seem to be losing the forest for the trees.

This case affords the Court the opportunity to refocus the lower courts on the forest by clearly articulating and applying the factors that are relevant to determining whether a punitive award exceeds the amount reasonably necessary to punish and deter. These factors largely overlap the *BMW* guideposts, but are not limited by them. Indeed, although several of the relevant factors are implicit in this Court's prior decisions, the Court has not heretofore expressly instructed courts to consider them. Now is an opportune time to do so. Cf. *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007). Moreover, the important thing is that these considerations not be applied with blinders on. The goal of determining whether "a more modest punishment * * * could have satisfied the State's legitimate objectives" (*State Farm*, 538 U.S. at 419-20) must always be kept firmly in mind.

In the balance of this brief, we set forth the considerations that bear on whether a particular punitive award exceeds the amount necessary to punish and deter and explain why these considerations compel the conclusion that the $2.5 billion exaction in this case is wholly unsustainable.

1. What is the conduct that is being punished?

Logically, the first step in the analysis should be to identify with specificity the conduct that is being punished. The Ninth Circuit "defined the relevant misconduct supporting punitive damages as Exxon's keeping Captain Hazelwood in command with knowledge of Hazelwood's relapse into alcoholism." Pet. App. 22a. But it based this determination on its speculation in its earlier opinion about what the jury ***might have*** found, not on what the jury necessarily or specifically did find, stating:

> The jury ***could*** infer from the evidence that Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound.

Id. at 89a (emphasis added).

When the question is whether a punitive award is excessive, however, it is neither sensible nor fair to assume that the jury accepted every inference urged upon it by plaintiffs' counsel. The jury's task in setting punitive damages is fundamentally different from its task in determining liability. The latter necessarily requires the jury to find particular facts (specifically, the elements of the cause of action). By contrast, the jury's task in setting the amount of punitive damages does not typically involve determining whether any particular fact has been proven. This case is a perfect example. Having been instructed that it could hold Exxon liable for punitive damages based on Captain Hazelwood's conduct, the jury very likely reached no conclusion at all about Exxon's own conduct. Or, if it did, it may have believed that the only "misconduct" for which Exxon was directly (as opposed to vicariously) liable was the decision to allow Hazelwood to captain tankers notwithstanding his diagnosis of "alcohol abuse—episodic."[2]

Although the jury imposed a punitive award of $5 billion, that was at the ***low*** end of the $5 billion to $20 billion range suggested by plaintiffs' counsel. See JA1320. Thus, as in most punitive damages cases in which the plaintiff is allowed to pursue a wealth-based punishment, it is unjustified to assume from the size of the verdict that the jury accepted the various inferences, many with only the most modest foundation, urged upon it by plaintiffs' counsel. Its $5 billion verdict could mean nothing more than that, having been provided with a massive "anchor"—the range of punishments suggested by plaintiffs' counsel—it believed itself to be imposing modest punishment for an error in judgment that it considered to be of modest reprehensibility.[3]

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[2] *Amici* doubt that this judgment call, even if in retrospect mistaken, was punishable conduct at all but assume for purposes of argument that it was (much as this Court did in *BMW*).

Accordingly, we urge this Court to hold that, when conducting an excessiveness inquiry, reviewing courts should not take the facts in the light most favorable to the plaintiff and give the plaintiff the benefit of every conceivable non-frivolous inference. As the California Supreme Court has recognized, that would allow the award's size to "indirectly justify itself." *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005). Instead, absent express findings by the jury (which would be reviewed under traditional sufficiency standards), reviewing courts should conduct an independent review of the evidence to determine what the punishable conduct was shown to have been. *Id.* at 72; cf. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 439 n.12 (2001) (when conducting excessiveness review, courts must accept "***specific*** findings of fact" by the jury) (emphasis added).

Had the Ninth Circuit not deferred to findings that the jury "could" have made, it would have been hard pressed to conclude that Exxon had actual knowledge that Hazelwood "was going on board to command its supertankers after drinking" (Pet. App. 22a). Not only is the notion that Exxon would knowingly play Russian roulette with five bullets absurd on its face, but the evidence that supposedly supports this conclusion is exceptionally weak. As Exxon explained in its opposition to the cross-petition (at 19), the only allegation that Hazelwood had been drinking on duty to reach the attention of Exxon management was investigated and found to be false.[4]

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[3] Research establishes that juries often use the amount of punitive damages requested by the plaintiff as the starting point or "anchor" for their deliberations. Cass R. Sunstein *et al.*, PUNITIVE DAMAGES: HOW JURIES DECIDE 30, 32, 40, 62-74, 216-19 (2002).

2. How wrongful was the conduct?

Once the reviewing court has identified the conduct that is being punished, the next task is to determine how wrongful that conduct was. This consideration equates with the first of the guideposts identified in this Court's due process cases—"the degree of reprehensibility" of the conduct (see *BMW*, 517 U.S. at 575)—and is "'deeply rooted and frequently repeated in common-law jurisprudence'" (*id.* at 575 n.24 (quoting *Solem* v. *Helm*, 463 U.S. 277, 284 (1983)).

In *State Farm*, this Court identified five (presumably non-exclusive) factors that are relevant to the reprehensibility inquiry. See 538 U.S. at 419. When applied with due consideration of the ultimate inquiry—whether the punitive award exceeds the amount reasonably necessary to punish and deter the conduct—these factors are helpful. Unfortunately, however, courts routinely treat them as a checklist, deciding how many are "satisfied" (or arguably "satisfied") and then using the resulting figure to rate the reprehensibility of the conduct. This approach, which is exemplified by the decision below, often results in overstating the degree of reprehensibility of the conduct. In product-liability cases, for example, the first two *State Farm* factors are invariably present, and courts often find one or more of the remaining three factors to be present as well.[5] Yet the idea that every product-liability case in which punitive liability is found necessarily is one of high reprehensibility is self-evidently invalid.

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[4] There was, evidently, some testimony that Exxon management knew that Hazelwood had consumed small amounts of alcohol on two occasions when his ship was in for repairs. But Hazelwood's diagnosis was "alcohol abuse–episodic," not "alcoholism." It is not a red flag that a person diagnosed with "alcohol abuse–episodic" (a description that applies to many perfectly functional adults) has had a drink or two while off duty. See Opp. to Cross-Pet. 17-21.

We submit that the inquiry needs to be more nuanced. Courts should consider the five factors—as well as any other pertinent factors—as a whole. The goal of the inquiry should be to determine the level of moral opprobrium that should attach to the conduct. See *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (the amount of punitive damages "depend[s] on * * * the degree of moral turpitude or atrocity of the defendant's conduct"). In making that determination, courts should give far more weight than they currently do to the defendant's state of mind—*i.e.*, whether the defendant acted out of malice or callousness, or instead merely exercised poor judgment

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[5] For example, some courts have held the third factor to be present because consumers are always financially vulnerable compared to product manufacturers, the fourth factor to be present because products with a design defect are sold to multiple consumers, and/or the fifth factor to be present because the product manufacturer knowingly chose the design instead of another design that allegedly would have avoided the accident. See, *e.g.*, *Maggard* v. *Ford Motor Co.*, 2007 WL 4255272, at *7 (M.D. Tenn. Nov. 30, 2007); *White* v. *Ford Motor Co.*, CV-N-95-0279-DWH, slip op. at 35-37 (D. Nev. Mar. 14, 2005), rev'd on other grounds, 500 F.3d 963 (2007); *Romo* v. *Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 806 (Cal. Ct. App. 2003); *Udac* v. *Takata Corp.*, Civ. No. 02-1-0260, slip op. at 3 (Haw. Cir. Ct. Jul. 20, 2006).

(which is often characterized as recklessness to satisfy the standard for punitive liability).[6]

Retributive principles call for a more severe sanction for conduct that is the result of "intentional malice" (*State Farm*, 538 U.S. at 419) than for conduct that is not motivated by a desire to inflict harm. By the same token, if the defendant was animated by neither malice nor callousness, the obligation to pay compensatory damages should normally suffice to advance deterrence interests. Cf. *BMW*, 517 U.S. at 584-85 (because there was no evidence that the defendant had a "history of noncompliance with known statutory requirements"—*i.e.*, that it intentionally violated the law—a $2 million punitive award was not necessary for deterrence).

Of course, the inquiry is not binary. There are degrees of intentionality, and other factors may serve to make some conduct more reprehensible than conduct involving a similar level of intentionality. For example, a scheme to defraud multiple vulnerable senior citizens is more reprehensible than a fraud perpetrated during an arm's-length business transaction. Yet many courts simply apply the five reprehensibility factors and, if they find two or more satisfied, label the conduct "reprehensible" and move on to the next guidepost. By viewing the conduct in isolation rather than in comparison to other willful or wanton conduct, courts routinely overstate the degree of reprehensibility of the conduct. It is equivalent to treating violet light as if it had the highest frequency in the electromagnetic spectrum because we cannot see gamma rays. To perform this task accurately and fairly, it is necessary to place the conduct at issue on the broader spectrum of all punishable conduct. Only then is it truly possible to determine the magnitude of punishment that the defendant's conduct warrants.

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[6] Here again, the reviewing court should not defer to "findings" that the jury did not actually make. Instead, the court must weigh the evidence relating to state of mind for itself. As this Court has explained in a different context, "[t]he strength of an inference [of scienter] cannot be decided in a vacuum"; courts must therefore "consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2510 (2007).

The decision below is a good illustration of the errors courts make when undertaking the reprehensibility inquiry. It is bad enough that the Ninth Circuit strained to find the first, second, and fourth *State Farm* factors to be present. But what is worse is that it accorded little weight to what should be the most important factor: the presence or absence of an iniquitous state of mind. The simple, undeniable fact is that Exxon did not deliberately drive its tanker onto a reef in order to destroy the livelihoods of local fishermen. Nor was there any evidence that Exxon retained Hazelwood as a captain because it simply didn't care about Alaskans. Rather, Exxon's conduct (as opposed to that of Hazelwood himself) involved what at worst was a misguided decision to allow someone with the diagnosis of "alcohol abuse–episodic" to have command of a tanker.[7] But "[p]unitive damages are hardly necessary to punish

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[7] Exxon explains in its brief (at 9-10) why firing anyone with such a diagnosis would discourage individuals from seeking treatment and thereby increase the risk of accidents. We endorse that view, but accept the contrary one for purposes of argument.

'thoughtlessness.'" *Moreno* v. *Consol. Rail Corp.*, 99 F.3d 782, 792 (6th Cir. 1996).

Although the courts below evidently were influenced by the severe damage that was done to the environment (and collaterally to the plaintiff class), they completely overlooked the fact that Exxon didn't intend any of this to happen. Its state of mind is not the sort to which fairly attaches any substantial degree of moral opprobrium.

Considered alongside other punishable conduct, surely this error in judgment (if it was that) falls on the low end of the reprehensibility spectrum. It is objectively less blameworthy than, *inter alia*, kidnapping, torture, and murder (*e.g.*, *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996)); death threats and similar acts of physical intimidation (*e.g.*, *Planned Parenthood of Columbia/Willamette, Inc.* v. *Am. Coal. of Life Activists*, 422 F.3d 949 (9th Cir. 2005), cert. denied, 547 U.S. 1111 (2006)); racial, ethnic, or religious discrimination and/or harassment (*e.g.*, *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003)); a pattern of defrauding "elderly, uneducated, single black women" (*Life Ins. Co. of Ga.* v. *Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997)); or deliberately failing to disclose a known, life-threatening defect in helicopter engines in order to foist the cost of remedying it onto the helicopter owners (*Barnett* v. *La Societe Anonyme Turbomeca France*, 963 S.W.2d 639 (Mo. Ct. App. 1997)). Indeed, it is hard to imagine conduct less iniquitous than Exxon's that would still be subject to punitive damages.[8]

In short, contrary to the Ninth Circuit's conclusion, Exxon's conduct was not in the "mid range" of reprehensibility (Pet. App. 31a) merely because several of the *State Farm* factors were arguably present. As in *BMW*, "the extraordinary size of the award in this case is [not] explained by the extraordinary wrongfulness of the defendant's behavior," compelling the conclusion that there is a "severe lack of proportionality between the size of the award and the underlying punitive objectives" (517 U.S. at 595, 596 (Breyer, J., concurring)).

3. Who committed the conduct?

One factor that is insufficiently reflected by the three guideposts is the identity of the wrongdoer. It is a truism that companies and other organizations can act only through their employees and managers. Yet in the quest to maximize punitive damages, plaintiffs routinely portray the company as a monolith and suggest that the punitive exaction must be large enough to punish and deter that monolith. Reviewing courts often adopt the same fallacious perspective. The inevitable consequence is oversized punitive awards that are far greater than necessary to ensure that the conduct is not repeated.

Here, for example, it was not "Exxon" that decided to allow Hazelwood to remain in command of tankers. It was a single human being, Exxon Shipping's president Frank Iarossi, who made that judgment call.[9] True, he was a high-level executive. But that doesn't mean that a $2.5 billion exaction is necessary to punish for his decision. Indeed, the great irony of imposing punitive damages against a company is that they punish shareholders, innocent employees, and customers, but not the individual(s) who actually committed the tort. Cf. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (declining to construe 42 U.S.C. § 1983 to allow for punitive damages against municipalities and observing that "an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort").

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[8] And, of course, it must be remembered that Exxon paid mightily for its personnel decision even before a penny of punitive damages was assessed.

Similarly, an exaction of this magnitude is not necessary to deter Iarossi, or others in similar positions, from making misguided personnel decisions in the future. An executive like Iarossi is judged on the basis of the performance of the business unit for which he is responsible. When there is a catastrophic accident, like the one here, the damage to the company's bottom line from the loss of good will, the clean-up costs, the loss of the cargo, the damage to the vessel, crew down time, the compensatory damages, and the fines imposed by the state and federal authorities already means that the performance of his business unit will be miserable and that he will suffer commensurately. It doesn't take a large punitive award against the company to provide an adequate incentive for him or his successors to want to avoid making a similar bad judgment call in the future. See, *e.g.*, *Johansen* v. *Combustion Eng'g, Inc.*,

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[9] Insofar as shipmates of Hazelwood had knowledge that he drank while on duty and failed to report it, Exxon was a victim of that deception, not its perpetrator.

170 F.3d 1320, 1338 (11th Cir. 1999) (recognizing in environmental tort case that punitive award need only be large enough to "attract the attention of whomever is in charge of the corporation's daily decisions regarding environmental protection"); Lisa Litwiller, *From* Exxon *to* Engle: *The Futility of Assessing Punitive Damages As Against Corporate Entities*, 57 RUTGERS L. REV. 301, 325-30 (2004) (large punitive damages awards often "overdeter[] corporate actors" in part because the culpable individuals "may no longer be affiliated with the company, and the employees working for the company at the time of the award may well be those who have corrected the harm of which the plaintiffs complain").[10]

4. To what extent do compensatory damages, fines, and other costs borne by the defendant as a result of its conduct already satisfy the goals of deterrence and retribution?

Another consideration that is not adequately encompassed within the three guideposts is the extent to which the compensatory damages, fines, and other costs (*e.g.*, awards of attorneys' fees and injunctive relief) borne by the defendant as a result of its conduct already satisfy the goals of deterrence and retribution. It is a matter of common sense that, from the defendant's perspective, any obligation to pay money—no matter how denominated—is going to have a punitive and deterrent effect. And that is all the more true when, as here, the conduct being punished was not calculated to, and did not, provide an economic benefit to the defendant.

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[10] Professor Litwiller analyzed empirical data concerning awards against corporations. She concluded that, when "punitive awards are assessed against corporate entities, the human constituents responsible for the corporate misconduct typically escape any consequences; rather, the consequences are borne by the shareholders, the consumers, and ultimately, the economy itself." *Id.* at 344.

That compensatory damages and awards of attorneys' fees can have deterrent and punitive effects has been recognized by this Court,[11] by other courts,[12] and by commentators.[13] Indeed, this Court implicitly recognized this point in *State Farm*, explaining that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419. If the amount of compensatory damages (and other costs borne by the defendant) should be taken into account in determining whether punitive damages should be permitted at all, it follows that they also should be considered when determining whether the amount imposed is excessive in relation to the government's legitimate deterrent and retributive purposes.

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[11] See, *e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are *compensatory*") (emphasis in original); *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").

[12] See, *e.g.*, *Glynn* v. *Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1505 (9th Cir. 1995) (disallowing punitive damages in maritime case because "[t]he threat of liability for attorney's fees adequately serves to deter recalcitrance" and "[p]unitive damages, in addition to attorney's fees, are thus not needed to provide a powerful incentive for shipowners to investigate and pay promptly"); *Allahar*, 59 F.3d at 697 (awards of $10,000 in compensatory damages and $20,000 in attorneys' fees were "highly punitive to a person of modest means" and would "likely provide 'adequate condemnation, punishment and deterrence to any else of like inclination'"); *Rowlett*, 832 F.2d at 206-07 (reducing punitive award from $3 million to $300,000, because "[t]he large compensatory damage award [of $299,999], by itself, provides significant deterrence, even to employers as large as [defendant]"); *Rosado* v. *Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (reversing punitive award because "[a]n award of actual damages coupled with reinstatement * * * is ample relief * * * and a sufficient deterrent to future wrongdoing"); *Pichler* v. *UNITE*, 457 F. Supp. 2d 524, 530-32 (E.D. Pa. 2006) (disallowing punitive damages for willful and reckless violation of the Driver's Privacy Protection Act because statutory damages of over $4 million and other fees and costs would provide "ampl[e]" punishment and deterrence "without imposing punitive damages"); *Lane* v. *Hughes Aircraft Co.*, 993 P.2d 388, 400 (Cal.

So too should the adverse reputational effects of a highly publicized tort. It is undeniable that businesses depend on having a favorable public image. Hence, the tarnishing of a business's image as a re-

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2000) (Brown, J., concurring) ("[L]arge compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves."); *Daka, Inc.* v. *McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (because substantial attorneys' fees include "'a certain punitive element[,]'" they "favor[] a lesser rather than greater award of punitive damages").

[13] 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV. 133, 137 (1982) ("ordinary civil damages—in the course of providing compensation—concurrently function to deter"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) ("if the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages").

sult of its involvement in an environmental disaster or some other tort itself has both punitive and deterrent effects. See Steven Shavell, *On the Proper Magnitude of Punitive Damages*: Mathias v. Accor Economy Lodging, Inc., 120 HARV. L. REV. 1223, 1226 (2007) ("nonlegal economic incentives," including reputational injury, may "significantly reduce the need for punitive damages to achieve deterrence").

If ever there were a case in which the compensatory damages, fines, other costs, and reputational effects fully sufficed to accomplish the governmental interests in retribution and punishment, it is this one. Even without punitive damages, Exxon already has paid more than $3.4 ***billion*** in damages, settlements, fines, and remediation costs. Pet. App. 100a. It also suffered massive damage to its corporate reputation. These costs—for conduct that was the product of neither malice nor callousness—already far exceed what is necessary to punish Exxon and to deter it and others from making similar errors of judgment in the future. Indeed, that is so even if the Court accepts the assumption that Exxon knew that Hazelwood was a relapsed alcoholic.

Ironically, the Ninth Circuit recognized this point in its original opinion. It observed that, "if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him 'only' $10,005 and he was not otherwise punished." *Ibid.* Similarly, "[a] company hauling a cargo worth around $25.7 million has a large incentive to avoid a $3.4 billion expense for the trip." *Ibid.* Accordingly, it concluded, "[t]his case is like the ink on the rug example * * *. Just the expense, ***without any punishment***, is too large for a prudent transporter to take much of a chance, given the low cost of making sure alcoholics do not command their oil tankers." *Ibid.* (emphasis added).

In this round, however, the Ninth Circuit completely ignored this critically important and manifestly valid point. That failure led it to authorize an exaction that serves no legitimate purpose whatever. Because the economic and reputational consequences of the grounding already more than adequately serve the interests of deterrence and retribution, nothing more than a nominal amount of punitive damages should be considered permissible.

5. What penalties have the expert regulatory agencies determined to be appropriate to punish and deter the same or similar conduct?

An exceptionally valuable data point in determining whether a punitive award exceeds the amount reasonably necessary to punish and deter is the penalties that the relevant governmental agencies have imposed for the same or similar conduct (a consideration that is similar but not identical to the third *BMW* guidepost). After all, in administering a statutory scheme that provides penalties for regulatory violations, governmental agencies are charged with choosing the penalty that, under the circumstances, best advances the government's interests in punishment and deterrence (and by the same token avoids overpunishment and overdeterrence). What is more, unlike a civil jury, regulatory agencies have the time, expertise, specialized personnel, investigative resources, knowledge of the statutory scheme and regulatory background, understanding of the range of punishable conduct, and historical perspective to perform a full and impartial evaluation and to "'assure the uniform general treatment of similarly situated persons that is the essence of law itself'" (*Cooper Indus.*, 532 U.S. at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring))).

It follows that when an expert regulatory agency (or prosecutor) has set or reached an agreed-upon fine for the very conduct that is the subject of a civil suit for punitive damages, a punitive award that materially exceeds the regulatory or criminal fine should be treated as presumptively excessive: If an expert regulator didn't think that a higher punishment was necessary or appropriate, a single civil jury should not be able to override that determination.[14] As Justice Breyer has put it in the context of federal preemption, it is "anomalous" to "grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring).

Of course, it is comparatively rare that a civil defendant will have actually been fined for its conduct.[15] When the defendant itself has not been fined, reviewing courts should consider the fining practice of the relevant agency more broadly. This inquiry should include both the full range of penalties that the agency has imposed during the relevant time frame and, more importantly, the penalties imposed for the most closely analogous conduct.[16] If the punitive award is materially higher than the fines that the agency has imposed for comparable conduct, that is a compelling indication that the award is excessive.

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[14] The presumption could be overcome by compelling proof of fraud on the agency, bribery, or some other basis for concluding that the penalty set by the agency is an undependable measure of the amount necessary to punish and deter.

[15] If an expert agency has investigated the conduct and decided not to bring an enforcement action, that is highly relevant to the reprehensibility inquiry.

The maximum penalties that hypothetically could be imposed under the governing statute are a far less useful and relevant benchmark. That is because the maximum penalty is reserved for the worst possible conduct, and it is seldom realistic to assume that the expert agency would impose such a penalty—especially in cases in which the agency has not sought to penalize the defendant at all. As the Eleventh Circuit has explained:

> If a statute provides for a range of penalties depending on the severity of the violation, * * * it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute. * * * For example, if the defendant had emptied a bottle of soda pop into a Georgia stream, it cannot reasonably be said that he was on notice [that] he could be fined $100,000.

Johansen, 170 F.3d at 1337 (emphasis in original; footnote omitted).[17]

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[16] Many agencies post the fines they have imposed in recent years on their web sites. See, *e.g.*, EPA, *Regional Newsrooms*, http://www.epa.gov/newsroom/newsrooms.htm.

[17] For a vivid example of why it is inappropriate to consider the theoretical maxima instead of realistic statutory fines, see *Pearson* v. *Chung*, No. 05-CA-4302-B (D.C. Super. Ct. June 25, 2007), in which the plaintiff sought up to $67 million under

Here, of course, there were actual criminal fines. Pursuant to a plea agreement, Exxon paid $25 million in fines (reduced from $150 million because of Exxon's laudatory remediation efforts) and $100 million in restitution for violations of the Clean Water Act. Pet. App. 103a. Although this Court has admonished against using the existence of criminal penalties to justify a high punitive award out of concern about the absence of criminal safeguards in a civil trial (*State Farm*, 538 U.S. at 428), there should be no similar qualms about using the amount of a criminal fine to establish that a punitive award vastly exceeding that goes beyond what the executive branch has determined to be necessary to punish and deter. In fact, at the sentencing hearing, representatives of both the United States and Alaska affirmatively argued that the agreed-upon penalty adequately served the governmental interests in punishment and deterrence. JA1520-21, 1531-33.

The punitive award in this case is $2.375 ***billion*** greater than the $125 million in penalties that the United States and Alaska deemed to be sufficient to punish and deter. It also exceeds by $2.417 ***billion*** the highest civil penalty that EPA ever has imposed.[18]

D.C.'s Consumer Protection Procedures Act for a dry cleaner's loss of his pants on the theory that each day the pants were missing was a separate statutory violation for which the maximum penalty could be imposed. Quite obviously, a $67 million penalty for lost pants is not realistic and would be excessive were it imposed.

[18] See http://cfpub.epa.gov/compliance/resources/reports/endofyear/fy2007/airhighlights/#1236 ($83.4 million civil penalty against seven diesel engine manufacturers is "largest in environmental enforcement history").

The Ninth Circuit brushed off these disparities, explaining that, when applying the third *BMW* guidepost, it "look[s] only to whether or not the misconduct was dealt with seriously under state civil or criminal laws." Pet. App. 41a.[19] That dismissive assertion, which finds no support in this Court's precedents, confirms once again that the Ninth Circuit failed to ask the right question—whether "a more modest sanction would * * * have been sufficient" to serve the governmental interests in deterrence and retribution (*BMW*, 517 U.S. at 585).

For their part, respondents contend that the informed conclusion of the United States and Alaska as to what is necessary to punish and deter should be given no weight because the possible criminal penalties were higher than the fine actually imposed. See Br. in Opp. 28 ("federal criminal penalties for the three crimes to which Exxon pleaded guilty could have exceeded $3 billion"). But respondents offer no basis for thinking that those hypothetical criminal penalties were realistic here. In fact, actual fining practice proves that they aren't. See JA54 (net sentence of $125 million exceeded the total of all fines previously imposed by the United States in environmental cases). Indeed, it is precisely this kind of misuse of criminal sentencing statutes against which this Court cautioned in *State Farm*. See 538 U.S. at 428.

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[19] As we pointed out in our *amicus* brief in support of the petition for certiorari (at 18-19 & n.11), the Ninth Circuit, unfortunately, is hardly alone in this respect.

6. How does the punitive award compare to prior punitive awards for comparable or more egregious conduct?

A plurality of this Court has recognized that "the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations." *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 458 (1993). That makes perfect sense. To be sure, "no two cases are truly identical," and "meaningful comparisons * * * are difficult to make." *Id.* at 457. Nevertheless, when a punitive award is materially higher than the amounts that other courts and juries have imposed for conduct that is similar to or more egregious than the conduct at issue, that should raise questions about whether the amount imposed really is justifiable for retributive and deterrent purposes. The punitive award here is the highest ever. It exceeds the next highest, which was imposed against the Marcos regime for kidnapping, torturing, and killing thousands of people, by ***$1.3 billion***. See *Hilao, supra*. Needless to say, no punitive award for non-malicious conduct comes close to this one.

The comparison with awards in other cases thus establishes not only that the exaction here far exceeds the amount necessary to punish and deter but also that Exxon has been denied "'the uniform general treatment of similarly situated persons that is the essence of law itself'" (*Cooper Indus.*, 532 U.S. at 436).

7. Is the punitive award disproportionate to the harm to the plaintiff(s)?

"The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." *BMW*, 517 U.S. at 580. Indeed, it is perhaps the "most commonly cited indicium of an unreasonable or excessive punitive damages award." *Ibid.*

When the compensatory damages are not "small," a high ratio of punitive to compensatory damages usually indicates that the exaction is greater than reasonably necessary to deter and punish.[20] But the converse is not necessarily true. A punitive award that is a small multiple of the compensatory damages may still materially exceed the amount necessary to punish and deter.

This case emphatically proves the point. As the discussion above demonstrates, not only is a $2.5 billion exaction (and 5:1 ratio) unnecessary to advance the interests of deterrence and retribution, but so too would be a punitive award of the same size as the compensatory damages—roughly $500 million. Indeed, as too few courts have recognized (notwithstanding this Court's strong hint in *State Farm*), the higher the compensatory damages and the greater the extent to which they outstrip any ill-gotten gain, the less the need for additional deterrence and punishment. Hence, there will be many cases in which treating a modest ratio as a safe harbor—as the Ninth Circuit implicitly did here—will result in upholding punitive awards that go far beyond their legitimate purposes.

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[20] It also is an important indication that the defendant lacked fair notice that it could be mulcted to this extent, which is relevant to the due process inquiry.

8. If the tortfeasor is an individual, what is his or her financial condition?

As the Court is no doubt aware, there is a raging debate about whether a defendant's financial condition is a relevant consideration in determining whether a punitive award is excessive. Indeed, we expect that respondents will defend the $2.5 billion exaction in this case on the ground that it is not large in relation to Exxon's finances. Financial condition is indeed highly relevant when the defendant is an individual committing a non-economic tort: A higher award is needed to punish and deter Bill Gates than to punish and deter his secretary. But the same logic does not apply to organizations. Because we understand that the Product Liability Advisory Council ("PLAC") will be discussing this topic at length, we will not address it further here other than to agree with Exxon and PLAC that Exxon's financial condition cannot justify the punitive award.

* * *

In sum, the relevant considerations compel the conclusion that a $2.5 billion exaction is far more than reasonably necessary to punish and deter. Indeed, given the enormous amounts that Exxon already has paid in compensatory damages, settlements, fines, and remediation costs (as well as the significant reputational harms that Exxon has suffered), no more than nominal punitive damages can be justified here.

CONCLUSION

The Court should vacate the punitive award and instruct the Ninth Circuit to reduce it to a nominal amount.

Respectfully submitted.

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APPENDIX

APPENDIX

The American Petroleum Institute is a nationwide, non-profit, trade association that represents over 400 members engaged in all aspects of the petroleum and natural gas industry.

The American Chemistry Council represents the leading companies engaged in the business of chemistry, a $635 billion enterprise that accounts for ten cents of every dollar in U.S. exports.

The American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms. ATRA's core purpose is to promote fairness, balance, and predictability in civil litigation.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Western States Petroleum Association is a non-profit trade association that represents approximately two dozen companies that explore for, develop, produce, refine, market, and transport petroleum and petroleum products in the six western States of Arizona, California, Hawaii, Nevada, Oregon, and Washington.

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EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF *AMICUS CURIAE* OF EXPERTS ON ALCOHOL IN THE WORKPLACE IN SUPPORT OF RESPONDENTS

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OTHER AUTHORITIES

Oddvar Arner, "The Role of Alcohol in Fatal Accidents Among Seamen," 68(2) *The British Journal of Addiction to Alcohol & Other Drugs* (June 1973) 22

Ronald Casper, "Drinking as Conformity: A Critique of Sociological Literature on Occupational Differences in Drinking," 40(9) *Journal of Studies on Alcohol* (Sept. 1979) 28

Kaye Middleton Fillmore, "*Occupational Drinking Subcultures: An Exploratory Epidemiological Study,*" *in Alcohol Problem Intervention in the Workplace* (Paul M. Roman ed. 1990) 28

Michelle Fine, et al., "Cultures of Drinking: A Workplace Perspective," *Social Work* (Sept. 1982) 29

Robert G. Heath, "Group Psychotherapy and Alcohol Addiction," 5 *Quarterly Journal of Studies on Alcohol* 555, 558 (1944-45) 20

Danielle Hitz, "Drunken Sailors and Others: Drinking Problems in Specific Occupations," 24 *Quarterly J. Stud. Al.* (1973) 28

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Stefanie Ritz-Timme et al., "What Shall we do with the Drunken Sailor? Effects of alcohol on the performance of ship operators," 156 *Forensic Science International* 16 (2006).........22, 23

Paul M. Roman, "Employee Alcoholism Programs in Major Corporations in 1979: Scope, Change, and Receptivity," *in Prevention, Intervention and Treatment: Concerns and Models* (U.S. Dep't of Health and Human Services 1982) 26

Paul M. Roman & Terry C. Blum, "Alcohol: A Review of the Impacts of Worksite Interventions on Health and Behavioral Outcomes," *The American Journal of Health Promotion* (1996)...26

William J. Sonnenstuhl & Harrison Trice, *Strategies for Employee Assistance Programs: The Crucial Balance* (1986)...............................2, 25

William J. Sonnenstuhl & Harrison Trice, "The Social Construction of Alcohol Problems in a Union's Peer Counseling Program," 17(3) *The Journal of Drug Issues, Inc.* 223 (Summer 1987)..25, 28

William Sonnenstuhl, Samuel Bacharach & Peter Bamberger, *Member Assistance Programs in the Workplace: The Role of Labor in the Prevention and Treatment of Substance Abuse* (1994)..2

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Harrison M. Trice & William J. Sonnenstuhl, 51(3) "On the Construction of Drinking Norms in Work Organizations," *Journal of Studies on Alcohol* 201 (1990) 25, 30

Harrison M. Trice, *The Alcoholic Employee and His Supervisor: A General Management Problem* 28

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Dr. Paul M. Roman and Dr. William J. Sonnenstuhl are experts on alcohol abuse and treatment in the workplace. They have conducted numerous studies to ascertain the causes of workplace problem drinking, and to determine the structure, content, and effectiveness of various employer alcohol policies and employee assistance programs. Dr. Roman and Dr. Sonnenstuhl have published extensively on alcohol and drug abuse, and have spent their professional careers teaching related courses.

Dr. Paul M. Roman has been a professor of sociology for 40 years and is currently the Distinguished Research Professor of Sociology at the University of Georgia and an adjunct professor at the Center for Alcohol Studies at Rutgers University. Throughout his career, Dr. Roman has conducted extensive research on alcohol abuse and treatment. He has been awarded more than $15 million in extramural grants to fund this research, and he has written more than 100 books and journal articles on alcohol-related issues. Because he is one of the nation's leading experts on substance abuse, Dr. Roman has served as an Editor-in-Chief or Editorial Board member for numerous journals that publish peer-reviewed research, including the *Journal of Employee Assistance Research*, the *Journal of Workplace Behavioral Health*, the *Journal of Substance Abuse Treatment*, the *Alcohol, Health and Research World*, and the *Labor Management Alcoholism Journal*.

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[1] Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than the *amici* and its counsel contributed monetarily to the preparation or submission of this brief.

Dr. William J. Sonnenstuhl is an Associate Professor and Director of Graduate Studies at the School of Industrial and Labor Relations at Cornell University. He is also the Associate Director of the R. Brinkley Smithers Institute for Alcohol-Related Workplace Studies, where he conducts research on substance abuse in the workplace. Dr. Sonnenstuhl is a prolific author of dozens of books, chapters and articles relating to substance abuse, including *Working Sober: The Transformation of an Occupational Drinking Culture* (1996); *Strategies for Employee Assistance Programs: The Crucial Balance* (with H. Trice) (2d ed. 1990); and *Member Assistance Programs in the Workplace: The Role of Labor in the Prevention and Treatment of Substance Abuse* (with Samuel Bacharach and Peter Bamberger) (1994).

Amicus curiae the Employee Assistance Professionals Association (EAPA) is the leading membership organization for employee assistance professionals. Founded in 1971, the EAPA is a 501(c)(3) non-profit organization, whose mission is to promote the highest standards of employee assistance practice and the continuing development of employee assistance professionals, programs and services. Its membership includes substance abuse practitioners, professional counselors and therapists, social workers, occupational health and wellness professionals, peer counselors, human resource professionals, risk management experts, benefits specialists and others dedicated to protecting and enhancing employee and workplace effectiveness through prevention, identification and resolution of personal and productivity issues, including alcohol, drug, health, marital, family, financial, legal, emotional, stress-related, and other personal or behavioral concerns. The EAPA sets and publishes professional standards for employee assistance programs, sponsors the Certified Employee Assistance Professional (CEAP®) credential, publishes the *Journal of Employee Assistance*, hosts professional conferences, and offers training and other resources to fulfill its mission.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Exxon argues that it should not be held liable for punitive damages for the massive oil spill that resulted when its supertanker, the EXXON VALDEZ, struck Bligh Reef in Prince William Sound, Alaska. In so arguing, Exxon attempts to absolve itself from the actions of its managerial employee – Captain Joseph Hazelwood – whose inebriated state was the cause of the spill. Exxon claims that its alcohol policies "conformed to industry standards," and that "employers who implement and enforce proper polices should not be subject to . . . punitive damages" for the actions of rogue employees.[2] It also asks this court to craft a general rule limiting the availability of punitive damages under maritime law to those cases where the employer itself acts culpably or recklessly. This rule is supposedly necessary because employers cannot closely monitor their employees' actions while at sea.

But Exxon did not have an alcohol policy that "conformed to industry standards." In reality, Exxon's "policy" only consisted of two rules: first, no drinking aboard ship, and second, no drinking within four hours of going on watch.[3] Importantly, Exxon did not design the policies and procedures necessary to implement these rules. And in practice, Exxon did not enforce them. For years, Captain Hazelwood repeatedly drank just prior to boarding and while aboard the EXXON VALDEZ and the EXXON YORKTOWN, and Exxon knew about it. Yet Exxon did not relieve him of duty or take any other disciplinary actions against him.

The facts of this case also make it an inappropriate vehicle for this Court to determine whether or not to craft a special rule limiting punitive damages in maritime cases. First, on the night of the spill, Captain Hazelwood was already intoxicated when he boarded the EXXON VALDEZ. Thus, everything Exxon needed to do to prevent this disaster could have been done on dry ground, where there is no doubt that Exxon could and should have properly supervised its employees. Second, Exxon's actions were culpable and reckless. Top company officials knew that Captain Hazelwood was drinking on the job, yet no disciplinary action was taken despite the obvious and serious safety risk. Exxon did not assist Captain Hazelwood in overcoming his addiction, even though it was in a position to do so. Rather, Exxon fostered a company culture that tolerated on-the-job drinking, thereby enabling and exacerbating Captain Hazelwood's alcohol problems.

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[2] Petrs. Br. 9-10, 15.

[3] JA655; DX3614.

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ARGUMENT

I. Exxon Misrepresents Its Alcohol Policy and Its Enforcement Of That Policy

In its petition for certiorari, Exxon claimed that this case was about whether "punitive damages [can] be imposed under maritime law against a shipowner . . . even when the [employee] conduct [at issue,] was contrary to polices established and enforced by the owner."[4] Similarly, Exxon claims in its opening brief that its alcohol policies "conformed to industry standards," and that "employers who implement and enforce proper polices should not be subject to . . . punitive damages."[5] At the time of the spill, however,

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[4] Exxon Cert. Petition at i.

[5] Petrs. Br. 9-10, 15.

Exxon did not have an alcohol policy that conformed to industry standards, and regardless, it did not enforce that policy.

A. The Inadequacies of Exxon's Alcohol Policy

Exxon's alcohol policy, as it existed in 1989, primarily consisted of two basic rules. The first rule, contained in a document entitled "Policy Statement on Employee Alcohol and Drug Use," stated as follows:

> Possession, use, distribution, or sale of alcoholic beverages on Company premises is not allowed without prior approval of appropriate senior management. Being unfit for work because of use of drugs, or alcohol is strictly prohibited and is grounds for termination of employment.[6]

Exxon Shipping President Frank Iarossi confirmed this policy in his trial testimony, and acknowledged that "company premises" included ships.[7] The second alcohol-related rule was based on Coast Guard regulations, and provided that officers and crew "shall not perform or attempt to perform any scheduled duties within four hours of consuming any alcohol" and "shall not be intoxicated at any time" while onboard.[8]

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[6] DX3614.

[7] Tr. 2891 (all such references are to the trial transcript).

It has long been common knowledge, however, that a "policy" must consist of more than printed rules. It must include a course or method of action. For safety-sensitive positions, a standard alcohol policy, even in 1989, would have included procedures to determine whether an employee was fit for duty, procedures for reporting violations of the alcohol policy, procedures governing enforcement of that policy, and finally, procedures for monitoring employees returning to work after undergoing alcohol or drug treatment. But Exxon's alcohol "policy" consisted only of bare bones rules; there were no written procedures to explain how these rules would be implemented.

1. *Fit for duty*. The captain and crew of a supertanker hold safety-sensitive positions. Even the smallest amount of alcohol can impair their ability to perform their job, and endanger the ship and the lives of everyone on it. For that reason, a standard alcohol policy would have established a procedure for ensuring that each member of the crew was fit to assume his post. For example, Exxon could have required that each crew member pass through a check point prior to boarding the ship. At that check point, an Exxon official could have evaluated their fitness for duty through simple observation and by asking

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[8] JA324; Tr. 1135-36. *See also* 33 C.F.R. § 95.045.

questions. If that official noticed bloodshot eyes, smelled alcohol on the crew member's breath, or detected slurred speech, an individual (non-random) alcohol test[9] could then be used to confirm or disapprove the suspicion of alcohol use.[10] Exxon's alcohol policy did not include any procedures relating to employee fitness for duty.

2. *Reporting violations and enforcement procedures.* A standard alcohol policy would also have included a procedure for reporting and confirming violations of the no-alcohol rule. That procedure could have mandated that employees witnessing or suspecting violations of the no-alcohol rule report such violations to the company. The procedure should have spelled out the person or persons designated to receive reports and should have guaranteed confidentiality to

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[9] *Amicus curiae* American Maritime Safety, Inc.'s lengthy discussion of the legality of random alcohol and drug testing in 1989 is a red herring. The parties to this brief are not advocates of random alcohol and drug testing. But such testing is not the only means an employer has for determining whether its employees are fit for duty, nor is it the most effective. Personal observation, proper supervision, and performance testing should be used for all employees in safety sensitive positions.

[10] Obviously, this is not the only way for determining whether an employee is fit for duty. Today, for example, an employer may wish to have all ship officers take a computerized test when reporting for duty, which could measure each officer's judgment and response time. This test could be an effective means of detecting not only any impairment caused by alcohol or drug use, but also other common problems such as fatigue, abnormal levels of stress, or mental-health issues.

the informant making the report, thereby protecting him from retaliatory action. A standard alcohol policy should also have explicitly stated the progressive disciplinary actions (verbal warnings, written notices, suspension, and discharge) to be taken by management if the no-alcohol rule was violated. Exxon's alcohol policy did not include any procedure for reporting violations,[11] and with respect to enforcement, it simply claimed that violation of the rule would be "grounds for termination."[12]

3. *Monitoring procedures.* Finally, a standard alcohol policy would have established some monitoring program for employees who returned to work after completing an alcohol treatment program. Typically, an employee would meet with his designated monitor, who would reiterate the company's alcohol rules. Then, that monitor would meet regularly with the employee to discuss how he was readjusting to his job, and to address any concerns. The length of this monitoring period could be tailored to the particular employee, depending on the depth of his substance abuse problem and the type of position he held within the company. Usually, monitoring programs last for a minimum of 90 days to one year. Some companies in the maritime industry, however, required far longer monitoring periods, even in

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[11] Additionally, testimony established that Exxon did not encourage reporting violations. JA434, 707, 721-22, 742-43.

[12] DX3614.

1989.[13] Exxon's alcohol policy did not include any monitoring procedures.

Without formal procedures to determine fitness for duty, to mandate the reporting of on-the-job drinking, and to establish monitoring of troubled employees, an employer is much less likely to detect employees with substance abuse problems. Exxon's alcohol "policy" presented only a false front of rules prohibiting certain alcohol use by its employees. It did not contain any written policies or procedures explaining how these rules would be implemented and enforced. Because many of Exxon's employees hold safety-sensitive positions, its failure to create these procedures endangered public safety.

B. Exxon Made No Attempt To Enforce Its No-Alcohol-In-The-Workplace Rule

Even without formal procedures, if an employee's alcohol problem is severe and extends over a long period of time, company management will *eventually* hear about it, whether that awareness comes from piecemeal reports or only after a workplace accident. Obviously, once an employer knows that an employee has been drinking on the job or reporting to work intoxicated, it must then enforce its no-alcohol policy by imposing progressive disciplinary actions or terminating the employee.

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[13] For example, Jerry Aspland, the president of ARCO Marine, Inc., testified at trial that in his company, a captain who had returned to work after attending a substance abuse treatment program was monitored for the next seven years. JA284-85, JA368, JA369-71, 68sa.

Because Captain Hazelwood's drinking problem was severe, even without formal reporting procedures or guarantees of confidentiality, some Exxon employees[14] reported his on-the-job drinking. What follows is a brief description of three such reports, taken from materials in the joint appendix filed with this Court. These reports illustrate that because Exxon had no procedures in place for implementing its no-alcohol rule, employees did not know to whom they should report violations of the policy. Reports were therefore made in a haphazard manner to individuals who did not believe it was their responsibility to investigate the incidents. Ultimately, although these reports made their way up the chain of command to top Exxon officials, no one took any disciplinary action against Captain Hazelwood.

1. Captain Hazelwood Drank Aboard the EXXON YORKTOWN After 1985

Jim Shaw was a port steward who regularly boarded Exxon vessels. He testified that on several separate occasions while aboard the EXXON YORKTOWN, he smelled "the distinct odor of alcohol on [Hazelwood's] breath."[15] Shaw reported this information to William Sheehy, the port captain of the Gulf Coast fleet, noting that Captain Hazelwood "had fallen off the wagon," and that he had seen him "drunk."[16]

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[14] Those reports were *not* made by his fellow crew members. Crew members were reluctant to report alcohol violations by their commanding officers. Tr. 1631, 2153, 2175, 2207. As noted earlier, Exxon did not have any procedures in place to ensure confidentiality for the reporter and thus, reporting an officer "could come back to haunt you." Tr. 2183.

Rather than investigate this report himself, Captain Sheehy tried to refer the matter to other Exxon employees. The first was Captain Pierce, who advised Sheehy that if Hazelwood was drinking again, he would be in serious trouble.[17] Captain Pierce did not have any supervisory authority over Captain Hazelwood, however, and thus could not take any disciplinary action. Sheehy also contacted Dwight Koops, the Gulf Coast fleet manager. Koops did have supervisory authority over Captain Hazelwood, but rather than initiate an investigation or take enforcement action, Koops testified that he told Sheehy to go over to the EXXON YORKTOWN unannounced and "spend as much time as possible on board the ship and see if things are okay." Sheehy claimed he spoke with Captain Hazelwood once, but admitted that he did not launch an investigation, and "did not specifically ask anybody if they had seen Captain Hazelwood drunk or anything like that."[18] Koops never spoke with Captain Hazelwood. Exxon's no-alcohol rule was not enforced.

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[15] JA410, 413-14, 418, 422-24.

[16] JA847-50.

[17] JA852.

[18] JA851.

2. Captain Hazelwood Drank Aboard the EXXON VALDEZ

Shortly thereafter, Exxon transferred Captain Hazelwood to fill a vacancy on the West Coast.[19] This new assignment – to the EXXON VALDEZ – meant that Hazelwood would be piloting a larger ship on more treacherous routes. Just prior to the transfer, Koops told Harvey Borgen, his counterpart on the West Coast, that Hazelwood had a "clean bill of health" as far as drinking was concerned.[20] Likewise, Sheehy spoke to Captain Andre Martineau, a port captain on the West Coast. Martineau had heard rumors about Hazelwood's drinking and asked Sheehy about it.[21] Sheehy simply responded by saying that Hazelwood's performance had been "above average," even though Hazelwood now ranked near the bottom of all ship captains.[22]

With the increased stress of operating a larger ship on more dangerous routes, Captain Hazelwood's relapse continued. In May 1988, an assistant repair superintendent named Steve Day heard Captain Hazelwood order Henry Weinhardt's beer over a company walkie-talkie while the EXXON VALDEZ was docked in Portland.[23] Day later saw empty Henry Weinhardt's beer bottles on board the vessel.[24]

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[19] JA427-30, 437-38.

[20] Tr. 3630.

[21] JA428-30, 860-61.

[22] JA861-62.

Day reported these violations to his boss, Herb Leyendecker, a repair superintendent from Houston headquarters.[25] Leyendecker in turn reported the incident up the chain of command to West Coast Fleet Manager Harvey Borgen.[26] Borgen did nothing.[27] Day also told Ship Group Coordinator Paul Myers, Captain Hazelwood's supervisor, about this incident.[28] According to Hazelwood, Myers talked to him about it "as an aside," and "just wanted to make sure that there was no violation of the alcohol policy."[29] When Hazelwood assured him there was no violation, Myers took no enforcement action and did not launch an investigation.[30]

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[23] JA708, 710-11.

[24] JA725-26.

[25] JA320-31, 712.

[26] JA1065-66, 717-18, 949-50.

[27] JA1073.

[28] JA321-23.

[29] JA718-19, 727.

[30] JA322-23.

3. Captain Hazelwood Returned To The EXXON VALDEZ Drunk Just Days Before The Grounding

Less than two weeks before the grounding, the EXXON VALDEZ was docked in San Francisco.[31] Late one evening, a launch left the dock to transport Exxon personnel back to their vessels. Mary Williamson, assigned to the EXXON GALVESTON, was aboard that launch as was Captain Hazelwood.[32] During the short trip, Captain Hazelwood loudly demanded that Williamson convey insulting comments to the EXXON GALVESTON's Captain Reeder. Williamson smelled alcohol on Hazelwood's breath. She told him "maybe in the morning if you feel better, you can relay that message" yourself.[33] When Captain Hazelwood arrived back on board the EXXON VALDEZ, however, he radioed the GALVESTON, calling Captain Reeder a "douche bag," and a "scum bag."[34] In light of this incident, Mary Williamson approached Steve Day, the officer supervising repairs on the EXXON GALVESTON, and requested that Hazelwood be investigated.[35] Of course, Day already knew of Hazelwood's drinking problems but had no supervisory authority over him. Day once again reported the incident to Captain Hazelwood's immediate supervisor, Ship Group Coordinator Paul Myers. But yet again, neither Myers nor any other Exxon official enforced the no-alcohol rule.[36]

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[31] JA736, 894.

[32] JA694-95.

[33] JA697.

[34] JA329-30.

[35] JA696-98, 705-06, 730-32.

As these three incidents indicate, because Captain Hazelwood's alcohol abuse problems were so severe, even without procedures to require the reporting of violations of the no-alcohol rule, several reports were in fact made to Exxon officials. Just from the three incidents described above, four on-shore officers of Exxon Shipping who were Hazelwood's direct supervisors – Sheehy, Koops, Myers, and Borgen – had received reports about Hazelwood's drinking. And yet, other than obtaining Hazelwood's denials that there was any violation of the alcohol policy, none of them did anything to investigate the incidents or enforce the policy. Exxon was simply not an "employer[ ] who implement[ed] and enforce[d] proper polices."[37] Rather, Exxon was an employer who, for years, allowed an employee who repeatedly violated federal law and the company's own no-alcohol rule to continue in command of a supertanker.

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[36] JA332-36, 745-46.

[37] Petrs. Br. 9-10, 15.

II. This Case Is Not The Appropriate Vehicle To Consider Whether Or Not To Craft A Special Punitive Damages Rule For Maritime Torts

Exxon asks this court to craft a special rule limiting the recovery of punitive damages in maritime cases.[38] Exxon argues that in the maritime setting, employee conduct should not be imputed to the employer absent "some level of culpability" on the part of the employer, or unless "the acts . . . were those of an unfit master and the owner was reckless in employing him."[39] This rule is supposedly required because employers cannot effectively supervise employees while they are at sea.[40]

This court should not entertain Exxon's request. As an initial matter, while the oil spill occurred at sea, it could have been completely prevented on land by stopping a noticeably intoxicated captain from boarding a supertanker. Thus, the main justification for the creation of a special maritime rule for punitive damages is not implicated.

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[38] Petrs. Br. 18-27.

[39] Petrs. Br. 20.

[40] Petrs. Br. 18, 20. Exxon also points to lower court decisions that justified a special maritime rule because ship captains need to be able to make split-second decisions, and imposing liability on the employer for those decisions would supposedly "result in hesitations and disastrous delays on the part of the master while he obtains advice and authority from his superiors many miles from the scene." Petrs. Br. 24. Captain Hazelwood made no split-second decision here because Bligh Reef was a known, stationary hazard.

More importantly, even if this Court were to adopt the rule advocated by Exxon, it would not change the outcome of this case because Exxon was both independently culpable and reckless. During the years in which Captain Hazelwood was battling alcoholism, Exxon did not reach out at all to assist him in overcoming his addiction by referring him to its employee assistance program. Instead, Exxon enabled his behavior by fostering a culture of tolerance to on-the-job drinking. Exxon also failed to remove Captain Hazelwood from his command even though company management knew he was drinking while on duty. Even small amounts of alcohol can impair a captain's judgment and navigational skills. Exxon knew that, and more, Exxon knew that an accident involving a supertanker filled with crude oil could have devastating impacts. This was culpable, reckless conduct.

A. While The Oil Spill Occurred At Sea, It Could Have Been Completely Prevented On Land

The disastrous oil spill that caused millions of dollars in damage occurred because Captain Hazelwood, the only person authorized under federal law to steer the EXXON VALDEZ through Prince William

Sound,[41] was so drunk[42] that he chose to put the ship on autopilot, leave the bridge, and return to his cabin, all just moments before a change in course was required to avoid Bligh Reef.[43] Exxon admitted at trial, through a stipulation with the plaintiffs, that Captain Hazelwood's decision to leave the bridge caused the oil spill:

> The Exxon Defendants admit that Hazelwood was negligent in leaving the bridge of the EXXON VALDEZ at or about 11:53 p.m., local time, that such negligence was a proximate cause of the Spill, and that the Exxon Defendants are responsible for this act of negligence.[44]

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[41] Coast Guard regulations require that vessels passing through Prince William Sound be directed by a person holding a Prince William Sound pilotage endorsement. PX1793 (SER 280). Captain Hazelwood was the only member of the EXXON VALDEZ's March 23, 1989 crew that possessed such an endorsement.

[42] In its brief, Exxon preposterously claims that Captain Hazelwood was not drunk on the night in question. Petrs. Br. 9 n.3. Yet Exxon's top officials admitted that he was drunk in testimony before Congress. Tr. 1589-90 (Exxon CEO Lawrence Rawl testified to the Senate that Hazelwood's "impairment apparently . . . created the spill"); PX184 (Rawl admits on Face the Nation that Hazelwood was not on the bridge at the time of the accident because "he was drunk").

[43] 46 U.S.C. § 8502; 46 C.F.R. § 15.812. *See also* JA801-02; Tr. 1590-91.

[44] JA894.

No captain would have left the bridge at this critical juncture if his or her reasoning were not significantly impaired by alcohol. And Captain Hazelwood's reasoning was undeniably impaired on that night.

On March 23, 1989, at 9:21 p.m., Hazelwood boarded the EXXON VALDEZ, which was loaded with a cargo of more than 53 million gallons of oil.[45] Before boarding, he drank between 10 and 18 single shots of vodka in port bars.[46] As a result, his blood alcohol level at the time of the accident was approximately 0.241, which is six times the legal limit.[47]

One of the main justifications proffered for imposing a special punitive damages rule in maritime cases is that employers cannot properly supervise their employees while at sea. But most problem drinking in the maritime industry occurs when ships are in port. Robert G. Heath, "Group Psychotherapy and Alcohol Addiction," 5 *Quarterly Journal of*

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[45] PX18; PX86 (SER 137); JA1248, 1253; Tr. 422, 898, 4729.

[46] JA249-50, 252-55, 334-35; Tr. 202-04, 2729, 2730, 2766-67.

[47] When the Coast Guard and the Alaska Department of Environment arrived at the scene of the accident at approximately 11:50 a.m. *the next morning*, they were still able to smell alcohol on Hazelwood's breath. JA266-67; JA268-71, 489-92, 1015-16. This observation gave the Coast Guard reasonable suspicion to perform a blood alcohol test. That test indicated that Captain Hazelwood presently had an alcohol level of 0.61, which, based on standard retrograde analysis, established that his blood alcohol level was approximately .241 at the time of the accident. JA575-79.

Studies on Alcohol 555, 558 (1944-45). And here, Captain Hazelwood was intoxicated *before* he boarded the ship. As explained in section I(a) *infra*, Exxon should have had polices and procedures in place to determine whether an employee in a safety-sensitive position was fit for duty. This accident was caused by Exxon's failure to craft and enforce those policies, and thus, its failure to supervise even its employees' land-based actions. Furthermore, Exxon had numerous prior opportunities to relieve Captain Hazelwood of his command due to alcohol policy violations that occurred while the EXXON YORKTOWN and the EXXON VALDEZ was in port. Under these circumstances, it is entirely appropriate to hold Exxon to the same punitive damages standard that generally applies in all tort actions.

B. Exxon Was Culpable and Reckless

Exxon knew that it was dangerous to have a captain with a drinking problem commanding a supertanker.[48] Exxon also knew that a major oil spill in Prince William Sound would have devastating effects on the local community.[49] Yet during the years in which Captain Hazelwood was battling alcoholism, Exxon did not reach out at all to assist him in overcoming his addiction by referring him to its employee assistance program. Instead, Exxon *enabled* his behavior by fostering a culture of tolerance to on-the-job drinking.

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[48] Pet. App. 121a-122a (District Court order).

[49] *Id.*

1. Exxon Knew That A Captain Drinking On-The-Job Posed Enormous Safety Risks

Exxon knew that Hazelwood was repeatedly drinking on the job, yet it allowed him to continue to command supertankers.[50] This is extraordinarily reckless behavior because even small quantities of alcohol can have a significant impact on nautical performance.

Alcohol is reported to be involved in up to 40% of all U.S. fatalities on the water. Stefanie Ritz-Timme et al., "What Shall we do with the Drunken Sailor? Effects of alcohol on the performance of ship operators," 156 *Forensic Science International* 16 (2006). *See also* Oddvar Arner, "The Role of Alcohol in Fatal Accidents Among Seamen," 68(2) *The British Journal of Addiction to Alcohol & Other Drugs* (June 1973) (noting that seafaring ranked higher than any other occupational group with respect to fatal accidents in Norway, and determining, after studying official governmental reports, that at least 33% of the deceased were intoxicated when the fatal accident occurred). While many lay people believe that the impact of alcohol on drivers of automobiles is more severe than its impact on ship operators, the opposite is actually true. One expert recently explained:

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[50] *Id. See also* Pet. App. 4a (Ninth Circuit's 2006 order); Pet. App. 83a (Ninth Circuit's 2001 order).

> Whereas the operations of drivers in road traffic are highly automated, skippers and commercial ship operators are confronted . . . with unpredictable outside influences such as weather and current. Options to react in case of imminent danger are limited in water traffic. Larger vessels may have stopping distances that take up kilometers and need a long time for course changes . . . The advancing technologic and electronic upgrade onboard of modern vessels requires a high level of intellectual capability and concentration. The complex process from the acquisition of information to adequate manoeuvres in water traffic demands a high degree of targeting foresight, attentiveness, flexibility, power of concentration, and sense of responsibility, which all may be impaired even by low [blood alcohol levels]. . . .

Ritz-Timme (2006).

Recently, a study was conducted to evaluate nautical performance in a ship-piloting simulator by captains before and after alcohol consumption. The study established that even very low blood alcohol levels bear high risks in water traffic. The most affected actions were the analysis of situations, foresight, concentration, navigation, risk disposition, and accurateness. None of the participants were able to operate the simulated ship with adequate safety after the ingestion of alcohol. Ritz-Timme (2006). This study demonstrates that given the effect of alcohol on nautical performance, the maritime industry needs at least as much incentive as other industries to closely supervise their employees. For that reason, this Court should not limit the availability of punitive damages in the maritime setting.

Exxon officials acknowledged that an alcoholic captain presented "a potential for a disaster,"[51] since the captain "is the most critical member of the crew."[52] To make matters worse, Exxon was well aware that an accident could have enormous implications if it occurred in Prince William Sound, because a major oil spill could not be contained in that area. Under these circumstances, it is obvious that Exxon employed an "unfit master" and that Exxon, as "the owner[,] was reckless in employing him."[53] Thus, even if this Court were to apply the special maritime rule that Exxon is advocating for, Exxon would not prevail.

2. Exxon Failed To Provide Any Assistance To Captain Hazelwood While He Was Struggling With Problem Drinking

The principal means of helping alcoholic workers is through an employee assistance program (EAP). An EAP identifies "troubled employees," (e.g., problem drinkers, drug users, etc.) motivates them to resolve their problems, and when necessary, either provides them with direct services or refers them to in-patient treatment facilities or community-based organizations such as Alcoholics Anonymous.

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[51] JA530-31.

[52] JA680, 692, 844-45, 869-70, 889, 898-899, 957.

[53] Petrs. Br. 20.

The core technology of an EAP is a strategy referred to as "constructive confrontation." Constructive confrontation requires that supervisors confront employees with evidence of their unsatisfactory job performance, coach them on ways to improve their work, urge them to seek help through the EAP, and, at the same time, emphasize to them the job consequences of continued poor performance. If constructive confrontation is used in conjunction with progressive stages of discipline, the employee's natural tendency to deny his addiction is gradually diminished until he finally recognizes the need to seek help. *See, e.g.,* William J. Sonnenstuhl & Harrison Trice, *Strategies for Employee Assistance Programs: The Crucial Balance* (1986); Harrison Trice & Paul Roman, *Spirits and Demons At Work: Alcohol and Other Drugs on the Job* (2d ed. 1978).

Several studies have been conducted to determine the effectiveness of constructive confrontation in a variety of work settings. These studies conclude that when properly implemented, an EAP program is very effective. William J. Sonnenstuhl & Harrison Trice, "The Social Construction of Alcohol Problems in a Union's Peer Counseling Program," 17(3) *The Journal of Drug Issues, Inc.* 223 (Summer 1987); Harrison M. Trice & William J. Sonnenstuhl, 51(3)

"On the Construction of Drinking Norms in Work Organizations," *Journal of Studies on Alcohol* 201 (1990); Paul M. Roman & Terry C. Blum, "Alcohol: A Review of the Impacts of Worksite Interventions on Health and Behavioral Outcomes," *The American Journal of Health Promotion* (1996). In fact, the typical recovery rate for employees using EAP programs is 70% or better. William J. Sonnenstuhl, *Working Sober: The Transformation of an Occupational Drinking Culture* (1996).

EAPs have been in existence for decades, and by 1979, a majority of Fortune 500 companies had created effective programs. *E.g.*, Paul M. Roman, "Employee Alcoholism Programs in Major Corporations in 1979: Scope, Change, and Receptivity," *in Prevention, Intervention and Treatment: Concerns and Models* (U.S. Dep't of Health and Human Services 1982). While Exxon had an EAP in theory, it never referred Captain Hazelwood to its program. Instead, in 1985, a friend and fellow Exxon employee, Captain Pierce, told Hazelwood that he had a drinking problem and told him to "see what you can do to fix it up." Captain Hazelwood had to find a rehabilitation program in the Yellow Pages. Even though he completed the 28-day treatment program, he may never have actually reached the realization that he was an alcoholic without the assistance of constructive confrontation to overcome his denial. He "dropped out" of the outside treatment facility's aftercare program[54] fairly quickly, and began drinking once again.[55] Then, although Hazelwood continued drinking for the next three years, *Exxon officials never referred him to their EAP, never again suggested that he seek treatment for his disease, and left him in command of a supertanker even though they "knew that he was drinking and driving."*[56] Instead, Exxon waited to act until after the oil spill, and then, simply fired Hazelwood for violating the company's alcohol policy.[57]

3. Exxon's Corporate Culture Tolerated On-The-Job Drinking And Enabled Captain Hazelwood's Addiction

Drinking behavior is learned within the cultural context of a group. Groups establish norms, rationales, and social controls about how, when, and where to drink. The workplace is an important place where drinking norms can be established because practically everyone wants to work, and most people spend more time working then they do with their own families. *See, e.g.*, Ronald Casper, "Drinking as Conformity: A Critique of Sociological Literature on Occupational Differences in Drinking," 40(9) *Journal of Studies on Alcohol* (Sept. 1979); Danielle Hitz, "Drunken Sailors and Others: Drinking Problems in Specific Occupations," 24 *Quarterly J. Stud. Al.* 496 (1973).

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[54] Exxon's EAP did not have its own aftercare program. In 1986, Exxon Shipping Company's Medical Director, Dr. Wrendell Nealy, told his supervisor that he would like to establish a company aftercare program "to give added motivation and support to people in recovery." The response was "that's not our job," and thus, Exxon never created such a program. Tr. 1946-48.

[55] JA285, 413-15, 418, 562-63, 567-71, 647-50, 693-98, 708-11, 728-33, 736.

[56] Pet. App. 154a.

[57] JA198sa.

Most workplaces develop temperate drinking cultures that discourage heavy consumption of alcoholic beverages and confine all drinking to leisure time. A small minority of workplaces, however, develop intemperate cultures, where heavy drinking is seen as "normal" rather than "pathological." In these companies, the consumption of alcohol, even on-the-job, is tolerated by fellow employees and management. Oftentimes, drinking is actually seen as performing useful functions, such as easing group relations, establishing greater intimacy, or activating fraternalism. Sonnenstuhl, *Working Sober* (1996); Kaye Middleton Fillmore, *"Occupational Drinking Subcultures: An Exploratory Epidemiological Study," in Alcohol Problem Intervention in the Workplace* (Paul M. Roman ed. 1990); Sonnenstuhl & Trice, "The Social Construction of Alcohol Problems" (1987). Thus, fellow employees are reluctant to report their colleagues' drinking problems and supervisors refuse to act on any reports that are made. Harrison M. Trice, *The Alcoholic Employee and His Supervisor: A General Management Problem* 341-42 (Attributing gap between alcohol policies and actual practice of supervisors to "strong group feeling among his immediate subordinates that drinking problems should be 'kept between the boys'").

Workplaces where on-the-job drinking is tolerated are especially problematic for individuals with existing alcohol problems. Workers returning from detoxification find themselves excluded from social groups by virtue of their abstinence from alcohol. This makes long-term rehabilitation that much more difficult. Michelle Fine, et al., "Cultures of Drinking: A Workplace Perspective," *Social Work* 436 (Sept. 1982).

Exxon was one of those few companies with a culture that tolerated on-the-job drinking. The EXXON VALDEZ, for example, openly hosted parties, attended by almost all ship personnel, where liquor was present. The crew kept liquor in their cabins.[58] They shared drinks with each other on board the ship, on board launches returning to the ship, and in shipyards.[59] Officers confiscated bottles from the crew only to drink them themselves.[60] Exxon's own Valdez agent repeatedly transported crew members to and from bars, often returning them to the Exxon tankers "noticeably drunk."[61] And when Captain Hazelwood returned to work after attending an out-patient treatment program, his supervisor actually held his back-to-work meeting at a bar, and ordered a beer.

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[58] JA568-71; Tr. 1406-09.

[59] JA231-33, 236-37, 562-63, 648-49.

[60] JA227-30.

[61] JA746-48, 750.

Exxon's culture of tolerance to on-the-job drinking made its conduct in this case that much more culpable. The company itself not only failed to provide Captain Hazelwood with assistance through its EAP, but company culture actually served as an "enabler" of Hazelwood's alcoholism, and limited his chances for recovery. Trice & Sonnenstuhl (1990). That behavior was reckless and it warrants no special rule absolving Exxon or any other company from punishment.

◆

CONCLUSION

For the foregoing reasons, punitive damages were properly imposed against Exxon, and we urge this Court to affirm.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,
v.
GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of businesses and associations, with an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographic region. One important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business. The federal courts' fair, consistent, and predictable administration of punitive damages awards – whether governed by federal statute or common law – is of profound concern to the Chamber's members.

Accordingly, the Chamber regularly files *amicus* briefs in significant punitive damages cases, including every case in which this Court has addressed that issue during the past two decades. This case raises critically important issues related to the respect that should be accorded congressional policy decisions on the availability of extra-statutory punitive damages remedies and the proper role of the federal courts in expounding the common law of punitive damages awards under federal maritime law. The Chamber has a vital interest in promoting a predictable, rational and fair legal environment for its members. It also believes that its knowledge of the practical implications for the business community of the legal principles involved in this case will assist the Court in resolving the important issues raised by Petitioners (hereafter "Exxon").

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

INTRODUCTION AND SUMMARY

This Court understands all too well the dangers of punitive damages "'run wild.'" See *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991). See also *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994) ("[p]unitive damages pose an acute danger of arbitrary deprivation of property"). Without a uniform framework establishing clear standards, punitive damages "have a devastating potential for harm" and "encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections." *Haslip*, 499 U.S. at 42-43 (O'Connor, J. dissenting). Large businesses are particularly at risk of being targeted by such jury determinations. See *Oberg*, 512 U.S. at 431 ("the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries"). Accordingly, where, as here, juries provide an initial assessment of punitive damages, the courts must retain substantial authority to prevent abuse.

The issues presented here are critical to evolving standards governing punitive damages awards under federal statutes and federal common law. In defining the legal framework to be applied, it is critical to American business, and indeed all regulated parties, that the courts establish clear standards that will cabin discretion and lead to fair, consistent and predictable results.

First, Congress's decision to exclude a punitive damages remedy from the comprehensive remedial scheme of the Clean Water Act ("CWA") should displace any federal common law cause of action for punitive damages based on conduct regulated by the CWA. As this Court has made clear, where Congress enacts a comprehensive remedial program that omits a specific remedy, particularly one as obvious as private punitive damages, courts are not free to supplement that scheme with an additional remedy under federal common law. This is true not only under maritime law, but as a general matter: A federal statute with a comprehensive remedial scheme displaces federal common law remedies – especially punitive damages which carry an inherent risk of overdeterrence. Congress struck a specific balance when it enacted the CWA. By doing so, Congress established maritime policy in this area, putting maritime businesses on notice about the specifics of the regulatory regime and the consequences and penalties for violating it and establishing uniform, consistent and predictable rules for regulated entities. Indeed, under the CWA, Exxon paid $900 million for natural resources damages, a fine of $150 million (reduced to $25 million based on its responsible post-spill conduct), and restitution of $100 million. This Court should enforce the regime enacted by Congress, a regime which omitted punitive damages from the panoply of remedies authorized.

Second, in the alternative, this Court should delineate the common law principles that federal courts must apply when reviewing punitive damages awards in maritime cases. In maritime and other federal common law cases, before addressing the question whether a punitive damages award is constitutional, the federal court must review the award under the relevant principles of federal common law. The court below wholly failed to do so, and thus affirmed an award that contravenes maritime policies in numerous respects. Moreover, because the central goal of maritime law is to protect commerce, federal courts must apply maritime principles and policies that further that goal – including uniformity, consistency, fair compensation, promotion of settlement and judicial economy. By supplying clear standards that can be predictably and fairly administered, this Court can end the damaging uncertainty that plagues this important area of commerce. In addition, whatever standards are ultimately established by this Court, the punitive damages award in this case will not pass muster. It is wholly inconsistent with the policies and purposes of maritime law.

In order for American maritime businesses to conduct commerce on a global level that sustains our national economy, it is essential that punitive damages be imposed based on clear standards that constrain the punishment that can be meted out by a jury and that ensure that similar conduct is treated similarly. Such a regime is also mandated by principles of fundamental fairness in order to "assure the uniform general treatment of similarly situated persons that is the essence of law itself." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 587 (1996). Based on these principles, the Chamber urges this Court to reverse the judgment of the Ninth Circuit.[2]

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[2] Although the Chamber fully supports Exxon's position on all three questions presented, this brief does not address the issue of imputed liability under maritime law, *viz.*, whether punitive damages may be imposed on the owner of a vessel for tortious

ARGUMENT

I. CONGRESS'S DECISION TO OMIT PUNITIVE DAMAGES AS A REMEDY IN THE CWA DISPLACES ANY FEDERAL COMMON LAW CLAIM FOR SUCH DAMAGES ARISING OUT OF CONDUCT REGULATED BY THAT ACT.

A. Once Congress Addresses A Common Law Issue, This Court Defers To The Policy Decisions Embodied In That Legislation.

When Congress enacts a statute addressing an issue of national concern and establishes a comprehensive remedial scheme, the resulting statutory regime is the product of the legislative effort to balance a host of competing interests. For example, in the CWA, Congress had to reconcile the deep tension between the public interests in a clean environment and a robust economy. Once this congressional balancing occurs, courts should defer to the policy decisions that Congress has made. See, *e.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 314-17 (1981).

Thus, as this Court has explained, when Congress "does speak directly to a question," courts "have no authority to substitute [their] views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625-26 (1978). This principle holds true even in areas in which the federal courts have traditionally enjoyed broad lawmaking authority, such as federal maritime law. See *Nw. Airlines, Inc.* v. *Transp. Workers Union*, 451 U.S. 77, 96 (1981) ("[e]ven in admiralty . . . where

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acts of the master and crew when the owner has not authorized, ratified, or controlled such actions.

the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress").

The punitive damages award in this case is inconsistent with the congressional choices reflected in the CWA. As the court of appeals acknowledged, "[b]efore and after the *Exxon Valdez* oil spill, the Clean Water Act's section on 'Oil and hazardous substance liability' provided a *carefully calibrated set of civil penalties for oil spills*, generally with ceilings on penalties, even if the spills were grossly negligent or willful." App. 74a (second emphases supplied). Specifically, the CWA authorizes substantial civil and criminal penalties. Under 33 U.S.C. § 1319(c), those who negligently or knowingly violate the Act are subject to fines of not less than $2,500 or $5,000 nor more than $25,000 or $50,000 per day of violation, respectively, and/or by imprisonment of not more than 1 or 3 years, respectively.[3] Additionally, as the court below noted, 18 U.S.C. § 3571, "the federal measure for fines in this case," could, under the facts of this case, result in criminal fines of either $200,000 or potentially even $1.03 billion, which is "'not more than the greater of twice the gross gain or twice the gross loss'" suffered by another person as a result of the offense. App. 101a, 102a.

On the civil side, an individual or entity who violates the statute is subject to a civil penalty "not to exceed $25,000 per day for each violation." 33 U.S.C. § 1319(d). Under § 1321(b)(6)(B), if an "owner, operator, or person in charge of any vessel . . . from which . . . a hazardous substance is discharged in violation of the statute," that individual or entity may be assessed up to" either $10,000 per violation (up to $25,000) or $10,000 per day for each day for which the violation continues (up to $125,000), depending on the kind of civil penalty assessed. *Id.* § 1321(b)(6)(A)-(B).

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[3] Repeat offenders are subject to maximum penalties of $50,000 or $100,000 per day of violation, depending upon whether the violation occurred negligently or knowingly. 33 U.S.C. § 1319(c)(1)-(2).

This "carefully calibrated" remedial regime imposed substantial costs and penalties on Exxon, see *supra* at 3, but it does not provide for punitive damages awards. Congress readily could have included punitive damages in the detailed remedial provisions of the CWA but plainly chose not to. The CWA displaces any federal common law cause of action for punitive damages arising from the conduct regulated by that Act.[4]

This conclusion is reinforced by fundamental separation-of-powers principles. Under our constitutional system, Congress is tasked with assessing the competing interests involved in federal policy decisions and enacting legislation embodying those choices. And, "when Congress has addressed the problem," this Court's "'commitment to the separation of powers is too fundamental' to continue to rely on federal common law by 'judicially decreeing what accords with "common sense and the public weal."'" *Milwaukee*, 451 U.S. at 315 (quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)). Courts, accordingly, do "not attempt to adjust the balance between those competing [interests] that the text adopted by Congress has struck." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 263 (1993). "This is especially true with . . . [a] complex and detailed statute that resolved innumerable disputes between powerful competing interests." *Id.* at 262.

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[4] Indeed, the CWA would displace all federal common law actions, even actions for compensatory damages were it not for certain provisions of the Act saving particular types of claims. Section 1321(o)(1) preserves actions seeking remedies for "damages to . . . *property*" (emphasis supplied). As explained in detail in Exxon's brief, however, this section does not save respondents' federal common law claim for punitive damages. Such a claim is not one for damage to "property." Moreover, § 1365(e) of the CWA limits only the reach of the citizen suit provision. Neither provision preserves the common law remedy of punitive damages for conduct comprehensively addressed by the CWA.

In enacting the CWA, Congress designed a detailed remedial scheme that imposes a variety of substantial penalties on maritime businesses who violate the Act, but omits any provision for punitive damages awards. The courts should respect the balance struck by the political branches and thus should not supplement Congress's remedial design with a punitive damages provision that Congress did not enact.

B. Federal Common Law Remedies Are Displaced When Congress Comprehensively Addresses The Appropriate Remedies For Unlawful Conduct.

This Court has made clear that where, as here, a federal statute "speak[s] directly to," *Higginbotham*, 436 U.S. at 625, or addresses, "a question previously governed by a decision rested on federal common law," the "exercise of lawmaking by the federal courts disappears." *Milwaukee*, 451 U.S. at 314. Indeed, federal courts begin their analysis of a federal statute's effect with a "willingness to find congressional displacement of federal common law." *Id.* at 317 n.9 (emphasis omitted).

There is no requirement that Congress expressly state that it is displacing federal common law. See *id.* at 315 ("the question [is] whether the legislative scheme 'spoke directly to the question[,]' . . . not whether Congress had affirmatively proscribed the use of federal common law"). Instead, "'[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979)); see also *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"); *Dooley* v. *Korean Air Lines Co.*, 524 U.S. 116, 123 (1998) ("[b]ecause Congress has already decided these issues, it has precluded the judiciary from enlarging . . . the recoverable damages").

Congressional intent to displace federal common law claims and remedies is routinely found when a statute establishes a "comprehensive regulatory program" that includes a set of calibrated remedies for addressing potential liability. See *Milwaukee*, 451 U.S. at 317-18. Indeed, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Nw. Airlines, Inc.*, 451 U.S. at 97; see also *Sea Clammers*, 453 U.S. at 14 ("In view of . . . elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . . ."); *O'Melveny & Meyers* v. *FDIC*, 512 U.S. 79, 85 (1994) (courts may not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed").

These principles have been applied in a variety of contexts and represent a general rule of statutory interpretation. For example, the Employee Retirement Income Security Act of 1974 ("ERISA") contains a comprehensive remedial scheme. Civil remedies for ERISA violations are set forth in § 502, 29 U.S.C. § 1132, which "provides 'a panoply of remedial devices' for participants and beneficiaries of benefit plans." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108 (1989) (quoting *Russell*, 473 U.S. at 146).[5] This Court has declined to supplement ERISA's remedial regime for the violation of a benefit plan administrator's duties with extracontractual compensatory and punitive damages remedies under common law, declaring itself "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 147. In addition, the Court noted, "there is a stark absence – in the statute itself and in its legislative history – of any reference to an intention to authorize the recovery of extracontractual damages." *Id.* at 148. Thus, the Court concluded, "Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." *Id.*

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[5] Under ERISA § 502(a)(1)(B), a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3)(B) authorizes civil actions "to obtain other appropriate equitable relief (i) to redress . . violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." *Id.* § 1132(a)(3)(B).

In *Mertens*, this Court similarly recognized that "[t]he authority of courts to develop a 'federal common law' under ERISA, is not the authority to revise the text of the statute." 508 U.S. at 259 (internal citation omitted). Particularly in light of ERISA's complex remedial scheme and the Court's wariness of disturbing congressional balancing, it held that it would not read into the statute a right to pursue money damages against a nonfiduciary of a benefit plan. *Id.* at 262.

Likewise, under the Labor Management Relations Act, which itself gives the federal judiciary federal common law making authority (see *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957)), this Court has concluded that the availability of a "significant array of other remedies" under § 301 for breaches of a collective bargaining agreement prevents courts from adding to those remedies as a matter of federal common law. *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401, 415-17 & n.18 (1981). The Court concluded that recognizing extrastatutory remedies is unwarranted precisely because "Congress itself balanced the competing advantages and disadvantages inherent in the possible remedies." *Id.* at 416.

Federal courts of appeals have taken a similar approach in evaluating the effect of the comprehensive remedial scheme of the Family Medical Leave Act ("FMLA"). Under 29 U.S.C. § 2617(a)(1)(A), any employer who violates the statute is liable "for damages equal to . . . the amount of": (1) "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation"; (2) interest on that amount; and (3) "an additional amount as liquidated damages equal to the sum of the amount described [in number one].” Courts have declined to supplement this detailed plan, uniformly concluding that only compensatory damages are available under the FMLA. See *Brumbalough* v. *Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1007 (6th Cir. 2005) (denying recovery for emotional distress under the statute); *Xin Liu* v. *Amway Corp.*, 347 F.3d 1125, 1133 n.6 (9th Cir. 2003) (“FMLA only provides for compensatory damages and not punitive damages”); *Walker* v. *UPS, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001) (“courts have consistently refused to award FMLA recovery for such other claims as consequential damages and emotional distress damages”); *Nero* v. *Indus. Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999) (same).[6]

This Court’s jurisprudence generally reflects its solicitude for the particularized policy choices made by Congress and embodied in detailed statutory regimes. Indeed, a comprehensive federal law directed at a *particular issue* – such as the CWA – displaces not only federal common law, but also federal laws such as § 1983 that give the federal courts jurisdiction to enforce federal law *generally*. Thus, in *Sea Clammers*, the Court held that the comprehensive remedial schemes in the CWA and the Marine Protection, Research, and Sanctuaries Act displaced federal common law remedies *and* prevented the plaintiffs from bringing suit to enforce statutory rights under § 1983. See 453 U.S. at 20-22. See also *Smith* v. *Robinson*, 468 U.S. 992, 1016 (1984) ("[Education for all Handicapped Children Act] is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education," and "Congress did not intend to have the EHA scheme circumvented by resort to the more general provisions of § 1983"), *superseded by statute on other grounds*, Education for All Handicapped Children Act of 1975, Pub. 2, No. 94-142, 89 Stat. 773, *as recognized in Plant* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121, 124 (2005) ("[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983").

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[6] *See also Snapp* v. *Unlimited Concepts, Inc.*, 208 F.3d 928, 930, 933-34 (11th Cir. 2000) (recognizing that §§ 216(a) & (b) of the Fair Labor Standards Act establish “a comprehensive remedial scheme for violations of the FLSA’s substantive provisions that covers the whole terrain of punitive sanctions, compensatory relief, private rights of action, and actions brought by the Secretary of Labor,” the court declined to authorize awards of punitive damages under the private cause of action).

These cases, like the cases holding that federal common law is displaced, recognize that when Congress enacts legislation, "[t]he ordinary inference [is] that the remedy provided in the statute is exclusive." *Id.* at 122. Courts do not second guess congressional choices regarding the availability of particular remedies when Congress has addressed an issue through comprehensive legislation. The CWA fits comfortably within this framework and displaces any federal common law cause of action for a punitive damages award based on conduct regulated by the Act.

C. Congress Regularly Enacts Statutory Regimes That Provide For Punitive Damages But Declined To Do So In The CWA.

"[W]hen Congress wishe[s] to provide a private damage[s] remedy, it kn[o]w[s] how to do so." *Touche*

Ross & Co. v. *Redington*, 442 U.S. 560, 572 (1979). Congress has specifically provided for punitive damages in a variety of statutes, including, *inter alia*, the Commodities Exchange Act (7 U.S.C. § 18(a)(1)(b)), the Fair Credit Reporting Act (15 U.S.C. § 1681u(i)(3)), the Petroleum Marketing Practices Act (15 U.S.C. § 2805(d)) the Federal Wiretap Act (18 U.S.C. § 2520(b)(2)), the Postal Accountability & Enhancement Act (39 U.S.C. § 3018(g)(2)), the Civil Rights Act of 1981 (42 U.S.C. § 1981a(a)(1)), and the Fair Housing Act (42 U.S.C. § 3613(c)(1)). Many other federal statutes contain punitive measures such as the trebling of damages. See, *e.g.*, 15 U.S.C. § 15 (Sherman Act); 31 U.S.C. § 3729(a) (False Claims Act).

In the domain of environmental legislation, Congress has on occasion authorized punitive damages. For example, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides for punitive damages. See 42 U.S.C. § 9607(c)(3). The punitive damages provision in CERCLA displays the careful attention Congress paid in crafting – and cabining – the availability of this particular remedy. Under 42 U.S.C. § 9607(c)(3), "[t]he President is authorized to commence a civil action . . . to recover the punitive damages" against "any person who is liable for a release or threat of release of a hazardous substance [who] fails . . . to properly provide removal or remedial action upon order of the President." Such damages, however, are limited to "an amount at least equal to, and not more that three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action." *Id.*

Thus, in providing for punitive damages awards in CERCLA, Congress restricted who may seek such relief and the amount recoverable, manifesting its sensitivity to excessive punitive damages awards in this area. Conversely, Congress omitted punitive damages from the remedial schemes in the Clean Air Act, 42 U.S.C. §§ 7401-7671q, and the Resource Conservation and Recovery Act, *id.* §§ 6901-6992k, two environmental statutes with enforcement provisions similar to those in the CWA. This legislative selectivity creates a strong inference that the omission of a punitive damages remedy from the CWA was not an oversight.

Moreover, the omission of a punitive damages remedy from the CWA is consistent with the limited role Congress saw for private enforcement of the Act. See, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found, Inc.*, 484 U.S. 49, 60-61 (1987) (preventing private citizens from bringing suits based on past violations). Expansion of the CWA's menu of available private remedies "would change the nature of the citizen's role from interstitial to potentially intrusive" with respect to the government enforcement efforts. *Id.* at 61.

This is particularly true with regard to punitive damages, which serve the *public goals* of punishment and deterrence. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416-17 (2003) ("punitive damages serve a broader function [than compensatory damages]; they are aimed at deterrence and retribution. . . . [and] serve the same purposes as criminal penalties"). The court below believed that "what saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest." App. 79a. But, punitive damages are public remedies that serve the goals of punishment and deterrence. A comprehensive scheme of public remedies presumptively displaces punitive damages.

Conspicuously absent from the CWA's comprehensive remedial scheme, set forth *supra* at 6-7, is any provision for punitive damages. "The judiciary may not, in the face of such [a] comprehensive legislative scheme[], fashion new remedies that might upset carefully considered legislative programs." *Nw. Airlines*, 451 U.S. at 97. The decision of the court below "upset the balance struck by Congress by authorizing a [remedy] with which Congress was certainly familiar but nonetheless declined to adopt." *Dooley*, 524 U.S. at 124. The federal judiciary's lawmaking authority in maritime cases is not a license to disturb deliberate congressional policy choices. This Court should reverse the Ninth Circuit's contrary conclusion.

II. COURTS MUST REVIEW PUNITIVE DAMAGES AWARDED UNDER FEDERAL MARITIME LAW TO ENSURE THAT THEY SERVE THE POLICIES AND PURPOSES OF THAT LAW.

Assuming that the punitive damages award at issue is not wholly displaced by the CWA, the decision of the court below nonetheless should be reversed. The Ninth Circuit refused to review the punitive damages award under federal maritime law to determine whether punitive damages comport with the policies and purposes of that law. App. 68a-70a, 90a-91a. This refusal cannot be reconciled with this Court's decision in *Oberg*, or with the longstanding common law principles that apply to appellate review of punitive damages awards.

Had the award been reviewed under the appropriate common law standards, it would not have survived scrutiny. In the circumstances presented here, any punitive damages award, and certainly the massive award in this case, contravenes the policies of consistency, fair compensation, promotion of settlement, and judicial economy that undergird maritime law's central goal of protecting commerce.

A. Federal Courts Must Review Punitive Damages Awards Arising Under Federal Common Law To Ensure They Comport With Common Law Principles.

Unlike all other punitive damages cases before this Court in the past two decades, this case involves an award that arises under federal common law, not state law. Thus, in examining the punitive damages award in this case, the federal court plays the same role played by a state court reviewing an award under its own laws. It is well established that, before determining whether a punitive damages award violates the federal Constitution, the state court decides whether the award comports with state common law principles. Similarly, here, the federal court should have determined whether the award was consistent with federal common law principles, before addressing whether the award violated the Due Process Clause.[7] Its failure to do so was legal error.

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[7] In *Browning-Ferris Industry of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court refused to find a punitive damages award based on a state-law cause of action "excessive as a matter of federal common law," holding that "[i]n a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Id.* at 278. Here, in contrast, the underlying claim arises under federal common law and thus review under federal common law principles is mandatory.

"Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Oberg*, 512 U.S. at 421; see also *Haslip*, 499 U.S. at 15. Long before this Court addressed federal constitutional limits on punitive damages awards, federal and state courts routinely reviewed them under common law principles. *Oberg*, 512 U.S. at 424-25; Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 995, 1014 (2001) ("[o]n the common-law side, courts have reviewed punitive damages verdicts for excessiveness since 1763"). The lower court's failure to engage in such review constitutes an abdication of its responsibilities as a federal common law court.

Oberg involved an amendment to the Oregon Constitution that precluded judicial review of punitive damages awards except in certain very narrow circumstances. 512 U.S. at 418. As the Court explained, "if the defendant's only basis for relief [was] the *amount* of punitive damages the jury awarded, Oregon provide[d] no procedure for reducing or setting aside that award." *Id.* at 426-27. This Court rejected Oregon's scheme, holding that "the Due Process Clause requires judicial review of the amount of punitive damage awards." *Id.* at 420, 432.

In so doing, the Court stated that "[j]udicial review of the amount awarded was one of the few procedural safeguards which *the common law* provided against that danger," *id.* at 432 (emphasis supplied). The problem was that "Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts," *id.* at 429. The Court held that, by "remov[ing] that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time," Oregon violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 432.

The Court's decision in *Oberg* makes clear that common law courts must conduct *some form* of review of punitive damages awards sufficient to ensure that "those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 429. Although some form of judicial review (or some equally effective safeguard against excessiveness and arbitrariness) is required, it is for the common law court – be it state or federal – to determine the precise content or substance of that mandatory common law review. And, *Oberg* makes clear that this common law review is independent of, and precedes, the application of constitutional limits on punitive damages awards. (Notably, this Court did not mandate the application of substantive constitutional limits on such awards until two years later in *Gore*.) Thus, a common law court – state or federal – must review a punitive damages award for compliance with both the applicable common law and the federal Constitution.

Many state common law courts conduct this two-phase review as a matter of course, first applying the pertinent excessiveness standard under common law and then considering the constitutional limits. See, *e.g.*, *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d 473, 484 (Or. 2001) ("the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the . . . rational juror review"); *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 307 n.33 (Tex. 2006); *Dardinger* v. *Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143-44 (Ohio 2002);

Sweet v. *Roy*, 801 A.2d 694, 714-15 (Vt. 2002); *Bowden* v. *Caldor, Inc.*, 710 A.2d 267, 277-78 (Md. 1998); see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431 n.12 (1996) ("[f]or rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy").

In cases involving federal common law, a federal appellate court reviewing an award of punitive damages should assume the same role as state appellate courts and conduct the same two-tier analysis. In reviewing the punitive damages award here, the court of appeals thus should have started by reviewing the punitive damages award under the applicable principles of federal common law – specifically principles of federal maritime law. This legal error, by itself, warrants vacatur of the award.

B. This Punitive Damages Award Contravenes Applicable Maritime Law Principles.

As this Court recently reiterated, "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 25 (2004) (emphasis and internal quotation marks omitted). In order to ensure that this interest is "fully vindicated," the federal judiciary must adopt and apply "'uniform rules'" under maritime law. *Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990). See also *E. River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("[w]ith admiralty jurisdiction comes the application of substantive admiralty law").

This Court has long recognized the necessity for "uniformity and consistency" in maritime law in light of its interstate and international character. *The*

Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874). Maritime law is equally concerned with the establishment of "flexible and fair remedies." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). In addition, this Court has emphasized the importance of the "promotion of settlement, and judicial economy" in the development of maritime rules. *McDermott* v. *AmClyde*, 511 U.S. 202, 211 (1994). Considering that the protection of commerce is at the heart of maritime law, the application of these principles demonstrates that the unprecedented punitive damages award in this case is wholly inconsistent with federal maritime law.

The Chamber will not repeat the detailed arguments made elsewhere about the maritime law policies that should inform and guide courts in their review of punitive damages awards such as the one in this case. See, *e.g.*, Exxon Br. 43-50. The Chamber agrees that under the applicable federal common law principles, respondents were not entitled to any punitive damages award because previously imposed criminal and civil sanctions, as well as numerous other compensatory and restitutionary payments, fully vindicated any reasonable public interest in punishment or deterrence of the conduct at issue.

At the very least, maritime law requires that federal common law courts provide some clear, limiting principles for application on the review of punitive damages awards. In light of certain fundamental, well established maritime policies – the requirement of consistent legal rules, appropriate and fair compensation for injury, avoidance of undue burdens on commerce, the encouragement of settlement of claims, and judicial economy – clear standards emerge. As Exxon details in its brief (pp. 17, 51-53), a jury should not be permitted to impose punitive damages that exceed either the civil fines and penalties that Congress has prescribed for particular conduct, or the compensatory damages paid to address harm resulting from particular conduct. When punitive damages awards exceed these limitations, they cease to be either predictable or to have any consistent or rational relationship to the wrongful conduct being punished.

Nor should maritime courts allow punitive damages awards that go beyond any reasonable deterrent function. Here, for example, there is no basis for arguing that the conduct at issue (a massive oil spill) could go undetected, and thus must be over-deterred by a massive award. Indeed, no reasonable argument could be made that the payments Exxon has already made do not adequately deter any future regulated conduct and incentivize Exxon to prevent future harm. And, the sole possible explanation for the award here – Exxon's net worth – is wholly illegitimate. The same conduct should not receive different punishment simply because an alleged wrongdoer has a higher net worth. That result undermines the maritime law principles of uniformity, consistency and predictability. It also has the practical effect of discouraging robust capitalization of maritime businesses.

The limiting principles articulated by Exxon and its *amici* reflect the pivotal role of commercial interests in shaping federal maritime law. The preeminence of commercial interests is the direct result of a judicial recognition of the risks involved with maritime commerce and the importance of such commerce to the national (and international) economy. The principles that animate maritime law necessarily reflect these considerations.

For example, like most businesses, maritime businesses have a substantial interest in and need for predictability in connection with business risks and costs. As a result, maritime law has always emphasized uniformity and consistency. See *The Lottawanna*, 88 U.S. (21 Wall.) at 575. Punitive damages present a real and inherent danger of arbitrariness and, absent review pursuant to clearly understood, limiting principles, are wholly unpredictable. See *Oberg*, 512 U.S. at 431-33. Indeed, punitive damages awards are a wild card as this case illustrates. Here, the public's interest in punishment and deterrence were fully vindicated through statutory remedies. For example, Exxon paid $125 million in fines under the CWA, and $20.3 million in compensatory damages. Yet, the jury awarded punitive damages in the billions, dwarfing compensatory liability.

For similar reasons, maritime businesses have a strong interest in legal standards that promote fair and accurate compensatory and punitive remedies. Liability for wrongful conduct must be commensurate with the wrong involved so businesses can properly insure risk and put in place appropriate deterrents to wrongful conduct. This interest is substantially undermined when punitive damages are awarded without any significant constraints or guiding principles. Again, this case is illustrative. The punitive damages award here was $2.5 billion, while compensatory damages were $20.3 million. The award comes on top of the $125 million in fines that government authorities deemed adequate punishment and deterrence for the wrong. The likely effect of allowing such an award is to make maritime commerce (and hence the goods transported in it) more expensive by injecting greater uncertainty into the system.

Again like most businesses, maritime businesses seek to avoid costly litigation, if possible. Allowing uncabined punitive damages awards, such as the massive award at issue here, plainly will discourage the settlement of lawsuits and strain judicial resources. Exxon moved quickly to negotiate with private parties and governmental entities concerning its liability and the appropriate level of compensation. Plainly, Exxon could not have anticipated that years later a jury deciding issues on unsettled claims for purely economic injury could return a $5 billion punitive damages verdict. If this verdict stands, shippers have little incentive to follow the responsible path taken by Exxon here. Instead, there will be a clear incentive to litigate liability and damage issues to final judgment, rather than ceding any legal ground. That outcome is contrary to maritime law's twin goals of promoting settlement and preserving judicial resources.

The appropriate procedural and substantive standards for reviewing punitive damages awards in maritime cases must be determined in light of the federal policies and interests at stake – a task the court below did not even undertake. Federal courts have done so in the closely analogous context of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), a statute that instructs the courts to create a federal common law interpreting, enforcing, and remedying violations of collective bargaining agreements and agreements between labor unions and their members. See *Nw. Airlines*, 451 U.S. at 95, 96 n.35. Pursuant to that statutory command, federal courts have developed the general contours of the law governing labor agreements, and have also crafted the law governing remedies for violations of such agreements. In doing so, their decisions are informed by the relevant federal labor policy. See *Int'l Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 50-52 (1979) (barring awards of punitive damages for breach of a union's duty of fair representation).

In this case, the Court should adopt the standards articulated earlier in this brief (see *supra* at 19-20), and more fully discussed by Exxon, that limit the imposition of punitive damages in maritime cases. This, in turn, will minimize the arbitrariness of punitive damages awards. The application of such principles plainly requires the vacatur of the award in this case. At the very least, the award must be reconsidered based on the relevant federal common law principles.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Supreme Court of the United States

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EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

—v.—

GRANT BAKER, *et al.*,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERNATIONAL CHAMBER OF SHIPPING, THE BALTIC AND INTERNATIONAL MARITIME COUNCIL, CHAMBER OF SHIPPING OF AMERICA, TEEKAY CORPORATION, THE BAHAMAS SHIPOWNERS ASSOCIATION, AMERICAN INSTITUTE OF MARINE UNDERWRITERS, AND AMERICAN COMMERCIAL LINES, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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United States Limitation Act of 1851, 46 U.S.C. §§ 30502-30512 21

46 U.S.C. § 30505(b) 22

Carriage of Goods by Sea Act, Ch. 229, 49 Stat. 1207 (1936), Pub. L. No. 109-304, 120 Stat. 1485 (2006), *reprinted in* note following 46 U.S.C. § 30701 ....20, 21, 22

46 U.S.C. § 50505(b) 22

Jones Act, 46 U.S.C. § 55102 *et seq*. 7

OTHER AUTHORITIES

A/CN.9/WG.III/WP.81 - Transport Law: draft convention on the carriage of goods [wholly or partly] [by sea], dated February 13, 2007, *at* www.uncitral.org. 22

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INTEREST OF THE AMICI CURIAE[1]

The amici curiae represent the overwhelming majority of the members of the United States and international maritime industry. The maritime industry transports about 97 percent of United States trade by weight excluding trade with Canada or Mexico.[2] That trade is vital to our nation's economic and national security, and uniform and predictable laws are critical to the maritime community.

International Chamber of Shipping

Formed in 1921, the International Chamber of Shipping ("ICS") is the trade association for the international shipping industry. Its membership comprises shipowners' associations and shipping companies from thirty-five countries (including the United States, Canada, and Mexico).[3]

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[1] No counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* represented in this brief made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

[2] *See* U.S. Department of Transportation, Bureau of Transportation Statistics, Figure 2: *Modal Shares of U.S. Merchandise Trade Handled by Land, Water, and Air Gateways by Value and Weight: 2003*, http://www.bts.gov/publications/americas_freight_transportation_gateways/.

[3] The membership of ICS also comprises national shipowners' associations from the following countries: Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Hong

ICS coordinates its efforts with the European Community Shipowners' Associations ("ECSA"), which represents the European shipping industry. In addition to associations that belong to ICS, ECSA membership includes associations from Estonia, Latvia, Lithuania, Malta, Poland, Portugal, and Slovenia. ICS also coordinates with national shipowners' associations from China, Chinese Taipei, Indonesia, Korea, Malaysia, the Philippines, Thailand, and Vietnam through the Asian Shipowners' Forum, a voluntary organization that is now being formalized.

Shipowner members of ICS represent about 450 million gross tons,[4] which constitute about two thirds of the world merchant fleet. ICS members carry about two thirds of the volume of United States ocean-going trade a year, making approximately fifty thousand United States port calls per year.

The shipowner members of ICS operate ships in all sectors and trades, including containerships (which carry the shipping containers in which the overwhelming majority of U.S. imports and experts, in terms of value, is transported), bulk carriers (which carry raw materials such as

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Kong, Iceland, India, Ireland, Italy, Japan, Kuwait, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Singapore, Spain, Sweden, Switzerland, Turkey, the United Arab Emirates, the United Kingdom, and the United States of America.

[4] Gross tonnage of a vessel "consists of its total measured cubic contents expressed in units of 100 cubic feet or 2.83 cubic meters." René DeKerchove, *International Maritime Dictionary* 339 (2d ed. 1948).

grain, ore, coal, and other cargo that is not packaged and is shipped in large quantities), oil and chemical tankers (which carry petroleum products and the many different chemicals that are transported worldwide), gas carriers (which carry liquefied gas), general cargo ships (which carry many different kinds of cargo that are not carried in containers, including large pieces of cargo that would not fit inside a container), specialist ships (e.g. automobile carriers and offshore oil rig supply vessels), and passenger ships. ICS members serve over 100 nations—virtually every nation with a seagoing port.

ICS acts as an advocate for the maritime industry on issues of maritime affairs, shipping policy, legal and technical matters, ship construction, operation, safety, and management, to develop the best possible practices in the industry. To accomplish these goals, ICS strives for a uniform regulatory environment that embraces safe shipping operations, protection of the environment, maintenance of open markets, and fair competition, as well as adherence to internationally adopted standards and procedures. ICS supports regulation of shipping at an international level to obtain uniform regulations that will be enforced worldwide.

The Baltic and International Maritime Council

The Baltic and International Maritime Council ("BIMCO"), founded in 1905, is the world's oldest and one of the largest association of shipowners, ship managers, ship brokers, agents, operators, associations, and other entities connected with the international shipping industry. Almost 1,000 shipowners, 1,400 ship brokers, and other shipping related companies are BIMCO members. Shipowner members represent more than 65% of the world's available cargo carrying-capacity.

BIMCO strives to raise standards of its members through the harmonization of commercial shipping practices. It promotes quality, safety, security, environmental protection, the fair treatment of seafarers, free trade, and open access to markets. To accomplish these goals, when appropriate and circumstances so demand, BIMCO takes a position on important issues facing the shipping industry, including filing briefs amicus curiae with this Court.

BIMCO also is a leader in producing standard contractual documents for the shipping industry.[5] These documents are balanced to be acceptable both to shipowners and to charterers[6] of ships. Use of standard documents reduces the need to negotiate each contract, promotes uniformity, and raises standards. These balanced documents are trusted by all parties in the maritime industry. BIMCO drafted the documents in reliance on existing statutes and treaties. This reliance would be impossible if the underlying statutory and treaty provisions could be circumvented by an award of punitive damages.

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[5] The documents are published and may be found at the BIMCO website, *at* http://www.bimco.org/. The many BIMCO documents can be found by clicking on the "Documentary" menu.

[6] A charterer is a person or entity who, pursuant to an agreement, called a charter party, hires a ship from a shipowner for a period of time, or who reserves all or part of a ship for carriage of goods for a period of time or voyage. *See* Jo Desha Lucas, *Cases and Materials on Admiralty* 587-88 (Foundation Press 1969).

Chamber of Shipping of America

The Chamber of Shipping of America ("CSA") include 30 U.S.-based companies that own, operate, or charter oceangoing container ships, dry bulk vessels, and tankers engaged in both the domestic and international trades, and companies that maintain a commercial interest in the operation of such oceangoing vessels.

CSA provides the voice of the U.S. maritime industry in promoting sound public policy through legislative and regulatory initiatives that include marine safety, maritime security, and environmentally protective operating principles. CSA supports a viable United States domestic maritime industry and promotes open international trade in shipping services. CSA also provides strong technical expertise, marine experience, and knowledge in order to be an authoritative and effective forum for U.S. maritime issues.

CSA represents owners, operators, and charterers of both U.S. and foreign flag ocean vessels before U.S. regulatory, legislative, and administrative entities.

Teekay Corporation

Teekay Corporation ("Teekay") operates a fleet of approximately 170 vessels, including time-chartered and commercially managed vessels, and is an essential marine link in the global energy supply chain. Teekay's vessels connect upstream gas and oil production with downstream refining and distribution.

In 2006, Teekay's tanker fleet transported 236.8 million metric tons of oil and 3.9 million metric tons of liquefied natural gas ("LNG")[7]—representing approximately 10 percent of the world's seaborne oil movements and about 2.4 percent of the world's LNG transport. Last year, the Teekay fleet completed 3307 voyages. In 2006, the United States imported about 12 million metric tons of LNG, about 10.1 million barrels per day of crude oil, and about 3.4 million barrels per day of other petroleum products.

The Bahamas Shipowners Association

The Bahamas Shipowners Association ("BSA") was inaugurated by The Bahamas Minister of Transport in 1997 to promote the interests of Bahamian registered vessels, currently 1,582 ships with a total of approximately 44 million gross tons. U.S.-based shipowners represent more than 10 percent of the Bahamian tonnage.

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[7] Liquefied natural gas is natural gas that is cooled to about minus 161° Celsius and compressed to 25kPa (3.6 psi) to keep the LNG in liquid form. *See* Maritime Administration, *What is LNG?*, http://www.marad.dot.gov/dwp/lng/faqs/index.asp#faq_7. It is transported in specially designed ships. While LNG supplies about 4% of the natural gas consumed in the United States at this time, it is predicted that LNG will supply 20% of natural gas consumed in the United States by 2015. Joe Silha, *Far East LNG demand siphons more supply from U.S.*, Reuters UK, Sept. 17, 2007, http://uk.reuters.com/article/oilRpt/idUKN1723399520070917.

The BSA fleet comprises a variety of ships, including cruise ships,[8] refrigerated cargo ships, dry bulk carriers, tankers, ferries, and ships involved in short sea shipping (coastal trade for short distances). BSA represents the interests of the owners of Bahamian registered vessels and voices its views on international policy before such organizations as the U.S. Coast Guard, the IMO, and the European Community.

American Commercial Lines Inc.

American Commercial Lines Inc. ("ACL") is one of the largest and most diversified marine transportation and service companies in the United States. ACL and its subsidiaries provide barge transportation and related services under the provisions of the Jones Act (current version at 46 U.S.C. § 55102 *et seq.*, formerly 46 U.S.C. app. § 883) and manufacture barges, towboats, and other vessels, including ocean-going liquid tank barges. ACL is regulated by general maritime rules and regulations, federal, state and local laws. Decisions relating to punitive damages under statutes affecting water trade and commerce, such as the Clean Water Act, ("CWA"),

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[8] Cruise ships contributed more than $35 billion to the United States economy in 2006. Sandra Spears, *Hard-hitting cruise sector adds $35bn to US economy*, Lloyd's List, Sept. 3, 2007, at 7.

33 U.S.C. § 1251, *et seq.*,[9] or under the principles of maritime law, have a direct effect on ACL. As a result, ACL is joining this brief to assist the Court in understanding the position of marine operators within the inland United States marine industry.

The inland marine industry operates on approximately 11,000 miles of commercially significant navigable waterways in the United States.[10] More than 4,000 towing vessels push a collection of 27,000 barges on these waterways.[11] These barges annually carry 617 million tons of materials and products that power the American economy, including coal, grain, petroleum products, petrochemicals, fertilizers, sand, gravel, metallurgic products, and much more.[12] The inland marine industry transports approximately 300 billion ton-miles of cargo annually.[13] These ton miles comprise up to 20 percent of all domestic waterborne cargo movements.[14]

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[9] 62 Stat. 1155, 33 USC § 1251, *et seq.*, as the Clean Water Act read on March 24, 1989, the date EXXON VALDEZ grounded.

[10] U.S. Department of Commerce, International Trade Administration, *Transportation Services in U.S. Industrial Outlook '92* 4020 (1992).

[11] *See* American Waterways Operators, *Value to the Nation*, http://www.americanwaterways.com/about_industry/value.pdf.

[12] David V. Grier, *Locks and Dams, Proceedings of the Marine Safety & Security Council, the Coast Guard Journal of Safety at Sea, Summer 2007* 56 (citing *U.S. Army Corps of Engineers, Institute for Water Resources, Inland Navigation, Value to the Nation (2000), unpublished update 2005)).*

[13] *Id.*

Transportation by barge is environmentally advantageous when compared to other modes of transportation, such as truck or rail car. For example, one large inland towing vessel can push 40 barges that have the same cargo capacity as approximately 2,400 trucks that burn one gallon of fuel to transport the equivalent of 70 ton miles as compared to 530 ton miles by barge.[15]

No company dominates or controls the inland river industry. The inland river industry consists of approximately 750 companies. Forty-five percent of the total capacity is spread amongst nine different operators.[16] In recent years, the inland river industry has weathered economic downturns that have hurt the profitability and development of some smaller operators. None could withstand the imposition of punitive damages approaching the scale assessed in this case.

American Institute of Marine Underwriters

The American Institute of Marine Underwriters ("AIMU") is a non-profit trade association representing the ocean marine insurance industry in the United States as an advocate, promoter, source of information, and center for education.[17] AIMU represents 49 marine insurance companies in the United States, which underwrite the vast majority of the ocean marine risks insured in the United States.

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[14] *U.S. Industrial Outlook '92*, *supra* note 10 at 40-20.

[15] Grier, *supra* note 12 at 56.

[16] U.S. Department of Commerce, International Trade Administration, *Transportation Services in U.S. Industrial Outlook 1993*, 40-19 (1993).

The risks insured by AIMU's members include physical damage to vessels, liabilities of shipowners including pollution liabilities,[18] and where permitted by public policy[19] and not excluded by policy wording, punitive damages and penalties. In 2006, AIMU's members underwrote marine insurance policies with collective total premiums of approximately $2.5 billion.

AIMU works in conjunction with the United States government and international groups to monitor the allocating of risks that affect the marine insurance industry and the broader marine industry. AIMU is the forum for action on the important and timely issues that affect United States marine insurers, reinsurers, and the maritime community at large.

AIMU members can operate efficiently and provide the maritime industry with vital insurance products only if the rules imposing liability are clear and predictable.

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[17] *See* www.aimu.org.

[18] While AIMU understands that Petitioners' liability for any punitive damages in this case will be uninsured and no AIMU member has a pecuniary interest in the outcome of this litigation, AIMU and its members have a strong interest in the effect this decision will have on future cases.

[19] In most United States jurisdictions, courts have determined that insurance coverage of punitive damages is not contrary to public policy. Lorelie S. Masters, *Punitive Damages: Covered or Not?*, 55 Bus. Law 283, 294 (1999).

INTRODUCTION

Permitting punitive damages in the context of this case would destroy the uniformity and predictability needed by the international and domestic maritime industries. The law cannot be uniform and predictable if the courts impose remedies that Congress did not authorize in the applicable statutes. The courts below undermined uniformity by adding a punitive damage remedy to the remedies specified in the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*[20] Congress carefully drafted the CWA to balance the interests of all affected parties and the courts should respect the Congressional judgment.

SUMMARY OF ARGUMENT

The Founders of our nation realized that the maritime industry must be governed by uniform and predictable laws. For that reason, the Constitution grants federal courts jurisdiction over admiralty and maritime matters. This Court has long held that the courts should not develop new admiralty law in an area in which Congress has legislated. The CWA governed the oil spill in question. That Act provided punishment for the party responsible for spilling oil. Exxon was punished according to the CWA and should not be further punished by punitive damages added to the CWA. The CWA represents a careful balance by Congress of the interests of all parties involved in the transportation in question. That balance should not be upset by the addition of non-uniform and unpredictable punitive damages.

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[20] 62 Stat. 1155, 33 USC § 1251, *et seq.*, as the Clean Water Act read on March 24, 1989, the date EXXON VALDEZ grounded.

ARGUMENT

I. The Law Has Long Recognized the Need for the Maritime Industry To Be Governed by Uniform and Predictable Law.

The need for uniformity and predictability in maritime law has long been recognized. The Constitution expressly extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 1.[21] Moreover, this Court's jurisprudence has long reflected the importance of uniform and predictable maritime law. Only two Terms ago, in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 29 (2004), this Court emphasized the importance of "protecting the uniformity of federal maritime law." The *Kirby* Court explained that the grant of admiralty jurisdiction in Article III of the Constitution "must have referred to a system of law coextensive with and operating uniformly in, the whole country." *Kirby*, 543 U.S. at 28 (citing *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna,* 88 U.S. 558, 575 (1874)). The *Kirby* Court particularly wished to avoid "undermin[ing] the uniformity of general maritime law." 543 U.S. at 28; *see also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 (1996) ("In several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision.") (citing *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961)).

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[21] Alexander Hamilton, writing in *The Federalist*, explained that the vesting of admiralty jurisdiction in the federal courts was intended to promote uniformity. Hamilton stated that maritime causes "so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public phase. . . ." The Federalist No. 80, at 478 (Alexander Hamilton) (G. Wills ed. 1982); *see also* The Federalist Nos. 12, 44, 64. Additional evidence of the Founders' intent for uniformity in maritime law can be seen in the 1789 Judiciary Act, which established the federal court structure. Section 9 of the Act provided that the Federal District Courts of the United States shall have:

> exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. . .; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

Act of Sept. 24, 1789, ch. 20 § 9, 1 Stat. 73, codified at 28 U.S.C. § 1331 (1).

The spirit and purpose of the Constitution's Admiralty Clause, U.S. CONST. art. III, § 2, requires that maritime legislation should be coextensive and operate uniformly in the entire United States. *See Panama R. Co. v. Johnson*, 264 U.S. 375, 386-87 (1924). Congress embraced its role in creating uniform maritime legislation when enacting legislation such as the CWA. Congress did not authorize punitive damages in that legislation and such damages should not be permitted to disharmonize its application and undermine uniformity in maritime law.

The proper harmony and uniformity of maritime law is vital because maritime law governs complex commercial transactions among nations.[22] Domestic uniformity of maritime law is not only a matter of importance for our internal commerce, it is important in our participation in the world community of international maritime commerce. This Court has explained that the framers of the Constitution placed admiralty and maritime cases under national control "because of its intimate relation to navigation and to interstate and foreign commerce." *Panama R. Co.*, 264 U.S. at 386. From the earliest times, this Court has recognized that maritime law has an important international dimension. *See The Lottawanna*, 88 U.S. 558, 572-73 (1874); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 453-54 (1851). More recently, this Court has recognized that "conflicts in the interpretation of [a maritime law convention] not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995). The application of punitive damages in maritime law would upset the uniformity and predictability of maritime law that is of vital importance to maritime commerce not only in this country, but throughout the entire international maritime community.

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[22] A typical shipping transaction involves principal participants from as many as six different countries. *See, e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. Mar. L. & Com. 553, 559 (1995).

II. The Unpredictable Nature of Punitive Damages Would Adversely Affect the Maritime Industry and Would Increase the Cost of Trade With the United States.

Uniform and predictable laws assist the safety of ships and ports. They also clarify the allocation of risks, which helps prevent the need for double insurance and allows an efficient insurance system to cover the many risks inherent in ocean shipping.

A. The Effects of Punitive Damages on Safety

The entire maritime industry, in the United States and abroad, should be able to look to one uniform set of safety regulations to govern a ship wherever the ship happens to be. Safety would be threatened if a ship's crew had to change its procedures as the ship moved from place to place, as this Court properly recognized in *United States v. Locke,* 529 U.S. 89 (2000) (rejecting Washington State's attempt to impose its own safe manning requirements when Congress and the international community had already spoken).

Safety regulations are truly uniform only to the extent that they are interpreted in the same manner throughout the world. If one jurisdiction were to consider the violation of a particular regulation sufficient to justify imposing punitive damages, then the imposition of punitive damages would essentially amend the safety regulations to place more emphasis on that particular regulation than on other provisions that might be even more important. If, for instance, a court were to impose punitive damages because a mariner departed from a rule of the International Regulations for Prevention of Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, adopted by statute at 33 U.S.C. § 1602, *et seq.*, ("COLREGS"), future mariners might be unduly reluctant to depart from that particular rule even if departure from it would help to prevent a collision. *See* COLREGS rule 2(b) (authorizing "a departure from these Rules necessary to avoid immediate danger"). The punitive damages would upset the careful balance of COLREGS by over-deterring a particular action.

Many federal statutes and international treaties govern the maritime industry to mandate the safety standards a shipowner must follow.[23] To ensure clarity, predictability, and certainty, they should be interpreted as they are written and only as they are written.[24] If they are interpreted otherwise, safety will suffer. No jurisdiction should give one safety regulation more importance than another unless the regulations themselves mandate that preference. If different courts were to decide that some regulations should be preferred over others, the relative importance of various regulations would change as a ship moved from one jurisdiction to another.

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[23] *See, e.g.* International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 ("SOLAS") (entered into force May 25, 1980), and its 1978 Protocol, Feb. 17, 1978, 32 U.S.T. 5577, 1226 U.N.T.S. 237 (entered into force May 1, 1981), as amended; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1978, S. Exec. Doc. No. 96-1 EE, 1361 U.N.T.S. 2 ("STCW") (entered into force Apr. 28, 1984, for the United States Oct. 1, 1991), and its July 7, 1995 amendments; the International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407, 1313 U.N.T.S. 3 ("MARPOL")(entered into force Mar. 30, 1983), and its 1978 Protocol, Feb. 17, 1978, 17 I.L.M. 546, 1340 U.N.T.S. 61 (entered into force Oct. 2, 1983); Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1915 (1994 & Supp. IV 1998) ("APPS"). APPS requires compliance with the MARPOL Protocol and applies to all ships of U.S. registry or nationality or operated under U.S. authority, wherever located. APPS also applies to foreign ships when in the navigable waters of the United States.

Punitive damage awards by various courts for acts or omissions that juries consider reckless create, in essence, new regulations, analogous in many ways to the Washington State regulations that were pre-empted in *United States v. Locke,* 529 U.S. 89 (2000). (Indeed, punitive damages are worse, for the governing standards are not set in advance by expert state regulators but after the fact by lay juries.) One of the preempted regulations in *Locke* would have harmed uniformity in crew training. A crew trained under one uniform set of standards will be safer than a crew trained to use varying standards at varying times and at varying places. Thus the *Locke* Court recognized that crew training is a subject on which uniformity is essential. *See id.* at 113; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 169 (1978) (recognizing "the congressional desire of achieving uniform, international standards"). Allowing individual juries to award punitive damages would also "frustrate the congressional desire of achieving uniform, international standards." *Id.*

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[24] Justice Story's opinion in *The Amiable Isabella,* 19 U.S. 1, 71, 72 (1821), clearly explained that treaties must be interpreted only by their texts.

> [T]his Court does not possess any treaty-making power. . . .; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a casus omissus in a treaty, any more than in a law.
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> * * * *
>
> [T]his Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise.

B. The Effects of Punitive Damages Would Change the Allocation of Risks and Would Thus Increase the Cost of Transportation.

Stability, uniformity, and predictability are needed in the maritime industry to allocate risks in a clear manner. This need concerns not just insurers, but the entire maritime industry. The adverse effect of punitive damages is not limited to oil tankers but extends to all kinds of ships and marine ventures.

If punitive damages are permitted in the context of this case, there is no way to predict when another jury might make a similar award. The increased insurance costs for maritime shipping would increase the cost of trade with the United States. The more clearly risks inherent in the maritime industry are defined and allocated, the more efficiently the insurance system may guard against those risks. Efficient definition and allocation of risks are found in the many admiralty treaties and in many United States admiralty statutes.[25]

When the law clearly allocates maritime risks to only one party, that party alone will typically obtain insurance and pay the premiums to guard against the risk. When the risk allocation is unclear, all parties to whom the risk might possibly be allocated need to obtain coverage and pay premiums for the risk that might be allocated to them, resulting in double insurance, increased business cost, and hence increased cost of trade with the United States.

Permitting punitive damages in this context would call into question the allocation of risks in maritime statutes and treaties across the board. The Ninth Circuit's rationale could justify a punitive damages award for an act or omission that by statute or treaty should be excused outright or should result in limited liability. Punitive damages could be imposed on a carrier in one case and on cargo interests in precisely the same circumstances in another case.

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[25] Although the United States has not ratified all of the world's admiralty treaties, even unratified treaties often apply in the United States under our conflict of law rules. *See, e.g., Man Ferrostal, Inc. v. M/V Vertigo*, 447 F.Supp.2d 316 (S.D.N.Y. 2006), *reconsideration and certificate of appealability denied*, 2006 U.S. Dist. LEXIS 66621 (S.D.N.Y. Sept 18, 2006) (applying 1910 Collision Convention); *Otal Investments Ltd., M/V Kariba*, 03 Civ. 4304, 03 Civ. 9962, 04 Civ. 1107, 2005 U.S. Dist. LEXIS 13321, 2005 AMC 2454 (S.D.N.Y. July 7, 2005) (applying 1910 Collision Convention), *aff'd in part, rev'd and remanded in part*, 494 F.3d 40 (2d Cir. 2007); *see also Itel Container Corp. v. M/T Titan Scan*, 139 F.3d 1450 (11th Cir. 1998) *cert. denied*, 525 U.S. 962 (1998) (applying the Hague/Visby Rules as incorporated by reference); *see also* Francesca Morris, *The Pennsylvania Rule: No Longer the Rule?*, 32 Tul. Mar. L.J. 131, 131 (2007).

The CWA governed this case. It set forth the duties of all parties involved in the carriage of cargo. The CWA also established penalties for its breach. Those penalties did not include punitive damages and the courts should not amend the CWA by adding punitive damages to it.

An analogous risk allocation system is used for the carriage of goods. The Carriage of Goods by Sea Act (COGSA)[26] determines the risks for which carriers pay for insurance and those for which cargo interests buy insurance. A great body of case law has developed on risk allocation for the carriage of goods by sea during years of experience. These decisions have created well-established authority on which the industry relies. The risk of punitive damages would seriously harm the precedential value of this entire line of authority.

III. Punitive Damages Awards Would Circumvent Further Refinement of Risk Allocation in the Maritime Industry by Liability Limitations.

Limitation of liability performs two valuable functions in the maritime world. It increases a carrier's ability to obtain insurance for risks allocated to it and thus assures that the great majority of losses will be paid to the parties suffering the losses. It also further defines the party to bear the risk of loss or damage. Thus it is no surprise that limitation of liability is a long-established, well-entrenched aspect at the core of maritime law. Carriers bear the risk of damage, if they are liable, up to the limitation amount, and claimants bear the risk above the limitation amount.

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[26] Carriage of Goods by Sea Act, Ch. 229, 49 Stat. 1207 (1936), Pub. L. No. 109-304, 120 Stat. 1485 (2006), *reprinted in* note following 46 U.S.C. § 30701 (formerly codified at 46 U.S.C. §§ 1300, *et seq.*)

Limitation also provides an effective method to punish grievous behavior by a carrier. A carrier can lose the right to limit its liability for grievous behavior both by the explicit provisions of many statutes and treaties and under some general maritime law doctrines, such as the "deviation" doctrine.[27] Two general types of limitation provisions are common. "Global limitations" are provided by the United States Limitation of Liability Act of 1851, 46 U.S.C. §§ 30502-30512, the 1976 Limitation Convention,[28] and the 1996 Protocol to the 1976 Limitations Convention.[29] These laws limit all liability of shipowners, not only liability for cargo, subject to certain exceptions. The other type of limitation regime limits the carrier's liability for specific claims. The most common of these is the "package limitation" under COGSA § 4(5) for cargo loss or damage.[30] The CWA also contains limitation provisions of this type. *See* CWA § 1321(f)(1) (Pet. App. 299a).

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[27] Judge Friendly explained the doctrine of unreasonable deviation in *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 507 F.2d 68 (2d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

[28] International Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 221, 16 I.L.M. 606 ("1976 Limitation Convention").

[29] Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, May 2, 1996, [2004] Austl. T.S. 16, 35 I.L.M. 1433 ("1996 Protocol"). The United States has not ratified or adhered to the 1976 Limitation Convention or its 1996 Protocol. United States courts, nevertheless, will apply these international treaties when appropriate under choice of law principles. *See* note 25, *supra*.

Rather than imposing punitive damages for grievous behavior, treaties, statutes, and general maritime law doctrines generally deprive a carrier guilty of such behavior of the protection of the otherwise applicable limitation provisions. Thus a carrier loses the protection of the Limitation Act if the cause of the damage is within the "fault or privity of the owner." 46 U.S.C. § 30505(b). Comparable international treaties deprive the carrier of the benefit of limited liability if "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." 1976 Limitation Convention, art. 4. Under the historic deviation doctrine, a carrier generally loses the benefit of the COGSA package limitation if it unreasonably "deviates" from the course of the voyage. *See*, *e.g.*, *Hostetter v. Park*, 137 U.S. 30 (1890). And under CWA § 1321(f)(1) (Pet. App. 299a), the limitation on compensatory damages does not apply when a discharge was "the result of willful negligence or willful misconduct within the privity and knowledge of the owner."

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[30] International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels, Aug. 25, 1924, 51 Stat. 233, 247, 120 L.N.T.S. 155 ("Hague Rules"); Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Signed at Brussels on Aug. 25, 1924, Feb. 23, 1968, 1412 U.N.T.S. 128 ("Hague-Visby Rules"); A/CN.9/WG.III/WP.81 – Transport Law: draft convention on the carriage of goods [wholly or partly] [by sea], dated February 13, 2007. The present draft of the proposed convention may be found at the UNCITRAL website: www.uncitral.org. by clicking on Working Group III.

In sum, these admiralty statutes, treaties, and doctrines rely on the loss of limitation rights rather than punitive damages to deter egregious behavior. Courts should not now permit jury punitive damage awards to disturb that well-established system. It would be a radical change in maritime law to allow a single jury to nullify the careful balance that has been struck to allocate risks among different segments of the industry.

IV. Separation of Powers Principles Prevent the Courts From Creating General Maritime Law Doctrines When Congress has Addressed the Same Issue in a Statute.

Maritime courts routinely decline to create new general maritime law doctrines in an area of maritime law in which Congress has enacted legislation. Thus in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 287 (1952), this Court refused to extend maritime law by approving a rule of contribution between joint tortfeasors in a maritime personal injury case. The *Halcyon Lines* Court reasoned that since Congress had specifically enacted legislation in the field of maritime personal injury torts, it would be inappropriate for the Court to do so. *Id.* at 285. The Court stated, "[w]e have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." *Id.* at 280. This Court went on to explain that Congress is best able to gather information, balance the interests at stake, and determine the most appropriate solution:

> The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made.

Id. at 286.

In *Mobil Oil v. Higginbotham*, 436 U.S. 618 (1978), this Court again emphasized the distinct and separate roles of Congress and the judiciary. In a lawsuit under the Death on the High Seas Act ("DOHSA"), the *Higginbotham* Court held that loss-of-society damages were not available, because the DOHSA preempted other maritime law. 436 U.S. at 624-25. In holding that the DOHSA governed the measure of damages, this Court stated "the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* at 625. The Court went on to explain that,

> [i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

Id.

In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), this Court furthered the separation of powers jurisprudence of *Higginbotham*. The *Miles* Court held that the judiciary should not be permitted to disturb congressional policy judgments by expanding remedies in maritime law. 498 U.S. at 27. The Court stated, "Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits" *Id.* at 24.

Here, the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, before it was amended in 1990, governed Exxon's[31] liability and specified the punishment to be imposed on Exxon for the EXXON VALDEZ spill. Most significantly, the CWA does not provide for the award of punitive damages against Exxon, the owner of the EXXON VALDEZ and the statutorily-mandated responsible party. Instead, the CWA, on the one hand, limits the liability of the party responsible for the oil spill, but, on the other hand, denies limitation of that liability if the "discharge was the result of wilful negligence or wilful misconduct within the privity and knowledge of the owner." 33 U.S.C. § 1321(f); *cf. supra* at 16. Neither the limitation nor the loss of limitation is relevant here, however, because Exxon accepted responsibility for the spill, voluntarily paid for virtually all the damage caused, and did not attempt to limit its liability.

The courts below imposed punitive damages, despite the CWA, because a jury, acting under faulty instructions, determined that Exxon was reckless.[32] But because punitive damages have no basis whatsoever in the statutory scheme of sanctions Congress crafted in the CWA, this Court should not overstep the well-established boundaries of the separation of powers in admiralty law. In enacting legislation, such as the CWA, to address oil spills, Congress gathered relevant information on the most effective way to prevent oil spills and deter irresponsible behavior. It also appropriately balanced the interests at stake. The enacted legislation achieves uniformity and is preemptive in the field. The Court should not go beyond the limits set by Congress by creating new remedies in a field preempted by Congress. To do so would conflict with congressional lawmaking powers, and would upset the uniformity, predictability, and effectiveness of congressional legislation not only as it affects the carriage of oil, but as it affects the entire maritime industry and the law in general.

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[31] Petitioners are referred to as "Exxon."

[32] *See* Jury Instructions on Vicarious Liability for Punitive Damages, Jury Instruction No. 33 (reproduced as Appendix K to Exxon's Petition for Certiorari at 301a).

V. Prescriptive Legislative and Administrative Measures Are More Effective In Preventing Damage Than the Threat of Punitive Damages

Punitive damages merely act as an instrument of punishment to scourge the offending party after an accident has already happened. They offer no guidance to the carrier in advance that would enable the carrier to prevent the accident. This Court has long recognized that the purpose of punitive damages is two-fold: punishing unlawful conduct *and* deterring its repetition. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Newport v. Fact Concerns, Inc.*, 453 U.S. 247 (1981); *Pacific Mutual*

Life Insurance Co. v. Haslip, 499 U.S. 1 (1991)). Requiring carriers to take specified actions to prevent the unwanted event is far more successful and makes far more sense than imposing punitive damages if the unwanted event were to occur. Finely tuned and carefully targeted legislative and administrative prevention programs are far superior to after-the-fact punitive damages imposed by a jury lacking any expertise in the field.

A. Unlike Punitive Damages, Prevention Programs Require Shipowners to Take Specific Steps to Prevent Oil Spills, Provide Detailed Guidance as to Those Steps, and Guarantee Full Compensation for Victims of Oil Spills

The Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-61 ("OPA 90") was enacted largely in reaction to the EXXON VALDEZ oil spill. The purpose of the statute was to establish a structured process that would reduce the risk of future oil spills from ships and fully to compensate persons damaged by any future oil spills. The legislation has succeeded in both aspects.

OPA 90 tasked the U.S. Coast Guard with a major rulemaking effort to draft specific precautions shipowners must take to prevent oil spills. For instance, OPA 90 requires that all new tank vessels must have double hulls.[33] Older tank vessels must be inspected according to strict standards to assure that they are structurally sound.[34] Ships must be fitted with overfill prevention devices to reduce the risk of spills during loading.[35] The use of automatic steering systems and unmanned engine rooms are strictly regulated.[36] Tankers must be escorted by tugboats in certain waters.[37] The tugboats could help prevent a grounding or collision in the event a tank vessel's steering or engine failed. OPA 90 includes many other precautions that shipowners must take.

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[33] OPA 90, Section 4115, codified at 46 U.S.C. § 3703a.

The specific precautions required by OPA 90 and the Coast Guard's regulations provide concrete guidance that informs carriers in precise detail exactly what they are expected to do. They are thus far more likely to prevent future damage than a vague threat of punitive damages, which simply warns a carrier not to do anything that a jury might subsequently find unacceptable. It therefore makes no sense for this Court to attempt to regulate carrier conduct ineffectively by authorizing lay juries to impose punitive damages while Congress and the administrative agencies are taking advantage of the expertise available to them to craft balanced and specific programs that are more likely to solve the problem.

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[34] OPA 90, Section 4109, found as a Note following 46 U.S.C. § 3703.

[35] OPA 90, Section 4110, found as a Note following 46 U.S.C. § 3703. This section also allowed for tank level or pressure monitoring devices, but they were determined to be impracticable.

[36] OPA 90, Section 4114 found as a Note following 46 U.S.C. § 3703.

[37] OPA 90, Section 4116(c), found as a Note following 46 U.S.C. § 3703.

B. History Shows That Voluntary Compliance Programs and Incentives Are Often More Effective Than Punitive Measures

The advantage of carefully targeted legislative and administrative measures instead of punitive measures is not limited to the oil spill context. Another good example of this proposition may be found in the Anti-Drug Abuse Act of 1986.[38] That act imposed extremely large fines on shipowners, if drugs were smuggled into the United States on one of their ships. The large fines did not prevent drug smuggling because the carriers simply did not know how to prevent the problem. But smuggling decreased after the federal government assisted carriers by entering "Carrier Initiative Agreements," which required carriers to take specific agreed actions designed to prevent smuggling.

In 1984 the Carrier Initiative Program was started generally in response to the increased smuggling of drugs into South Florida, and specifically in response to the customs seizure of an American flag air carrier. Nathan J. Bayer & Ellen Y. McClain, *The Anti-Drug Abuse Act of 1986: The Ocean Carrier's Dilemma*, 20 J. Mar. L. & Com. 299, 322 (1989). The carrier's aircraft had repeatedly violated Custom's drug laws. *Id.* As a condition of release of the aircraft, the carrier agreed to a multi-point agreement implementing stringent security measures. *Id.*

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[38] Pub. L. No. 99-570, 102, 100 Stat. 3207, 3207 (1986).

Punitive measures, even substantial penalties and vessel seizure, were obviously not a sufficient deterrent for a carrier that did not know what steps to take. The focus of the program eventually changed from responding to individual seizures for drug violations to a "preventative awareness initiative, addressing security problems and concerns of the members of the transportation industry as a whole *before* they were confronted with the assessment of a manifesting penalty and seizure of their conveyances by the Customs Service." *Id.* (emphasis added).

The resulting Sea Carrier Initiative Agreement—now known as the Carrier Initiative Program ("CIP")—is an overarching scheme under which carriers calling at U.S. ports agree to abide by various security measures to prevent drug smuggling. Under the auspices of the CIP, U.S. Customs and Border Protection ("Customs") provides anti-drug smuggling training to air, sea, and land commercial transport companies.[39] According to Customs,

> [t]he overall goals of these programs and their training component are to encourage commercial carriers to share with CBP the burden of stopping the flow of illicit drugs; to deter smugglers from using commercial carriers to smuggle drugs; and to provide carriers with the incentive to improve their security and their drug smuggling awareness.[40]

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[39] U.S. Customs and Border Protection, http://www.cbp.gov/xp/cgov/border_security/international_activities/partnerships/cip.xml.

[40] *Id.*

In exchange for signing the agreements, Customs provides training to carriers' employees and management. In the event that illegal drugs are found on board, the degree of compliance with the security measures is considered as a mitigating factor in any seizure or penalty decision.

Successful implementation of the CIP and its ancestry shows that harsh punitive measures simply do not work as well as legislative and administrative measures. The balance of parties' interests and specific requirements are much better able to achieve a desired purpose than is a vague threat of punitive damages. This Court should leave the solution of such problems to Congress, the Coast Guard, and the international maritime safety community—the actors with the expertise to solve them. Empowering a jury to award punitive damages is much less likely to achieve any positive results.

CONCLUSION

The judgment should be reversed.

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December 24, 2007

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IN THE
Supreme Court of the United States

EXXON SHIPPING CO. AND EXXON MOBIL CORP.,
Petitioners,
v.
GRANT BAKER, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF JEAN-MICHEL COUSTEAU AND OTHER NATURAL AND SOCIAL SCIENTISTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Daily, G., NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, Island Press, Washington, DC (1997) 34

Lubchenco, "Lessons from the Land for Protection in the Sea: The Need for a New Ocean Ethic," in OPEN SPACES (2007) 33

National Research Council, OIL IN THE SEA III: INPUTS, FATES, AND EFFECTS (2003) 15

INTEREST OF AMICI CURIAE

Amici are a combination of natural and social scientists who have studied and devoted much of our professional careers to the understanding of how oceanic ecosystems function and the necessity for their preservation[1]: **Jean-Michel Cousteau** is president of the Ocean Futures Society; **Peter Auster**, Ph.D., holds the position of Science Director for the National Undersea Research Center; **John Avise**, Ph.D., is Distinguished Professor of Ecology and Evolutionary Biology at the School of Biological Sciences, University of California at Davis; **Donald F. Boesch**, Ph.D., is President of the University of Maryland Center for Environmental Science; **Benjamin Cuker**, Ph.D., is Professor of Marine and Environmental Studies at Hampton University; **Dan Esler**, Ph.D., is a Research Scientist at the Centre for Wildlife Ecology at Simon Fraser University, in British Columbia.; **Michael Fry**, Ph.D., is the Director of Conservation Advocacy; **Gregory Golet**, Ph.D., is a senior ecologist for the Nature Conservancy; **Roger Green**, Ph.D., is Professor Emeritus at the University of Western Ontario; **Burr Heneman** is a co-founder and the current

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[1] Letters of consent to the filing of this brief from all parties have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, nor did any person or entity other than *amici* or its counsel make a monetary contribution to its preparation or submission. The views of any signer to this brief do not necessarily reflect the views of that signer's organization unless specifically stated.

Ocean Policy Director of Commonweal; **Richard Kocan**, Ph.D., is Professor Emeritus at the School of Aquatic and Fishery Sciences at the University of Washington; **Jane Lubchenco**, Ph.D., is the Wayne and Gladys Valley Professor of Marine Biology & Distinguished Professor of Zoology at Oregon State University; **Craig Matkin**, M.S., is a founding member and director of the North Gulf Oceanic Society; **John Ogden**, Ph.D., is the Director of the Florida Institute of Oceanography; **Thomas Okey**, Ph.D., is the founder and current science director for the Conservation Science Institute; **Daniel Pauly**, Ph.D., is the Director of the Fisheries Centre of the University of British Columbia, Vancouver; **Charles "Pete" Peterson**, Ph.D., is Alumni Distinguished Professor in the Department of Marine Sciences at University of North Carolina - Chapel Hill; and **John Teal,** Ph.D., is currently Scientist Emeritus for the Woods Hole Oceanographic Institution.[2]

As professionals who have devoted our careers to understanding the interdependent nature of oceanic ecosystems, as well as man's participation in those ecosystems, we believe that we are in a unique position to evaluate and describe the effects that the Exxon Valdez Oil Spill ("EVOS") has had on the North Alaskan ecosystem surrounding Prince William Sound. Indeed, *Amici* are convinced that it is only with the benefit of the scientific information currently available that courts and other policy makers may understand the real costs of massive oil and toxic chemical spills, and most particularly the devastating effects caused by the Exxon Valdez Oil Spill. It is as a result of our understanding of these very real costs that we feel compelled to submit this brief urging this Court to affirm the verdict below.

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[2] See Appendix "A" for biographical summaries of each *amicus curiae*. *Amici Curiae* Charles "Pete" Peterson, Ph.D., and Richard Kocan, Ph.D., served as expert witnesses on behalf of the Plaintiffs at the time of trial after having prepared expert reports which summarized their research prepared for the joint state-federal Exxon Valdez Oil Spill Council. Roger Green, Ph.D., and Michael Fry, Ph.D., prepared similar expert reports but did not testify at the trial. In the thirteen years since that trial, none of these four *amici* has received any compensation from Plaintiffs or Plaintiffs' counsel. Nor are any of these four *amici* being compensated in any way for their appearance or participation in this brief.

SUMMARY OF ARGUMENT

There is no question that the spillage by the Exxon Valdez of 43 million liters (11 million gallons) of Alaska North Slope crude oil into Prince William Sound was a catastrophic event. It had an immediate impact not only directly and adversely on the salmon and herring on which commercial fishers in the region rely and the much larger group of animals on which Native Alaskans subsist, but also on the entire interdependent ecosystem. Furthermore, government studies over the past two decades belie comments Exxon has made in its briefing to this Court about the total long-term impact of this tragedy or Exxon's efforts to restore Prince William Sound to its native condition. These studies have consistently demonstrated the breadth of the incredible immediate devastation caused by the spill. They further show that the injury to the entire ecosystem and to the humans whose lives and livelihood have depended upon that ecosystem has been far greater than it was possible to discern at either the time of the spill or even at the time of trial in 1994.

To this day, residual oil remains a destructive force to the entire ecosystem. Diverse interdependent animal populations – clams, mussels, fishes, birds, sea otters, and killer whales – have continued to suffer in ways which were not appreciated at the time of the spill or its immediate aftermath. Moreover, after causing the spill, Exxon substantially compounded the harm by the massive pressure washing of beaches, a process which disrupted the naturally protective physical structure of those beaches and by itself resulted in the destruction of intertidal habitats for decades to come.

Exxon claims that it has already paid dearly for what is widely considered the number one spill worldwide in terms of damage to the environment and the communities that depended on it. But Exxon certainly has not paid for the full impact of the destruction it has caused in the oil spill region of Prince William Sound and beyond. Science shows us almost twenty years later that complete recovery is at minimum decades away, if ever. This scientific research demonstrates that the need for deterrence is even greater now than initially would have been thought. To the extent that punitive damage awards are meant to provide deterrence or compensation where "the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine," *BMW of North America, Inc.* v. *Gore,* 517 U. S. 559, 582 (1996), this is undoubtedly one such example.

INTRODUCTION

The coastal or nearshore ecosystem of the Pacific Northwest is one of the most biologically productive on the planet, comparable to tropical rainforests and the most highly managed and fertilized terrestrial agricultural systems. This high production has for millennia reached upwards through the food web to support diverse and abundant populations of fishes, seabirds, and marine mammals. Quite simply, the coastal region of the northern Gulf of Alaska has been a spectacular treasure trove of the bounty of the sea, recognized worldwide in its wealth of economically and culturally important fish and shellfish and its simultaneous showcase of spectacular wildlife.

As part of this system, before the 1989 spill, Prince William Sound was a pristine environment with abundant and diverse fish and wildlife. The abundance of fish and wildlife inhabiting the region and concentrating in the coastal habitats for reproduction and intense feeding just at the late spring-to-summer period (at the very time of the spill) was a testament to the natural productivity and integrity of the ecosystem and the near universal absence of toxic contaminants in the supportive environment. In fact, that environment was able to support an economy nearly wholly dependent upon the natural resources it provided. Although small in population, Cordova was one of the top 10 U.S. ports when ranked by value of its commercial fishery landings. Subsistence harvest was a dominant way of life and a cultural heritage for Native Alaskans in Prince William Sound and in neighboring areas of Kodiak Island and both the Kenai and Alaskan Peninsulas.

The spillage by the Exxon Valdez of 43 million liters of Alaska North Slope crude oil into this pristine environment has proven to be a devastating, massive experiment in ecotoxicology. Due to its magnitude, the spill has become the most studied environmental disaster in history. Unfortunately for the environment, these studies, ongoing to this day, have consistently demonstrated the magnitude, broad scope, and long temporal duration of the disaster.[3] Far from causing only acute injury to the ecosystem, considerable evidence demonstrates that EVOS has caused long-term, chronic, direct, indirect and delayed effects that even now will likely take decades to recover from. Below we discuss a number of these effects.

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[3] In very large part the scientific research upon which this brief is based was prepared for the EVOS Trustee Council in cooperation with federal and state government scientists as part of one of more of the following projects: 00090, 00454, 00459, 00476, 030012, 030423, 030585, 040159, 040574, 040708, 050751, 94166, 95074, 98012, 98191, 99025, 99328, 99379. Reports for those projects are publicly available through the Council and on the Council's website at http://www.evostc.state.ak.us/ or separately at the Alaska Resources Library and Information Service http://www.arlis.org. The Trustee Council was formed shortly after the spill and is composed of representatives of the United States Department of the Interior, the United States Department of Agriculture, and the National Oceanic and Atmospheric Administration, as well as the Alaska Departments of Fish and Game, Environmental Conservation, and the Department of Law. The Trustee Council requested and oversaw most of the science discussed in this brief.

ARGUMENT

I. The Continuing Devastation Makes it Clear That Exxon Has Not Yet Fully Paid for the Harm Which it Caused

"The spill was immediately known. There was no possibility of hiding it, even for a few minutes. Exxon made no profit, and had no prospect of profit, from any of the activities that plaintiffs point to as wrongful. If Exxon made mistakes, it has paid dearly for them. But that does not change the grounding into a situation economically appropriate for punitive damages. The rules of maritime law, designed to protect maritime commerce, ought to be shaped by this Court to fit economic reality."

Petitioners' Brief at 54-55

This statement, made by Exxon itself, raises the question of precisely what Exxon "paid for." Exxon certainly did not pay to return this pristine environment to anything approaching what these areas were like before the spill. While it is true that shoreline clean-up assessment teams initially estimated that by 1993 the extent of oiled shoreline had decreased from 783 km to 10 km and that most of the oil remained on the surface in the upper intertidal zones, Exxon incorrectly took the position that the remaining oil spilled on the relatively high-energy beaches of Prince William Sound would soon diminish to negligible amounts and have no residual effect on the plants, wildlife or other natural resources of the Sound. Exxon's assessment is, and was, incorrect. Both the oil from Exxon's spill and adverse affects caused by that spill to the ecosystem of Prince William Sound and the neighboring areas of Kodiak Island and both the Kenai and Alaskan Peninsulas have continued to this very day.

We in the scientific community understood even in 1994 that the assumption which was the basis for Exxon's cleanup effort was not valid. At the trial, Plaintiffs' expert James Bush correctly demonstrated that there was likely substantial, mostly subsurface, oil still remaining (*Trial Trans.* 4376-4385). Moreover, the jury members, as a result of an Exxon motion for a "jury view," had the opportunity to observe for themselves that even in assertedly pristine beaches, a little digging showed substantial residual oil. (*Clerk's Docket* 5743).

What was not understood was that to this day reservoirs of oil would still persist buried at shallow depths in the intertidal shores of many coastlines. This oil has not been degraded because it is protected from light, physical disturbance, oxygen, and microbes that would otherwise promote degradation of hydrocarbons. As a result, we now understand that its toxicity will likely persist for decades, causing a cascade of effects: (i) chronic persistence of oil in shallow sedimentary reservoirs, leading to biological exposures, then sub-lethal and lethal impacts to vertebrates using these intertidal sediments for reproduction and foraging; (ii) delayed population impacts of exposure as a consequence of impaired survival or reproduction of individuals with compromised health or suppressed growth; (iii) indirect effects of trophic and other interaction cascades, such as through losses of keystone species and individuals important to critical social organization functions; and (iv) delayed impacts, including habitat degradation, prey declines, trophic cascades, and other indirect effects of ecosystem perturbation from the spilled oil and the clean-up interventions.

Since the oil spill, substantial research has revealed the persistence of ecologically significant amounts of still toxic Exxon Valdez oil in shallow subsurface reservoirs throughout the intertidal zone of many oiled beaches. In 1997, eight years after the spill, researchers encountered significant residual oil. The largest quantities with the least weathering occurred at depths of 25-50+ cm under the protective cover of a well-sorted cobble/boulder armor on intermittently exposed, coarse-grained gravel beaches within Prince William Sound. Researchers found that a stable armor had developed over the upper and lower platforms of these more exposed, coarser-grained gravel beaches. Once such armoring is achieved, only extreme erosional events will mobilize the coarse armor. In the absence of such events, little to no change in degree of weathering of the oil had occurred at these sites since earlier measurements made in 1994.

In 2001, 12 years after the spill, researchers from the National Oceanic and Atmospheric Administration ("NOAA") conducted extensive surveys in Prince William Sound to assess both the volume of oil remaining in and on the beaches and the area of beach still contaminated by the spill to determine whether the spilled oil still was a long-term reservoir of toxic hydrocarbons. Surface and subsurface oil was measured in nearly 6000 pits, which were randomly located along shorelines previously identified as heavily oiled. The study found Exxon Valdez oil on 58 of 91 beaches randomly selected according to their oiling history, suggesting that the area of oiled beach had probably changed very little since 1992. Although the researchers concluded that their study likely underestimated (by 30%) the volume of oil remaining, the conservative estimate totaled nearly 60,000 kilograms of Exxon Valdez oil still remaining, or more than twice what had been estimated back in 1993.

Prior to this 2001 survey, the hypothesis presented by Exxon – that oil persisted only in the upper intertidal zone – was based on the conjecture that oil would adhere better to rock surfaces in the drier upper intertidal areas, where it would form biologically inert asphalts. The most disturbing revelation from NOAA's study in 2001 was that most of the subsurface oil was located much lower in the intertidal zone than expected and that it persisted in liquid state with minimal weathering, typical of what would occur in only a week or two of exposure. Furthermore, its presence only about 10 cm below the sediment surface in the mid and lower intertidal zone, where key invertebrate prey like clams and mussels are abundant, poses a much greater risk to the food chain and especially vertebrate consumers that forage by excavating intertidal invertebrates. Analysis of the oil by chemical fingerprinting indicated that over 90% of the surface oil and all of the subsurface oil was from the Exxon Valdez.

This research provided evidence that EVOS oil was having a material impact on many nearshore and intertidal dependent wildlife, and was contributing to their documented slow recovery in some parts of Prince William Sound. Because the remaining oil is buried and not exposed to elements like light, oxygen, physical disturbance, and oil-degrading microbes that could degrade it, this persistent oil could remain hazardous to wildlife for decades to come.

To assess the extent of that ongoing risk to the ecosystem, a similarly composed team of NOAA researchers examined 32 shorelines selected at random in 2003 from oiled shores in Herring Bay, Lower Pass, and Bay of Isles in Prince William Sound. They evaluated the vertical distribution of oil remaining from the 1989 Exxon Valdez oil spill and then estimated the probability that key wildlife such as sea otters and sea ducks, which depend on foraging in the intertidal zone, would encounter oil while foraging. The study involved 662 randomly dug, shallow pits along 32 stretches of shoreline. The researchers encountered Exxon Valdez-fingerprinted oil at 14 of 32 sites, more than half of which were in the biologically rich, lower intertidal zone, where predators may encounter it while disturbing sediments in search of prey. Calculating the probability that foraging wildlife would encounter subsurface oil based on the amount of oil remaining led the researchers to conclude that sea otters and diving ducks that routinely excavate sediments while foraging within the intertidal zone would likely encounter subsurface Exxon Valdez oil repeatedly during the course of a year. The researchers estimated that a sea otter might dig 1000 pits per year while foraging, sufficient to cause a high likelihood of intermittent encounter and exposure to oil. The substantial probability of encountering oil in the lower intertidal is particularly relevant biologically because the availability of molluscan prey of sea otters, diving ducks, and shorebirds increases in the intertidal zone as tidal elevation falls.

In 2005 members of the same NOAA team returned again to Prince William Sound and the Gulf of Alaska shorelines to focus on the rate of removal and the processes which were contributing to the persistence of relatively unweathered oil from the spill. They found that oil stranded by the 1989 Exxon Valdez spill had persisted in subsurface sediments of exposed shores now for 16 years. They calculated that annual loss rates had slowed down from about 68% in the first years down to less than 3-4% after 2001. The conclusion was that the persistence of the most toxic polycyclic aromatic hydrocarbons (PAHs)[4] is prolonged by burial for decades with little change. The trends that they had documented since 2001 indicate that there will be ever slower loss rates for the subsurface oil which has remained. Such persistence of only partially weathered oil: i) creates a persistent source of chronic low-level contamination to intertidal and nearshore dependent species; ii) poses a contact hazard to intertidally foraging sea otters, sea ducks, and shorebirds; iii) discourages subsistence in a region where traditional subsistence harvest along rocky shores has been intense and important; and iv) degrades the wilderness character of protected lands.

These NOAA studies of the long-term persistence of oil in intertidal sediments have been complemented and validated by other studies of oil persistence and its causes. A 2006 study showed that Exxon Valdez oil persisted for a decade as subsurface mousse along the high-energy coast of the Alaska Peninsula under conditions where boulder armoring protected the underlying sediments from physical disturbance. This oil was also maintained for 10 years in a largely unweathered condition, compositionally similar to 11-day old oil.

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[4] The multi-ringed, higher molecular weight polycyclic aromatic hydrocarbons or "PAHs" are among the most toxic family of compounds found in petroleum products. These can become air or waterborne and be ingested by living creatures.

Exxon Valdez oil has also been shown to persist for long periods of time in another intertidal environment likewise physically protected from disturbance and weathering. Intertidal mussels often form extensive beds, which blanket the underlying sediments. Oil has seeped deeply into and under these beds on heavily oiled shores of Prince William Sound. Because mussels represent such important prey organisms for shorebirds, diving ducks, sea otters and many invertebrates and are valued as subsistence, oil mussel beds were left undisturbed during clean-up operations during the summers of 1989-1991 in the hope that natural processes would cleanse them. Later studies have shown, however, that these beds have become a source of chronic contamination and exposure to oyster-catchers and likely other vertebrates. Repeated sampling of many of these oiled mussel beds has provided evidence that the oil will persist for 30 years or more. Consequently, the very locus of dense and preferred prey for many predatory vertebrates is also a hotspot of prolonged contamination – an unfortunate conjunction likely dooming these shoreline predators to long-term contamination and subsequent harm.

The studies of Prince William Sound complement research from petroleum spill sites on the East Coast performed by researchers at Woods Hole Oceanographic Institute which shows persistent toxicologically active hydrocarbons 30 and 40 years after a spill into the protected environment of coastal salt marshes. The explanation for why oil has persisted for so long in salt marsh sediments is consistent with what researchers have concluded from studying EVOS oil in intertidal sediments: wherever oil can become buried in physically protected environments, degradation can become inhibited and persistence occur.

This continued persistence of subsurface Exxon Valdez oil, often only minimally or moderately weathered, means that to this day a reservoir of biologically available polycyclic aromatic hydrocarbons (PAHs) remains on beaches impacted by the spill. Furthermore, its extension into the more biologically productive middle and lower intertidal zones has created the potential for long-term biological effects on beaches most heavily impacted by the spill as well as to those plants, fish, and wildlife that use these beaches for foraging and reproduction.

II. EVOS Has Had a Devastating Long-term Effect Not Only on Critical Fish Populations but Throughout the Entire Food Chain

"The spill did not cause a fish kill ...."

Petitioners' Brief at 6

With these few words, Exxon cavalierly and inaccurately dismisses the devastating impact that

EVOS has had on fish in the marine environment and, as a result, on the commercial fishers and subsistence users who rely on its resources. Truncated descriptions of short-term acute mortality ignore the very real short-term and long-term consequences of exposure of marine ecosystems to Exxon's petroleum hydrocarbons. In fact, population impacts from chronic exposures have occurred at extraordinarily low pollutant concentrations. (*See* National Research Council, OIL IN THE SEA III: INPUTS, FATES, AND EFFECTS (2003) at 123 *et seq.*)

At trial, the jury heard testimony about the injuries to commercial fisheries and awarded several hundred million dollars in damages to fishermen for the fish killed and not caught. However, the extent of the harm has proven to be immeasurably greater than was believed at that time. Important commercial fish have continued to suffer because for crucial early life stages of keystone fish species in this ecosystem, the multi-ringed, polycyclic aromatic hydrocarbons (PAHs) in Exxon's crude oil has proven to be not only the most toxic component, but also the most persistent. This is particularly problematic for fish like salmon, sand lance, and capelin that deposit eggs to incubate in sediments, but also impacted herring. The resulting chronic exposure to Exxon's oil even at very low concentrations (a few parts per billion), has resulted in substantial fish population losses through lowered survival and reproductive success.

The losses in susceptible fish have cascaded through the ecosystem to cause long-lasting declines in predatory vertebrates dependent upon them. Moreover, because oil has often persisted in intertidal sediments for many years without degrading, foraging seaducks and sea otters have themselves continued to be exposed to contamination that has enhanced mortality and prevents population recovery. Smooth-skinned marine mammals like killer whales have experienced mortality and, even more significantly, losses to their populations grew more serious over time as their social structures degraded. In sum, the EVOS has had a significant effect on populations of commercial pink salmon and herring, as well as sea otters, harlequin ducks, Barrow's goldeneyes, pigeon guillemots, killer whales, harbor seals and many other interdependent species.

A. Short and Long-term Consequences for Pink Salmon

Wild pink salmon are a major component of the Prince William Sound ecosystem and, along with hatchery-raised pink salmon, are the dominant contributor to the region's commercial fisheries. Juvenile salmon are also a source of prey for certain nearshore predators and once adults have returned to spawn, their carcasses serve to enrich the spawning areas along streams where they die.

At the time of the spill, at trial, and in its briefing here, Exxon's claims that fish would not be killed by spilled oil have been based largely on testing acute toxicity in short-term laboratory exposures. After the Exxon Valdez oil spill, however, research on the toxicology of weathered crude oil on fish embryos and larvae has clearly shown that chronic exposures cause substantial mortality of exposed eggs and larvae and resulting population losses.

In fact, the life cycle of pink salmon has made them especially at risk. Nearly all pink salmon of Prince William Sound are intertidal spawners, spawning in freshwater reaches of streams at low tide. Spawning occurs from mid-July through September, not long after the spilled oil was heavily deposited there, forming what has been described as the "oil bathtub ring" located at the tide line. Eggs deposited into the intertidal gravels hatch between late October and December, and alevins continue to incubate in gravel until about April, giving them 8-9 months of total potential exposure to the sediments and any sediment contaminants. Following emergence from the gravel, pink salmon juveniles migrate immediately to potentially oiled estuaries for an additional 3 to 4 months of initial feeding and growth in nearshore waters before they migrate to open ocean.

By the time of trial of this matter, scientists knew that through 1993 salmon eggs in oiled streams exhibited higher mortality rates than those deposited in unoiled streams. Because these results were disputed by Exxon-funded investigators, a government team from NOAA's National Marine Fisheries Service conducted laboratory studies to test the impact to salmon embryos exposed to very low concentrations of weathered oil under controlled conditions similar to field exposures. The results showed unequivocally the damage to eggs and larvae of pink salmon as a consequence of chronic exposure to low concentrations of weathered crude oil. PAH concentrations as low at 1 ppb of weathered Exxon Valdez crude oil killed directly, and indirectly through reduction in fitness, a large fraction of pink salmon embryos exposed to the same type of persistent stranded oil located alongside salmon streams.

Pink salmon, exposed as embryos to low concentrations of spilled oil PAHs in water percolated through the spawning gravel, have been shown to have suffered a significant decrease in marine survival when compared to unexposed salmon. This has been attributed to delayed growth in those juveniles that survived the embryonic exposures and lower fitness of the smaller salmon in the marine phase of their life. These long-term adverse effects of exposure to weathered oil during the development of pink salmon suggest that recovery of salmon breeding habitats may be even slower than ever assumed. The effects of even low concentrations of weathered PAHs on incubating salmon include not only egg mortality and sublethal effects of slower growth of survivors, but also reduced survival during the marine phase as a combined consequence of predation, disease, and perhaps food competition. In other words, smaller size at the time of departure from the natal stream implies lower fitness such that sublethal effects on growth transform into population effects later in the life history of pink salmon, before they can return to spawn.

Synthesizing all these consequences of exposure to persistent oil, it has been estimated that the survival reduction across all life stages of the pink salmon caused by chronic oil exposure reduces the numbers of mature adults returning to spawn by half. These definitive experiments conform with a growing scientific understanding of how exposure to toxins at sensitive early stages in vertebrate development can lead to enhanced mortality and reproductive impairment later in life through endocrine disruption and developmental abnormalities.

Historical pink salmon data were analyzed and population modeling was conducted for the purpose of addressing how observed decreases in survival caused by chronic contamination could influence equilibrium population size. This analysis concluded that the equilibrium size of a simulated pink salmon population diminished with increasing contamination of their spawning and rearing habitat, even leading to increased risk of local extinction from the anadromous stream. Exposed populations can recover if the contamination is removed, but if the equilibrium population falls far enough because of chronic contamination over many generations, that population faces an appreciable risk of extinction from naturally fluctuating environmental factors.

Consideration of the studies showing long-term persistence of significant reservoirs of Exxon Valdez oil in intertidal sediments and those showing persistence of exposure in spawning habitat leads to the conclusion that the toxicity of oil spilled into this coastal environment may have adverse effects on pink salmon for many more years than previously assumed. The pockets of persistent oil serve as toxic PAH reservoirs that sit waiting for environmental perturbations, such as storms, to release the oil into the nearshore ecosystem where it again will induce long-term, delayed effects on eggs and larvae of pink salmon that may, in turn, produce population declines over generations.

B. Long-term Consequences for Herring

Herring also play crucial roles in the ecosystem by sustaining both a commercial fishery and by serving as a universal prey species for a large number of predators in the coastal zones – marine mammals, seabirds, and other larger fishes. Thus, spill-related impacts to the herring population have had significant repercussions economically, culturally, and ecologically.

The timing of the Exxon Valdez oil spill matched the spring season of adult return, spawning, larval and post-larval development of Pacific herring. Studies have shown that newly hatched larvae exposed to oil had many structural and genetic abnormalities, which challenge their ultimate survival. Lower viability of larvae exposed to oil was confirmed by other studies demonstrating much higher rates of larval mortality in oiled areas as well as lower growth rates when compared to larvae from unoiled areas. The results of field studies have been verified by laboratory experiments in which exposure to an Exxon Valdez type of crude oil causes genetic damage, physical deformities, lower hatch weights, and premature hatching.

Later laboratory studies have shown that these lethal and sublethal abnormalities occur at extremely low exposures. A study of herring eggs exposed to oil of similar composition and at similar concentrations to those prevailing at the time of the spill has found significant dose-related sub-lethal effects, including malformations, reduced swimming ability, and genetic damage, which all led to consequent higher mortality to herring embryos after exposure to PAHs at a few parts per billion. Again, these sublethal effects matched those documented in the field after the spill in 1989.

By analyzing herring egg deposition counts on oiled and unoiled shores and applying the observed differential in larval mortality rates, it has been estimated that 40-50% of the eggs deposited in 1989 were exposed to oil and 99% of expected herring survivors were killed on the oiled shores. As calculated, this loss would lead to reduction of over 40% in the expected total production of the 1989 year class of herring from Prince William Sound. In fact, when adults derived from this 1989 year class returned to spawn in 1993, the 1989 year class was one of the smallest on record despite the high spawn deposition reported by the annual survey carried out by Alaska Fish and Game. When researchers reviewed several independent lines of evidence (historic patterns of herring spawn, anomalies in the historic fisheries model predictions, as well as a database of acoustic measurements of herring biomass), the analysis showed that the beginning of the herring decline was coincident with the oil spill, and that the decline took place over a five-year period.

This research also showed how the herring collapse appears to be linked to several negative indirect and long-term impacts on many of the fish-eating marine wildlife species in Prince William Sound whose winter food source has traditionally been herring. Many species of seabirds with depressed populations, like pigeon guillemots and marbled murrelets, and marine mammals like harbor seals, are still falling short of recovery in part because they once fed heavily on herring. The rare

Kittlitz's murrelet similarly suffered acute mortality from contact with surface oil during the spill. That along with depressed herring populations may be enough to drive this already declining population to extinction.

Indeed, although herring populations up to 1989 had been at record highs, and have remained high in other areas of the North Pacific and Gulf of Alaska like unoiled Sitka Sound, herring populations in the oiled areas have remained extremely low ever since 1993. Even now, herring adult numbers in Prince William Sound remain insufficient to permit a return of full-scale commercial fishing. The spill thus appears to have induced a persistent reduction in reproductive success of this intertidal and shallow subtidal spawner, with potentially long-term consequences at a population level.

C. Long-term Consequences for Sea Otters

Sea otters did not avoid the floating oil. Despite their swimming ability and intelligence, they experienced initially high acute mortality through contamination of pelage, dysfunction of insulation, ingestion of oil, and inhalation. More than a decade of study of sea otter population dynamics after EVOS has revealed important delayed impacts which have slowed their recovery, presumably caused by the loss of animals with compromised health, chronic exposures by ingestion of contaminated prey, or direct contact while excavating oiled sediments during feeding.

After 1989, the rate of sea otter recovery at about 4% per annum (averaged throughout western

Prince William Sound) has fallen far short of the 10% expected from earlier population recoveries observed after termination of trade in sea otter pelts. At heavily oiled northern Knight Island, sea otters have remained at half the estimated pre-spill numbers with no recovery initiated by 2000, whereas the unoiled Montague Island population doubled just in the period from 1995 to 1998. Modeling of population dynamics based on historic carcass survey data indicates that sea otter survival in oiled areas of Prince William Sound was generally lower in the years after the spill and that survival declined rather than increased in years immediately following the oil spill.

It is clear that sea otters have been consistently exposed to PAH contamination as a result of the spill. First, persistent exposure of otter populations to oil in 1996-98 is confirmed by higher levels of the detoxification enzyme CYP1A in individuals from northern Knight Island than in those from Montague Island. One likely reason is that suspension-feeding clams and mussels, the otter's main food source, concentrate and only slowly metabolize hydrocarbons, which leads to chronically elevated PAH contamination in their tissues when persistently exposed. Additionally, sediments in protected areas, including oiled mussel beds and shallow eelgrass habitats, also retained contamination, with recovery to background in oiled mussel beds estimated from repeated sampling to require up to 30 years. As recent research on the persistence of subsurface oil in the mid and lower intertidal zones demonstrates, it is likely that otters and other intertidal foragers encounter oil repeatedly as part of their normal foraging in oil-contaminated areas. As a result, foraging sea otters suffer chronic exposure to residual petroleum hydrocarbons from both sediment contact and ingestion of bivalve prey with exterior shell and tissue contamination.

It has also been concluded that progress toward recovery of sea otters in Prince William Sound where initial oil effects were greatest is suppressed and may be constrained by residual spill effects, which include elevated mortality and induced emigration. The result has been a protracted recovery period, prolonged by long-term spill effects on survival and emigration and intrinsic limits to population growth.

D. Long-term Consequences for Harlequin Ducks

Because harlequin ducks reside for much of the year in nearshore marine environments while feeding on benthic invertebrates in the intertidal zone, they are particularly susceptible to any impacts to that environment. Individual ducks remain faithful to their particular wintering sites. Like other sea ducks, they have relatively low annual productivity but long life spans to make up for it. Also, because of their small body size, they are limited in the amount of energy reserves they can carry, leaving them dependent on reliable and safe food sources to survive the winter.

In contrast to Exxon's position that oil spill effects on bird populations would be relatively short in duration, restricted to the period of direct contact between floating or grounded oil and bird feathers, research conducted between 1995 and 1998 determined that adverse impacts on harlequin duck populations were still exhibited at least 9 years after the spill. Because harlequins were in many of the areas where oil persisted in the benthic environment, individual ducks in oiled areas continued to have significant exposure to oil, as evidenced by elevated cytochrome P4501A (CYP1A) induction in 1998. This ongoing exposure of harlequin ducks to oil for years after the Exxon Valdez oil spill is further corroborated by studies of other nearshore vertebrate predators of benthic invertebrates during 1995-1999. More recent data from March 2005 demonstrate that harlequin ducks continued to have elevated CYP1A in oiled areas.

By attaching radio transmitters to harlequin ducks, an EVOS Trustee Council research group found that adult females survived less well in oiled than in unoiled areas during the study period from 1995 through 1998, the same period during which continued exposure to residual oil was documented by the CYP1A evidence. Other government researchers doing population surveys found that fall counts of harlequin ducks declined significantly on oiled areas from 1995 through 1997, which contrasted to stable population counts in unoiled areas. Furthermore, population surveys over the 16 years after the spill have indicated that wintering numbers have not increased in oiled areas, indicating suppressed recovery.

As a result, harlequin recovery has been constrained by exposure to and ingestion of residual oil through at least 1998, which led to decreased adult female survival during periods of winter stress. The studies on this population indicate that exposure to oil and delays in population recovery have occurred over a much longer time period for harlequin ducks than urged by Exxon at the time of the spill.

E. Long-term Consequences for Other Intertidal Predators

Analogous tissue sampling of Barrow's goldeneye, adult pigeon guillemots, and various fishes indicate that several nearshore vertebrate predators in oiled areas of western Prince William Sound were exposed years after the spill to lingering Exxon Valdez oil, based on elevated levels of the biomarker CYP1A.

Barrow's goldeneye is another diving duck that occupies nearshore waters, foraging for mussels and other invertebrates, making them susceptible to long-term contamination from persisting reservoirs of subsurface oil in the intertidal zone, especially in oiled mussel beds. Organ tissue evidence of long-term exposure to oil by Barrow's goldeneye in oiled areas of Prince William Sound after EVOS serves to explain why Barrow's goldeneye populations in the oiled areas of western Prince William Sound have continued to fall.

Pigeon guillemots were relatively abundant in Prince William Sound before EVOS. This seabird species feeds close to shore during chick rearing, typically within 0.5 km of the nest. Chicks are fed almost exclusively fish and historically their prey of choice were schooling fishes like sand lance and herring, while adults would augment their diet with nearshore benthic invertebrates. USFWS shoreline boat survey data have demonstrated significant declines in pigeon guillemots in oiled areas of western Prince William Sound as compared to unoiled shoreline segments, documenting not only that the population declined after the spill but that recovery has subsequently been suppressed. The finding of elevated CYP1A enzyme concentrations in oiled areas 10 years after the spill indicate that recovery from losses suffered during the oil spill may be suppressed by chronic exposure of adults to residual oil during foraging for benthic prey. An additional factor limiting recovery has been the post-spill shortage of high-quality forage fish such as herring, sand lance and capelin. Thus, chronic challenges to recovery of this seabird are likely to be the result of contributions from multiple sources, directly or indirectly caused by EVOS.

F. Long-term Consequences for Killer Whales

Killer whales are apex predators at the top of the marine food web. These whales are long-lived and aggregate in matrilineal groupings and travel in pods of closely related whales. They mate with other whales exclusively outside the pod during multi-pod aggregations. Individual whales never leave their pod and their life span is, on average, 30-60 years. Because of their group stability and individually distinctive markings, there is a very well documented history of each individual killer whale in the groups that regularly use Prince William Sound.

There are two ecologically distinct types of killer whales, the fish eating "resident" whales and mammal eating "transient" whales. Killer whales from one resident pod and a unique transient population whose range centers in Prince William Sound were photographed swimming through the oil following EVOS. Using photo identification methods to monitor these two killer whale populations from five years before to 16 years after the spill has revealed that one resident pod, AB pod, and the small AT1 transient population, suffered losses of 33% and 41% respectively during the year of the spill and the following year. The synchronous losses of unprecedented numbers of killer whales from two ecologically and genetically separate groups and the absence of other obvious perturbations strengthens the link between the high killer whale mortalities and the oil spill as well as their lack of recovery after EVOS.

Population growth (at an annual rate of 3.2%) of all resident pods other than AB pod over the 23-year study suggests that conditions in the northern Gulf of Alaska as a whole (including southeastern Alaska) have been near optimal for resident killer whales. However, despite such ideal conditions, recruitment in AB pod in 16 years since the spill was considerably less than expected as a consequence of the disproportionate loss of reproductive and juvenile females at the time of the spill and the resulting loss in long-term reproductive potential. The AT1 transient population, which lost nine members following the spill, has had no recruitment since, and has continued to decline toward extinction.

Three key aspects of killer whale behavior and ecology leave them highly vulnerable to oil spills. First, free-ranging killer whales do not or cannot detect or avoid crude oil sheens at the water's surface and are thus susceptible to inhalation of vapors and to oil-lung contact, and, especially in the case of mammal-eating transients, to ingestion of oil. Second, resident killer whale pods, even under optimal conditions, may take decades to recover from the impacts of an oil spill if reproductive and nurturing functions of females are lost. Third, in a small, isolated and threatened population like the AT1, a major environmental perturbation can greatly increase the probability of extinction through stochastic effects (accidents matter more to lineages of small families).

Although it appears that the AB resident fish-eating pod will eventually recover if other atypical and unforeseen mortalities do not occur, recovery may take decades because of the demographic consequences of the removal of breeding females. The outlook for the AT1 mammal-eating population is bleak and the group will likely go extinct within the next several decades. Although the future fate of these two injured populations of killer whales differs, each has exhibited suppressed recovery and thus persistent impacts of the spill expressed through altered social demographics that reduce breeding.

Given the small numbers of individuals in these apex predator populations, their potential role in structuring ecological communities, and their cultural value to coastal residents, indigenous populations, and visitors from around the world, the deaths in AB pod and the impending extinction of the AT1 transients represent losses of and damage to resources of international ecological and cultural significance.

G. Long-term Consequences for Harbor Seals

Harbor seals suffered acute mortality (302 individuals) during EVOS from exposure to oil and concentrated fumes. Seals became lethargic and disoriented and many died showing evidence of brain lesions during autopsy. Using counts during moulting, it has been shown that the decline that occurred in 1989 after the oil spill was far greater in oiled than in unoiled areas of Prince William Sound. Subsequent to the oil spill, continued censuses during moulting failed to detect any trend toward recovery in the oiled portions of the Sound. The delayed recovery of harbor seals in the oiled portions of Prince William Sound may be a response to low availability of forage fishes, including herring that were significantly depressed by the spill, crashed thereafter, and have not yet begun to recover.

III. Contrary to Exxon's Representations Regarding its Clean-up Efforts, Those Efforts Were Not Only Often Ineffectual but at Times Harmful

"Exxon acknowledged responsibility for the spill and initiated a massive cleanup, ultimately spending $2.1 billion on that effort"

Petitioners' Brief at 16-17.

In undertaking the clean-up after the grounding of oil along hundreds of miles of initially pristine beaches, Exxon's preferred method was to use high-pressure water washing during the summers of 1989, 1990, and 1991 in an effort to disperse the spilled oil and displace it from the beaches. This high-pressure washing by itself caused significant additional injury to plants and animals of both rocky and mixed-soft intertidal beaches by thermal shock and physical disturbance.

Moreover, recovery of the washed ecosystems has in many cases been delayed more so than on beaches that were not cleaned at all. Recovery of rocky intertidal communities on oiled but uncleaned beaches appeared to have recovered to the status of unoiled beaches within 5 years. By contrast, a considerable proportion of mixed-soft beaches in the treated areas of the Sound remained extremely disturbed and functionally impaired in their ability to support important foraging of clams by humans and nearshore vertebrate predators such as sea otters when studied 13 years after the spill.

For example, large, long-lived hard-shell clams remained in 2002 66% less abundant at washed sites than at unoiled reference sites. Based on several lines of evidence, it has been concluded that the delay in clam recovery has been attributable in large part to the beach washing; namely, the disruption of the physical structure and surface armoring of mixed soft beaches whereby coarser materials accumulate on the surface. When these sedimentary structures become organized by armoring, this structural layer provides newly settled clams with more effective protection from physical hydrodynamic disturbances and predators than sediments lacking organization by armor. In the absence of this natural armoring, clam recovery has been widely suppressed. Consequently, recovery of clams has been suppressed by recruitment failures on beaches where armoring has been disrupted. The destruction of these armored beaches, which were quite common in Prince William Sound, has proven especially significant to predatory invertebrates, shorebirds, diving ducks, sea otters, and subsistence users of shellfish. Yet, based on the recovery trajectory to date, it has been predicted that recovery to pre-spill status will still take several more decades for those beaches that were pressure washed resulting in the destruction of their armoring.

Similarly, intertidal communities have at times suffered more from the clean-up intervention than from the oil. Short-term measurements of losses of plants and invertebrates on intertidal rocks have demonstrated greater acute injury to intertidal algae and invertebrates from the high-pressure washing than from the oil itself. Furthermore, the joint impacts of oiling and clean-up modified communities of plants and invertebrates in ways that led to subsequent indirect effect cascades, so the injuries ramified and extended over longer time frames. The loss of the structural habitat-providing rockweed and its gradual recovery over several years suppressed abundances of many invertebrates like small snails and crustaceans that are dependent on the rockweed for protection against physical environmental extremes like desiccation during sunny low tides, for substratum on which to live, and as food for grazing herbivores. Many other similar interactions among species induced indirect impacts of the oil spill and its clean-up on multiple rocky shore populations, extending the duration of injury for years beyond the period of acute mortality and delaying recovery.

IV. The Public Purpose of Punitive Damages Is Demonstrated by Exxon's Failure to this Day to Acknowledge Both the Near- and Long-Term Effects Caused by its Oil Spill

"It is unclear what public purpose could support allowing an Alaska jury to transfer to Alaska plaintiffs a windfall of $2.5 billion, on top of the full compensation they already received for their (purely economic) losses."

Petitioners' Brief at 49

Oceans cover 70% of our planet and encompass 99% of the inhabitable three-dimensional space for life on Earth. As Professor Jane Lubchenco has pointed out: "Oceans provide a wealth of benefits in the form of food, fiber, medicines, pharmaceuticals, blueprints for new materials, a storehouse of knowledge, the recycling of nutrients, detoxification of pollutants, partial regulation of the water cycle, partial climate regulation, regulation of gases in the atmosphere and the provision of spectacular places for recreation, tourism, inspiration and enjoyment – essentials we call ecosystem goods and services." Lubchenco, "Lessons from the Land for Protection in the Sea: The Need for a New Ocean Ethic," in OPEN SPACES (2007).

The types of goods and services collectively provided by the diversity of ocean ecosystems are rarely represented more fully than in Prince William Sound: kelp forests, salt marshes, mud flats, estuaries, rocky shores, sandy beaches, continental shelves, and open oceans. Optimally, each ecosystem harbors a complex assemblage of species that interact with each other and their specific physical and chemical environment to produce the services that are the byproducts of the proper functioning of an intact ecosystem. The economic value of Nature's services is often taken for granted but is clearly enormous,[5] dwarfing the production of most human enterprises.[6]

Preserving intact ocean ecosystems so that this natural capital can continue to provide its free production of goods and services is in the hands of managers and the abuse of the natural production engine as occurred via EVOS externalizes extensive service losses to diverse human enterprises.

The implications of the many long-term studies of the effects of EVOS are now quite sobering. In many areas to this day oil is retained that might last for decades. Persistence of minimally weathered still toxic oil in shallow subsurface reservoirs in the intertidal zone of the spill area has caused long-term population impacts on important vertebrate predators tied closely to the nearshore and intertidal zone for feeding or reproduction. Consumers like sea otters and diving ducks can themselves ingest residual oil passed upwards from eating contaminated clams and from contact during excavation of prey with residual reservoirs of oil. Meanwhile, beaches that Exxon aggressively cleaned with pressurized water have been seriously impacted by the modifying of the physical structuring of the sediments so as to render those beaches largely uninhabitable for these clams for several decades after the washing.

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[5] Daily, G., NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, Island Press, Washington, DC (1997).

[6] Costanza R., et al. *The value of the world's ecosystem services and natural capital*, NATURE 387(15): 253-260 (1997).

The full extent of an oil spill or any other major perturbation to a natural ecosystem can only be assessed by including a basic appreciation of the interconnectivity among multiple species and their environment. This perspective, generally ignored by Exxon, has revealed the long-term, chronic, and indirect effects of the spill on the marine environment and on the natural resources that environment sustains, as well as on the humans who have depended on those systems for their lives and livelihood.

For example, pink salmon populations have suffered for many years from enhanced egg mortality in gravels contaminated by residual oil and the larvae and juveniles that did survive grew less and suffered higher mortality at sea from size-dependent mortality processes. This has prevented many from returning to spawn, thereby reducing the total population dramatically. The sub-lethal effect on growth rate in an early life stage has been transformed into a population reduction by the size-dependency of the interactions between salmon at sea and marine predators, competitors, and other challenges.

When the herring population crashed after the oil spill, a cascade of indirect effects influenced both the many human and non-human vertebrate consumers of herring. Among the many vertebrate consumers of herring that continue to suffer delays in recovery as an indirect result of the oil spill are marbled murrelets and Kitlitz's murrelet, the latter of which seems headed for extinction.

In fact, as of November 2006, in its most recent "Update on Recovery of Injured Resources and Services,"[7] the Trustee Council concluded that 17 years after the spill only 9 out of 22 studied indicator species could be classified as fully recovered. For instance, sea otter recovery even today is incomplete on northern Knight Island and not even initiated in Herring Bay. Harlequin ducks suffered added mortality of over-wintering adults over a decade after the spill and their population recovery is as yet incomplete.

Clearly, the Exxon Valdez oil spill has had a significant long-term impact on the coastal marine ecosystem and the economy which long depended upon that ecosystem, none of which Exxon acknowledges when it represents to this Court that full compensation has been paid. The efforts of those studying the spill and its impacts over long time frames now approaching two decades have resulted in the discovery of immeasurably greater long-term impacts than were understood at the time of the punitive damages award in this case. Indeed, it is clear that recovery of Prince William Sound is far from complete even today – almost twenty years later. It is on this basis that we conclude that to the extent punitive damage awards are meant to provide deterrence or compensation where "the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine," *BMW*

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[7] www.evostc.state.ak.us/Publications/injuredresources.cfm

of North America, Inc. v. *Gore,* 517 U. S. 559, 582 (1996), this is undoubtedly one such example.

CONCLUSION

For the reasons stated herein, the Ninth Circuit's decision should be affirmed.

Respectfully submitted,

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Appendix A

Amicus **Jean-Michel Cousteau** is the son of ocean explorer Jacques Cousteau. As such, he spent much of his life with his family exploring the world's oceans aboard Calypso and Alcyone. Honoring his heritage, Jean-Michel founded the Ocean Futures Society in 1999 to carry on this pioneering work. As Executive Vice President of The Cousteau Society for nearly 20 years, and now as Founder and President of Ocean Futures Society, Jean-Michel travels the globe, meeting with leaders and policymakers at the grassroots level and at the highest echelons of government and business. He served as a spokesman on water issues at the United Nations World Summit on Sustainable Development in Johannesburg, at the Third World Water Forum in Kyoto, and at the Dialogues on Water for Life and Security in Barcelona.

His diplomatic achievements as a voice for the ocean were recognized in 2000 when he was the first person to represent the Environment in the Opening Ceremonies of the 2000 Olympic Games, and in December 2003 when he was the first person to receive the Ocean Hero Award from Oceana, recognizing his commitment to communicate the value of the oceans and the threats they face to people of all nations and generations.

Jean-Michel has been Executive Producer of over 75 films and is currently the Executive Producer of "Jean-Michel Cousteau's Ocean Adventures," a twelve-part series in partnership with KQED, a PBS-affiliate, which first aired in 2006. He has been awarded the Emmy, the Peabody Award, the 7 d'Or, and the Cable Ace Award, among other film tributes.

He is dedicated to educating young people, documenting stories of change and hope, and lending his reputation and support to energize alliances for positive change. In recognition of his many and diverse contributions to learning, Pepperdine University awarded Jean-Michel an Honorary Doctor's Degree in Humane Letters in 1976. He has received DEMA's 1994 Reaching Out Award and the 1995 NOGI Award from the Academy of Underwater Arts and Sciences. In 1996, Jean-Michel was awarded the SeaKeepers Award from Showboats International, and the John M. Olguin Marine Environment Award from the Cabrillo Marine Aquarium.

Ocean Futures Society, a non-profit marine conservation and education organization, serves as a voice for the ocean by communicating in all media the critical bond between people and the sea and the importance of wise environmental policy.

Amicus **Peter Auster, Ph.D.**, is the Science Director for the National Undersea Research Center and an Associate Research Professor of Marine Sciences at the University of Connecticut. His research focuses on the ecology and conservation of fishes. Dr. Auster has a Bachelors degree in ecology, a Masters in biological oceanography and a Ph.D. in zoology. For the past 15 years, Dr. Auster has conducted studies to define how variation in underwater landscapes mediate the distribution and abundance of fishes, understand the linkages between habitat level processes and population-community dynamics, and develop methods for monitoring the dynamics of habitat attributes and habitat use. He serves on a number of panels and committees that are focused on marine resource management and conservation and he is involved in several outreach initiatives that are targeted at informing the public about marine conservation issues. He is a recipient of the Pew Marine Conservation Fellowship in 1999, a NOAA Environmental Hero Award in 2000 and was a Distinguished Conservation Scholar at Duke University Nicholas School of the Environment in 2001. In 2005, he was elected a fellow at the American Institute of Fishery Research Biologists.

Amicus **John Avise,** Ph.D., is Distinguished Professor of Ecology and Evolutionary Biology at the School of Biological Sciences, University of California at Davis. He has a Ph.D. in Genetics from UC Davis, 1975. Dr. Avise is a current and past member of the editorial boards for 15 scientific journals and he is a fellow of several honorific academies (including the National Academy of Sciences and the American Academy of Arts and Sciences). He is also the recipient of numerous distinguishing academic awards. Dr. Avise is an expert at ecological and evolutionary genetics, natural history and conservation biology. His research involves use of genetic markers (e.g. from allozymes, microsatellites, and mitochondrial DNA) to analyze the natural histories and evolution of wild animals. Topics range from micro- to macro-evolutionary: genetic parentage, mating patterns, geographic population structure, gene flow, hybridization, introgression, phylogeography, speciation, systematics, and phylogenetics. Research has been conducted on all major groups of vertebrates plus some invertebrates, and has involved taxa from marine, freshwater, and terrestrial environments. The primary goal typically is to unveil ecological, behavioral, or evolutionary features of the organisms themselves; an important secondary concern is to elucidate molecular and evolutionary properties of protein and DNA molecules.

Amicus **Donald F. Boesch, Ph.D.**, is a Professor of Marine Science and President of the University of Maryland Center for Environmental Science (UMCES). Dr. Boesch is a biological oceanographer who has conducted research in coastal and continental shelf environments along the Atlantic Coast and in the Gulf of Mexico, eastern Australia and the East China Sea. He has published two books and more than 85 papers on marine benthos, estuaries, wetlands, continental shelves, oil pollution, nutrient over-enrichment, environmental assessment and monitoring and science policy. Presently his research focuses on the use of science in ecosystem management. UMCES conducts comprehensive research, trains graduate students, contributes to public education, and advises public agencies and others on environmental and natural resource management from its three laboratories distributed across the state. A native of New Orleans, Don Boesch received his B.S. from Tulane University and Ph.D. from the College of William & Mary. He was a Fulbright Postdoctoral Fellow at the University of Queensland. He assumed his present position in Maryland in 1990.

Amicus **Benjamin E. Cuker, Ph.D.**, is Professor of Marine and Environmental Studies at Hampton University. He is noted for creation of student-based programs to promote diversity in the aquatic sciences. These include the American Society of Limnology and Oceanography Minorities Program (ASLOMP), Multicultural students At Sea Together (MAST), and the Hall-Bonner program for minority doctoral scholars in the ocean sciences. These programs are supported by external grants and have impacted hundreds of minority students from across the nation. Dr. Cuker was named a Pew Fellow in Marine Conservation and given the ASLO Distinguished Service Award for these efforts. He has 16 peer-reviewed publications.

Amicus **Daniel Esler, Ph. D.**, is a research scientist at the Centre for Wildlife Ecology at Simon Fraser University, in British Columbia. He received his doctorate in wildlife science from Oregon State University, in 2000. His research interests are in nearshore marine systems, avian ecology and conservation, sea duck biology, nutritional and physiological ecology, population biology and demography, population structure and genetics, wildlife habitat associations, and oil spill impacts and recovery.

Amicus **Michael Fry, Ph.D.**, is the Director for the Conservation Advocacy at American Bird Conservancy. Dr. Fry is an avian toxicologist with research interests in the effects of pollutants and pesticides on ecosystems, with a focus on wild birds. He received his doctorate at the University of California-Davis, where he then went on to be a research physiologist in the Department of Avian/Animal Sciences for 23 years, and joined American Bird Conservancy in 2005. Dr. Fry has been a panel member for the National Academy of Sciences on hormone active chemicals in the environment and has participated in toxicology reviews and international symposia for the Organization for Economic Cooperation and Development (OECD) and for the United Nations University in Japan. He is a current member of the Scientific Committee of the Dept. of Interior, Minerals Management Service Advisory Board, and an advisory committee member for EPA. He served on a National Academy of Science panel on hormone active agents in the environment, was a committee member for OECD in revising avian toxicity test methods and was a member of the EPA Ecological Committee for Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Risk Assessment Methods (ECOFRAM).

Amicus **Gregory H. Golet, Ph. D.**, is a senior ecologist for the Nature Conservancy. The Nature Conservancy is the leading conservation organization working around the world to protect ecologically important lands and waters for nature and people. Dr. Golet is a senior advisor for the restoration of the Sacramento River project. Dr. Golet also served with the U.S. Fish and Wildlife agency, and has been a project scientist for the Exxon Valdez Trustee Council. He received his Ph.D. from the University of California, Santa Cruz.

Amicus **Roger Green, Ph.D.**, is Professor Emeritus at the University of Western Ontario in Zoology. His Ph.D. was done at Cornell in ecology with minors in genetics and biogeochemistry. After working in Australia on a Fulbright postdoctoral fellowship at the University of Queensland he returned to serve as Resident Ecologist at the Woods Hole Oceanographic Institute. From there he joined the faculty at the University of Manitoba. During this time he began consulting for private and governmental entities on study design and statistical analysis of data. In 1976-77 supported by a National Research Council contract he wrote one of the leading textbooks on sampling design and biostatistics, Sampling Design and Statistical

Methods for Environmental Biologists (Wiley, 1979). Dr. Green is widely published in the field of study design and statistics, having authored more than 80 articles for peer reviewed journals or presentations and numerous contributions to books or other documents. He has given workshops and presentations in this field around the world. He has consulted for both private industry and government, including most particularly as member of the Scientific Advisory Committee of the Prince William Sound Regional Citizens Advisory Council and for the Exxon Valdez Oil Spill Trustee Council.

Amicus **Burr Heneman** is a co-founder and the current Ocean Policy Director of Commonweal, Burr has been involved in marine policy and science at the state, national, and international levels since the 1970s. He formerly was director of the (now) Ocean Conservancy's Pacific region (1991-1994); consultant to BirdLife International and the Saudi Arabian wildlife agency on the Gulf War oil spill and fires (1991); consultant to the U.S. Marine Mammal Commission on marine debris and conflicts between marine mammals and fisheries (1985-1988); and executive director of PRBO Conservation Science (1980-1984). Mr. Burr received a Bachelor of Arts degree from Yale University. His marine conservation activities now concentrate on the intersection of policy, management and science. At different times his focus has been policy development, legislation, policy implementation, dispute resolution and initiation of marine monitoring programs. Investigation of various marine issues has taken Mr. Burr to the Farallon Islands (seabird and great white shark research and conservation); the Pribilof Islands (seabirds and marine debris); the Lesser Antilles, Baja California, and the Yucatan (marine debris); Prince William Sound (the Exxon Valdez oil spill); the Galapagos Islands (seabirds and fisheries); the Persian Gulf (the Gulf War oil spills and fires); Shetland (oil spill prevention and seabird/fisheries conflicts); the Gulf of Maine (seabird research and restoration); Belize (shark research); and Fiji (seabird conservation). Mr. Heneman serves on the Stakeholder Council of the Marine Stewardship Council. He was awarded a Pew Fellowship in Marine Conservation in 1999.

Amicus **Richard Kocan** is Professor Emeritus at the School of Aquatic and Fishery Sciences at the University of Washington. Dr. Kocan has a Bachelor's degree from Hiram College, a Masters in Microbiology and Public Health, University of Michigan and a Ph. D. in Microbiology and Public Health, University of Michigan. Dr. Kocan specializes in aquatic toxicology, environmental pathology and aquatic animal diseases. He has been a consultant to a number of state and federal agencies, corporations and Indian Tribes, including the State of Washington, Department of Fish and Game, Exxon Valdez Trustee Council reviewing fish studies in Prince William Sound, the State of Alaska Department of Fish and Game. Some current projects include: An investigation into herring diseases in Prince William Sound Alaska following the Exxon Valdez oil spill, diseases in Yukon River salmon, toxic effects of agricultural pesticides and PCB effects upon trout.

Amicus **Jane Lubchenco, Ph.D.**, is Wayne and Gladys Valley Professor of Marine Biology & Distinguished Professor of Zoology at Oregon State University. She graduated from Colorado College, received her Ph.D. from Harvard University in marine ecology, taught at Harvard for two years, and has been on the faculty at Oregon State University since 1978. Dr. Lubchenco leads an interdisciplinary team of scientists who study the marine ecosystem off the west coast of the U.S. which is learning how the ecosystem works, how it is changing and how humans can modify their actions to ensure continued benefit from ocean ecosystems. She is a former President of the International Council for Science, the American Association for the Advancement of Science (AAAS) and the Ecological Society of America. She was a Presidential appointee to two terms on the National Science Board which advises the President and Congress and oversees the National Science Foundation. She is a member of the National Academy of Sciences, the American Philosophical Society and the American Academy of Arts and Sciences.

Amicus **Craig Matkin, M.S.**, is a founding member and director of the North Gulf Oceanic Society (NGOS). NGOS is a federally recognized non-profit research and education organization that specializes in long-term marine mammal research. Mr. Matkin completed his M.S. in Zoology in 1980 at the University of Alaska, Fairbanks, and has worked with marine mammals for 25 years. He has authored more than 50 scientific reports and articles on marine mammals. His work has included identification, detailed life histories, geneology, acoustic vocalization and language patterns, and movement of individual whales and whale aggregations, as well as DNA and contaminant analyses. Because NGOS has been monitoring individual killer whales and their clan groups since well before the EVOS, they have detailed data on the status of these populations before and after the spill.

Amicus **John Ogden** is the Director of the Florida Institute of Oceanography (FIO) and Professor of Biology at the University of South Florida since 1988. He received his undergraduate degree from Princeton University and his Ph.D. in Biological Sciences from Stanford University in 1968. After two years at the Smithsonian Tropical Research Institute in Panama he joined Fairleigh Dickinson University, built the West Indies Laboratory (WIL) in St. Croix in the Virgin Islands, and began his continuing fieldwork on global coral reefs and associated ecosystems. Dr. Ogden was Director of WIL from 1981-1988, operated the saturation diving facility Hydrolab for NOAA during this period, and directed the construction and initial operations of Aquarius, the only currently operational facility. Dr. Ogden has published over 100 scientific papers, has contributed to several books, and has produced several television films on tropical ecosystems. He has served on federal and state commissions dealing with coastal ecosystem management and was a member of the founding Advisory Council of the Florida Keys National Marine Sanctuary. He presently serves on the Technical Advisory Committee of the Sustainable Seas Expedition, the Board of the World Wildlife Fund, and is a Fellow of the American Association for the Advancement of Science.

Amicus **Thomas Okey, Ph.D.**, is a marine ecologist and conservation biologist who studies the scientific, management and policy issues related to the effects of climate change on marine ecosystems and on distinguishing these impacts from those caused by fisheries mismanagement and pollution. His research has ranged from subtidal experimental studies of the effects of natural disturbances and production subsidies on marine soft sediment communities to broad syntheses of ecosystem knowledge and fisheries impacts using and refining food web trophodynamic modeling techniques. Dr. Okey received his doctorate from the University of British Columbia in the area of zoology, which compliments his Bachelors and Master degrees in Marine and Coastal Biology. Dr. Okey is the founder and current science director for the Conservation Science Institute, an organization that provides science support and education for conservation goals. He is also a Pew Fellow in Marine Conservation, a Scientist-in-Residence at the Bamfield Marine Sciences Centre, and an Adjunct Professor at the University of Victoria School of Environmental Studies. During the late 1990s, he was the director of the Center for Marine Conservation's Pacific Fisheries Program. He expanded that program from areas adjacent to California, Oregon, and Washington to those adjacent to Alaska and Hawaii. During this time, Dr. Okey also chaired a national working group on Essential Fish Habitat, sat on Marine Mammal Take Teams, and developed marine protected area strategies and teams.

Amicus **Daniel Pauly, Ph.D.**, is the Director of the Fisheries Centre of the University of British Columbia, Vancouver, Canada. Educated in Germany, he has spent most of his working life inventing new approaches for fisheries research and management in data-sparse settings and teaching on these issues in four languages in Europe, Africa, Asia, Oceania and Latin America. Besides numerous and well-cited journal articles, books and other publications, his work led to the creation of software (ELEFAN, Ecopath) and scientific databases (FishBase) now used throughout the world. His work links to concepts now structuring a wide span of research in marine biology, notably on "fishing down marine food webs," which impacts all the world's aquatic systems, but which many do not notice because of the "shifting baseline syndrome of fisheries." Dr. Pauly is Principal Investigator of the Sea Around Us Project, funded by the Pew Charitable Trusts, Philadelphia and is devoted to investigating the global impact of fisheries on marine ecosystems. He has received numerous scientific awards, including UBC's Distinguished University Scholars and elected a Fellow of the Royal Society of Canada (Academy of Science). In 2004, he received the Roger Revelle Medal from IOC/UNESCO, and the Award of Excellence of the American Fisheries Society.

·*Amicus* **Charles "Pete" Peterson, Ph.D.**, is Alumni Distinguished Professor in the Department of Marine Sciences at The University of North Carolina at Chapel Hill. He was trained at Princeton University and the University of California at Santa Barbara. Dr. Peterson has spent his working career of some 40 years in academia conducting research in marine fisheries and conservation ecology. He serves presently as editor of two international scientific journals, has published over 160 peer-reviewed papers, and regularly reviews papers for over 50 scientific journals and for the basic science foundations of several countries. Dr. Peterson has served on 5 panels of the U.S. National Academy of Sciences. His awards include National Science Foundation, Woodrow Wilson Foundation, Ford Foundation, and Japan Society for Promotion of Science fellowships. In 1994, he was named a Pew Charitable Trust Scholar in Conservation and the Environment. He served the U.S. Department of

State for several years as a national representative to the ICES (International Council for Exploration of the Sea) Shellfish and Mariculture Committees. Dr. Peterson may be the most highly cited of all scholars with a primary research focus on marine communities, habitats, and ecosystems based on sedimentary bottoms. Presently, his research focus is on developing ecosystem-based management for marine resources.

Amicus **John Teal, Ph.D.**, is currently Scientist Emeritus for the Woods Hole Oceanographic Institution. Dr. Teal's professional career began in the early 1950's with his Ph.D. thesis on the trophic relationships in a tiny cold spring in Massachusetts. After getting his degree, he joined the University of Georgia Marine Institute at Sapelo Island where he studied salt marshes. After four years, he went to the new oceanography center at Dalhousie University in Halifax, NS. He joined Woods Hole Oceanographic Institution in 1961 and has been Scientist Emeritus there since 1995. In addition to research on coastal wetlands, he has worked on effects of hydrostatic pressure on deep sea animals, physiology of large, warm blooded fishes, bird migration over the oceans, oil pollution, wastewater treatment, and restoration ecology. He is currently involved with constructed wetlands for wastewater treatment and with marsh restoration in fresh, brackish and salt wetlands. For the last six years, he has worked on a salt marsh restoration project in Delaware Bay that encompasses 32 square miles. He has served on National Academy of Science committees, editorial boards of scientific journals, published in the scientific literature, written popular articles and books, and served on local committees. He has also served on the board of the Conservation

Law Foundation of New England since 1978 and been vice chair since 1980 and serves as an advisor to local land trusts.

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IN THE
Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL.,
Petitioners,
v.

GRANT BAKER, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF STATE OF MARYLAND AND 33 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Herman & MacLean v. Huddleston,
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In re Glacier Bay,
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Juno Marine Agency, Inc. v. Taibl,
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Kolstad v. American Dental Association,
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United States v. Alexander,
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OTHER AUTHORITIES

Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages, 98 A.L.R.3d 870 (1980) 20

Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 Neb. L. Rev. __ (2008), *available at* http://ssrn.com/abstract=1007337 13

Dr. Vernon R. Leeworthy, Nat'l Survey on Recreation and the Env't, Nat'l Oceanic and Atmospheric Admin., NOAA Oceans and Coasts, Special Projects Office (May 15, 2001), *available at* http://marineeconomics.noaa.gov/NSRE/NSRE_V1-6_May.pdf (last visited Jan. 27, 2008) 2

Kristen M. Crossett, *et al.*, *Population Trends Along the Coastal United States: 1980-2008*, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv., Special Projects Office (September 2004), *available at* http://oceanservice.noaa.gov/programs/mb/supp_cstl_population.html (last visited Jan. 27, 2008). 2

Leon E. Panetta, PEW Oceans Comm'n, *America's Living Oceans* 64-65 (2003) 3

Mark Palmer, *Satellite Communications: Bringing the Vessel at Sea Closer to the Shore*, Lloyd's List, Dec. 21, 2001, at 1 16

Nat'l Marine Fisheries Serv., Office of Science and Tech., *Fisheries of the United States* (2004), *available at* http://www.st.nmfs.noaa.gov/st1/fus/fus04/02_commercial2004.pdf (last visited Jan. 27, 2008) 2

R.J. Eassom et al., *HF Transmitters and Receivers for Naval Radio* Int'l Conference on 100 Years of Radio 62 16

Restatement (Second) of Agency § 217(c) (1958) 10

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Restatement (Third) of Agency § 7.03, cmt. e (2006) 8, 15

S. Rep. No. 101-94 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722 19

Sandra Speares, *Inmarsat 20 Successful Years: A Revolution in Marine Communications*, Lloyd's List, Nov. 17, 1999, at 17 16

The Hon. Franklin L. Lavin, Under Sec'y for Int'l Trade, U.S. Dep't of Commerce, Test. Before Senate Commerce Committee's Subcomm. on Trade, Tourism, and Econ. Dev. (June 22, 2006), *available at* http://commerce.senate.gov/public/_files/Lavin062206.pdf (last visited Jan. 27, 2008) 2

U.S. Army Corp of Eng'rs, *Waterborne Commerce of the United States – Calendar Year 2005, available at* http://www.iwr.usace.army.mil/ndc/wcsc/wcsc.htm (last visited Jan. 27, 2008)............................1

William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 4942, at 640-41 (2002 rev. vol.)...10

INTEREST OF *AMICI CURIAE*

The Amici States have vital interests in the substantive rule of tort law that this Court will adopt to govern corporate liability for punitive damages in maritime law. Exxon's assertion that the availability of punitive damages in maritime law implicates no issues of federalism or state sovereignty, Petrs. Br. 27, pays little heed to the States' strong interest in deterring misconduct that could result in massive toxic spills, with potentially catastrophic effects to our coastlines, lakes, and rivers, and the economies that depend on those waters.

Nineteen of the States that have signed this brief have coastal shorelines, either on the Pacific, Gulf, or Atlantic coasts, or on the Great Lakes. Many others have navigable rivers and lakes. The threat of a major oil spill looms large for all.[1] Excluding Alaska, coastal States constitute 17% of the Nation's land area, but contain 53% of its population. Maritime law also applies to the many waterways in the noncoastal Amici States. The Amici States, therefore, have a critical interest in ensuring that the common law and overall regulatory scheme governing toxic spills allow for punitive damages in appropriate cases, in order to deter and punish reckless maritime conduct to the same degree that common law deters and punishes land-based reckless conduct.

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[1] In 2005, 1.1 billion tons of petroleum products and 175 million tons of toxic materials passed through U.S. coastal waters, a 20% increase since the Valdez catastrophe. U.S. Army Corp of Eng'rs, *Waterborne Commerce of the United States – Calendar Year 2005*, *available at* http://www.iwr.usace.army.mil/ndc/wcsc/wcsc.htm (last visited Jan. 27, 2008).

As the facts of this case illustrate, a large-scale maritime accident can have ruinous effects not only on the environment, but on public and private interests in large economic sectors such as the tourism[2] and fishing industries,[3] and the businesses surrounding fast-growing coastal areas and lakes and rivers.[4] In many instances, a region's culture, and the lives and livelihoods of its people, depend almost entirely on the health of our territorial waters, our coastlines, and our rivers and lakes.

A single catastrophic maritime accident can cause far-reaching economic harms to citizens of many States. The EXXON VALDEZ spill, once spread by wind and water, extended over 600 linear miles, roughly the distance from

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[2] Tourism is the Nation's largest employment sector and contributes $1 trillion to Gross Domestic Product. The Hon. Franklin L. Lavin, Under Sec'y for Int'l Trade, U.S. Dep't of Commerce, Test. Before Senate Commerce Committee's Subcomm. on Trade, Tourism, and Econ. Dev. (June 22, 2006), *available at* http://commerce.senate.gov/public/_files/Lavin062206.pdf (last visited Jan. 27, 2008). Coastal states receive 85% of U.S. tourism revenues and attract more than 89.3 million visitors annually. Dr. Vernon R. Leeworthy, Nat'l Oceanic and Atmospheric Admin., *Nat'l Survey on Recreation and the Env't* (May 15, 2001), *available at* http://marineeconomics.noaa.gov/NSRE/NSRE_V1-6_May.pdf (last visited Jan. 27, 2008).

[3] In 2004, U.S. commercial fishing revenues were $3.6 billion, and recreational anglers caught 35 million metric tons of fish within three miles of the United States coast. Nat'l Marine Fisheries Serv., Office of Science and Tech., *Fisheries of the United States* (2004), *available at* http://www.st.nmfs.noaa.gov/st1/fus/fus04/02_commercial2004.pdf (last visited Jan. 27, 2008).

[4] In the years since the EXXON VALDEZ spill in 1989, the population of coastal counties has increased 16.5% to 150 million Americans. Kristen M. Crossett, *et al.*, *Population Trends Along the Coastal United States: 1980-2008*, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv., Special Projects Office (September 2004), *available at* http://oceanservice.noaa.gov/programs/mb/supp_cstl_population.html (last visited Jan. 27, 2008).

Cape Cod, Massachusetts, to Cape Lookout, North Carolina, and over 10,000 square miles of the surrounding marine ecosystem. Apart from a spill's geographic reach, citizens of other States can be directly affected by the harms a spill causes. In fact, citizens of our States have been harmed by the EXXON VALDEZ oil spill itself. More than a third of the class members—over 11,000 people—reside for part of the year outside Alaska.

Toxic spills also cause changes in the environment that can have persistent, lingering effects on water resources. *See* Leon E. Panetta, PEW Oceans Comm'n, *America's Living Oceans* 64-65 (2003). Furthermore, the Amici States bear a large measure of the burdens associated with cleaning up hazardous chemicals, burdens which are typically borne by entities such as state port authorities. The availability of punitive damages under federal maritime law serves to deter conduct that can impose these harms and costs on the States.

Adoption of the unduly restrictive punitive damages regime that Exxon advocates, or a holding that the Clean Water Act precludes punitive damages altogether, would interfere with the Amici States' ability to protect our waterways from toxic spills through appropriate state regulations and common law. The Amici States have a strong interest in a rule of vicarious liability for federal maritime cases that harmonizes with the approach that the state courts have developed under state common law.

STATEMENT

The salient facts concerning Exxon's reckless misconduct and its devastating effect on the Prince William Sound region bring into sharp focus the threat that toxic spills pose to the economic viability of our States' industries, businesses, and citizens that depend on our waterways. These facts vividly demonstrate why States need the protection of a federal rule of vicarious liability for punitive damages that would deter and punish the kind of devastating recklessness on display here.[5]

For decades, Exxon has shipped oil on supertankers through the "icy and treacherous" waters of Prince William Sound and southward, Pet. App. 22a. The "economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities," and thousands of Native Alaskans in the area live a subsistence way of life that goes back centuries. JA1442; *see also* Pet. App. 41a, 155a; JA1439, 1475-81; *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) ("If [Alaska Natives'] right to fish is destroyed, so too is their traditional way of life."). From the time Exxon began shipping oil through the Sound, it knew that "[a] major spill in the Valdez area would cause [an] incurable disaster to the rich fisheries." JA1488; *see also* Pet. App. 122a, 232a; JA213-14, 1437-41, 1475-94.

Despite this knowledge, Exxon put in command of a supertanker, the EXXON VALDEZ, a man Exxon whom knew to be an active, relapsed alcoholic and to be drinking while captaining the supertanker: Captain Joseph

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[5] The facts summarized here are those set forth in, *inter alia*, the opinions of the district court and the Ninth Circuit on *de novo* review, Pet. App. 22a-31a, 120a-124a, 147a-157a, which exhaustively reviewed and summarized the evidence presented at trial.

Hazelwood. JA1033-34; SJA135sa-36sa. In 1985, while employed by Exxon, Hazelwood attended a 28-day alcohol treatment program, but dropped out of the ensuing aftercare program and relapsed after returning to duty as captain. Pet. App. 63a-64a, 121a; JA306. Hazelwood's supervisors promptly began receiving reports that he "had fallen off the wagon." Pet. App. 63a, 154a-155a; JA409-26, 849. The first report was relayed to the *President* of Exxon Shipping, who was told that Hazelwood was acting "kind of crazy or kind of strange." JA960-61.

Hazelwood's relapse was known throughout Exxon Shipping, and it was common knowledge in the Valdez area that supertanker crews drank excessively on ship and in ports, routinely violating unenforced policies against drinking on board and against returning to duty within four hours of drinking. JA226-37, 306-08, 314-15, 331-38, 379-80, 423-24, 445-47, 499, 562-71, 639-40, 649, 750-54; SJA118sa-29sa. Between the time of his relapse until less than two weeks before the disaster, "the highest executives in Exxon Shipping" were receiving reports of Hazelwood's alcoholic conduct. Pet. App. 29a, 64a, 83a, 121a-122a, 153a-157a. As the Ninth Circuit held, "[t]he evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." Pet. App. 83a.

This was the state of Exxon's knowledge of the risk that Hazelwood's active alcoholism posed as of March 23, 1989. That night, Exxon entrusted Hazelwood with command of an Exxon supertanker carrying 53 million gallons of crude oil through Prince William Sound. Indeed, Hazelwood was the only officer aboard licensed to navigate through portions of the Sound. And he was drunk. His blood alcohol level upon leaving port was later determined to be .241. Pet. App. 64a, 87a, 256a.

After setting off, he moved the EXXON VALDEZ out of a shipping lane to avoid ice, and pointed the ship towards a known hazard, Bligh Reef. Then, because "his judgment was impaired by alcohol," Pet. App. 63a, he made a series of poor decisions. Pet. App. 63a-64a, 87a; JA460-84, 776. As a result, the ship hit Bligh Reef, and 11 million gallons of crude oil spilled from its ruptured hull into Prince William Sound.

The oil spill "disrupted the lives (and livelihood) of thousands of [people in the Prince William Sound area] for years," Pet. App. 24a, damaging approximately 1,300 miles of shoreline and destroying the subsistence livelihoods of Native Alaskans, "for whom subsistence fishing is not merely a way to feed their families but an important part of their culture." Pet. App. 123a. With the economy in ruins, "the social fabric of Prince William Sound and Lower Cook Inlet was torn apart," producing a high incidence of severe depression, post-traumatic stress disorder, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound. Pet. App. 150a-151a, 166a-167a; SJA386sa-572sa.

In sum, the case against Exxon for punitive damages was straightforward. As the district court put it:

> For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving.

Pet. App. 154a; *see also* Pet. App. 29a, 64a, 83a, 89a-91a, 121a-122a, 153a-157a.

SUMMARY OF ARGUMENT

The Court should reject both Exxon's test for vicarious liability for punitive damages, and Exxon's argument that the federal Clean Water Act implicitly preempts federal maritime law from providing for punitive damages in common law tort actions.

Federal courts in maritime cases tend to follow the general state common law of tort when there is no uniquely maritime aspect of the case. Nearly all of the 48 States that allow punitive damages follow one of two approaches to vicarious liability for punitive damages; Exxon's proposed test differs markedly from both approaches, is substantially narrower than either, and is in substance a rule of corporate immunity that would threaten to undermine the States' ability to deter and punish reckless misconduct through incremental common law-making.

Under Exxon's proposed test, the corporation must direct, countenance, or participate in the act. The proposed test is not only overly restrictive, but would also generate a host of difficult and confusing issues concerning whose "complicity" suffices to establish corporate ratification or approval of another managerial agent's misconduct. No corporate officer with the authority to ratify or approve corporate conduct would do so if the mere refusal to approve gross misconduct would immunize the corporation from punitive damages. Moreover, the proposed test is premised on nineteenth-century notions that a captain at sea is beyond the reach of a shipowner. With today's modern communication and navigational technologies, the relationship between a ship captain and shipowner is no different from that between a corporate officer at headquarters and one in a field office.

Exxon's Clean Water Act preemption argument should be rejected not only because it was not preserved and differs materially from the argument Exxon did make below, but also because there is no reason to conclude that Congress intended for the Clean Water Act to preempt the availability of punitive damages in private tort actions under federal maritime law.

ARGUMENT

I. The Court Should Be Guided By Widely Accepted State Common Law Principles Of Vicarious Liability For Punitive Damages And Reject Exxon's Test.

Almost all of the forty-eight States that allow for punitive damages have adopted one of two approaches to vicarious liability for such damages: 1) liability based on the misconduct of any agent or 2) liability based on the misconduct of a managerial agent. The states are nearly evenly balanced between these approaches, with a slight majority following the any-agent rule. Restatement (Third) of Agency § 7.03, cmt. e (2006). Exxon's test is more restrictive than either of the approaches that the States have adopted. Under Exxon's test, "the jury [is required] to find that the shipowner directed, countenanced, or participated in the conduct." Petrs. Br. 15. Someone at a high level in management must ratify or authorize the reckless misconduct, even, apparently, when the reckless misconduct was that of someone else at a high level in management. This unduly restrictive test would effectively immunize corporate maritime defendants, and only corporate maritime defendants, from liability for the same types of reckless misconduct that would warrant an award of punitive damages against land-based defendants. This disparate treatment makes no sense: there is "no reason . . . why vicarious liability should be treated differently on sea than on land." *See CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 704 (1st Cir. 1995).

1. This Court has long looked to state common law to inform its development of federal maritime law. *See Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893) ("[C]ourts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing

exemplary damages."). When the Court has considered what substantive tort law to apply in maritime cases that do not involve uniquely maritime concerns, the extensive experience of state courts in evolving tort principles has provided guidance. *See Exxon Co. U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-39 (1996) ("In ruling upon whether a defendant's blameworthy act was sufficiently related to the resulting harm to warrant imposing liability for that harm on the defendant, admiralty courts may draw guidance from, *inter alia*, the extensive body of state law applying proximate causation requirements . . . ."); *see also American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284-85 n.11 (1980) (adopting rule of "clear majority of States"); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1970) (adopting general Restatement test).

The Court's traditional consideration of state common law to inform maritime tort law makes sense, since state courts have particular expertise in developing tort law through the common law method, whereas the role of federal courts in making common law has "largely withdr[awn] to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly [and others involving] interstitial areas of particular federal interest." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004); *see Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 886 (1997) (Scalia, J., dissenting) ("[U]nlike state courts, we have little first-hand experience in the development of new common-law rules of tort . . . .").

In the context of vicarious liability for punitive damages, state common law has evolved workable rules that the States have found to be effective in deterring and punishing reckless misconduct. The majority "any-agent" rule rests on a familiar, straightforward *respondeat superior* theory. *See American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982). The more restrictive minority rule, which the Ninth Circuit applied here, is based on the Restatement (Second) of Agency § 217(c) (1958) and the Restatement (Second) of Torts § 909 (1979), and provides corporations with an additional level of protection: a corporation is subject to punitive damages when one of its *managerial* agents acts recklessly in the scope of employment.[6] State courts have applied these principles to waterborne, as well as land-based, torts. *See, e.g.*, *Juno Marine Agency, Inc. v. Taibl*, 761 So. 2d 373, 374-75 (Fla Ct. App. 2000) (upholding punitive damages award against shipowner for wrongful death of person who died trying to rescue a crew member from the hold of shipowner's vessel); *Allen v. Camden & Philadelphia Steamboat Ferry Co.*, 46 N.J.L. 198, 199 (N.J. 1884) (allowing passenger to seek punitive damages against a ferryboat company for the forcible ejection of passenger by the company's agent). These rules of vicarious punitive liability typically apply regardless of whether the agent's action violated some corporate policy. *See* William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 4942, at 640-41 (2002 rev. vol.).[7]

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[6] Section 909 of the Restatement (Second) of Torts provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent, if but only if,
>
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
>
> (c) *the agent was employed in a managerial capacity and was acting in the scope of employment*, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

(Emphasis added.)

[7] In *Kolstad v. American Dental Association*, the Court held that an employer may not be vicariously liable for punitive damages based on discriminatory employment actions of managerial agents that are contrary to the employer's "good-faith efforts" to comply with the

Exxon's test, on the other hand, would effectively immunize the reckless misconduct of even managerial agents by requiring the corporation to ratify or authorize the misconduct. Moreover, it is far from apparent whose ratification is necessary: presumably some *other* high-level executive, or perhaps a board of directors, would have to approve the misconduct. The incoherence of Exxon's test contrasts with the relatively clear lines of accountability established in the rules that the States have adopted.

Taken together, the any-agent and managerial-agent rules reflect a collective judgment of the state courts, developed incrementally in countless factual contexts, that that the imposition of punitive damages on corporations, *at least* when a managerial agent engages in the reckless misconduct, best serves the States' interests in deterrence and punishment of reckless corporate misconduct. *See BMW of N. Am. v. Gore,* 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991) (imposing punitive liability for acts of any agent provides "strong incentive for vigilance").[8] The adoption of Exxon's test, on the other hand, would undermine the States' ability to calibrate, through the application of substantive tort law, the

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nondiscrimination laws. 527 U.S. 526, 545-46 (1999). The Court's decision in *Kolstad* reflected considerations unique to federal civil rights policy, namely, the concern about creating a disincentive for employers to educate employees about nondiscrimination laws. *Id.* at 544-45. But, as discussed below, the imposition of punitive damages under the managerial agent test creates proper incentives in the maritime industry.

[8] Notably, the Court in *Haslip* did not question the constitutional propriety of Alabama's imputation of any corporate agent's misconduct to the company for purposes of establishing corporate liability for punitive damages. 499 U.S. at 14.

appropriate measure of deterrence and punishment that governs reckless misconduct directly threatening their very substantial economic interests in tourism, commercial and recreational fishing industries, and coastal development.

The States have compelling and wholly legitimate interests in a punitive damages regime that provides for a consistent measure of deterrence and punishment on land and on water.[9] The imposition of a separate standard for punitive damages under maritime law would impinge on the States' legitimate need to protect their citizens and economic interests from dangerous conduct on the waters, contrary to maritime law's traditional respect for States' interests in this regard. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 n.13 (1996) ("Federal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters."). In this regard, an unduly restrictive rule of federal maritime law here may underdeter reckless misconduct that States, as a policy matter, have chosen to deter through their common law rules. *Cf. Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007) (punitive damages regimes may "impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies.") (quoting *Gore*, 517 U.S. at 571–572).

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[9] The generalized interest in restraining "punitive damages that 'run wild,'" *Haslip*, 499 U.S. at 18 (internal citation omitted), is more properly effectuated not through a substantive rule of vicarious liability for punitive damages in maritime law, but through this Court's continuing development of standards guiding courts and juries. *See TXO Prods. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993) (plurality) (due process places limits on "grossly excessive" punitive damages, but does not require a bright-line test); *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 574-75 (1996) (identifying "guideposts" of reprehensibility, ratio, and comparison to civil penalties in comparable cases); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) ("[C]ourts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (elaborating on *BMW v. Gore* guideposts); *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007) ("Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent . . . .").

2. Quite apart from the anomalies created by applying Exxon's test on waters adjacent to land where different rules apply, Exxon's test is unwise and unworkable. It is hard to imagine that any corporate actor would ever ratify or approve conduct that could give rise to punitive damages, when the simple act of disclaiming responsibility for the wrongdoer – or worse, intentionally avoiding contact and oversight – would shield the corporation from punitive liability. Aside from the fanciful notion that any such "ratification" or "approval" could ever be shown to have occurred, Exxon's test generates a host of uncertainties about where corporate responsibility ultimately lies. Whose complicity is necessary for a corporation to ratify or approve reckless misconduct? If the wrongdoer is a high-level manager, is it necessary for a higher-level manager to ratify or approve the misconduct? If the chief executive officer is the wrongdoer, must the board of directors ratify or approve the misconduct? What conduct must be ratified or approved? If the conduct requiring approval was the specific act of recklessness that caused harm, what corporate executive would ratify such an act? Why would any corporation ratify an act of misconduct, knowing that it could escape punitive damages -- no matter how high-level an agent the wrongdoer may have been -- merely by disassociating itself from the wrongdoer? Under Exxon's test, responsibility for corporate misconduct vanishes in an endless regression. *See* Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 Neb. L. Rev. __ (2008),

available at http://ssrn.com/abstract=1007337 (discussing the theoretical impossibility of determining whose ratification is required if the wrongful act occurs at high levels of corporate authority).

The confusion that such a rule would generate is evident in this very case. On the one hand, Exxon's own expert testified that a supertanker captain, such as Hazelwood, "is a CEO." Tr. 3866:6-22. On the other hand, Exxon argues that it should not be liable "solely" for Hazelwood's misconduct.[10] Exxon, however, asks to be excused for Hazelwood's misconduct because no one else at Exxon subsequently approved of his disastrous, drunken decisions. It is nonsensical to adopt a rule that would tie Exxon's liability for punitive damages to a finding that Exxon executives ratified or authorized the specific recklessness Hazelwood engaged in on March 23, 1989. Such a rule would create a perverse incentive for corporations to minimize oversight of their agents. *Haslip*, 499 U.S. at 14.

In effect, Exxon's test would reward with immunity a corporate governance scheme that avoids accountability: "[L]arge corporations that routinely delegate managerial authority to shape corporate policy by making important corporate decisions could unfairly escape liability for punitive damages by virtue of their size." *Albuquerque Concrete Coring Co. v. Pan Am World Servs.*, 879 P.2d 772, 778 (N.M. 1994). The proposed test "would permit punitive damages against smaller concerns, . . . but not against a large corporation whose size and ramifications make express authorization by the top executives of tortious acts of its working-level agents highly unlikely." *General Motors Acceptance Corp. v. Froelich*, 273 F.2d 92, 94 (D.C. Cir. 1959). A rule of vicarious liability that generates such disparate and unfair results based upon the organizational form of the offender must be avoided.

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[10] In fact, the record shows that Exxon's liability here does not rest "solely" on Hazelwood's misconduct on the night of March 23, 1989, whether as a "CEO" or otherwise. It rests on the misconduct of other high-level Exxon executives, who knew that Hazelwood was drinking again, captaining a supertanker through Prince William Sound, and creating an intolerable but foreseeable risk of catastrophic environmental, economic, and human harm.

In contrast, the Restatement rule quite sensibly locates corporate responsibility in the "employment of unfit persons for important positions." Restatement (Second) of Torts § 909 cmt. b. The threat of vicarious punitive liability provides a "mechanism to focus attention at an organizational level on how to best exercise control over employees and other agents to reduce the risk of harm that their activities pose to third parties." Restatement (Third) of Agency § 7.03 cmt. e. The Amici States' experience with regulating corporations (both civilly and criminally) suggests that the managerial agent test, or something even broader, promotes careful selection of employees and accountability.

3. Exxon's test is not only out of step with state tort law and ill-conceived on its own terms, but is also untethered from the reality of the relationship between a shipowner and ship captain today. The fact is that, with the advent of modern ship-to-shore communication technologies, a corporate shipowner is functionally indistinguishable from any other corporate common carrier or, indeed, any other corporation with field offices or employees who work offsite. Modern communication and navigational technologies have transformed the relationship between a ship captain and shipowner, thereby undermining the operative premise of nineteenth century maritime law: that once a ship set sail, the captain was on his own at sea, out of touch with the shipowner.

The "ship master at sea" concept remained a reality no later than the late nineteenth century, when basic wireless communication using Morse code first enabled land-based owners or managers to communicate with ships at sea. *See* R.J. Eassom et al., *HF Transmitters and Receivers for Naval Radio*, 1995 Int'l Conference on 100 Years of Radio 62. Today, however, "the ship master at sea" can readily communicate with other corporate managers, by telephone, e-mail, fax, and other means. *See* Mark Palmer, *Satellite Communications: Bringing the Vessel at Sea Closer to the Shore*, Lloyd's List, Dec. 21, 2001, at 1. Indeed, shoreside personnel simply lifted a phone and spoke with Captain Hazelwood after he grounded the EXXON VALDEZ. JA872-76. Not only can those on board the vessel readily contact their corporate colleagues and superiors on land, but satellite communications enable shore-based personnel to guide and direct captains on a regular basis, rather than only during times of crisis, as in the past. *See* Sandra Speares, *Inmarsat 20 Successful Years: A Revolution in Marine Communications*, Lloyd's List, Nov. 17, 1999, at 17. Moreover, sophisticated vessel management systems, not unlike air traffic control systems, have been developed to guide ship movement.

In sum, because there is no real difference between a ship captain and other corporate managerial agents, there is no justification for a distinct maritime rule of vicarious liability.[11] At the same time, there would be no principled basis to deny non-maritime corporations the same protection from liability for punitive damages.

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[11] Exxon's plea that special vicarious liability rules are needed to protect maritime commerce hardly aids its cause. "[T]he fishing industry is clearly part of traditional maritime activity; and to assert otherwise would amount to a repudiation of much of maritime history." *Union Oil Co. v. Oppen*, 501 F.2d 558, 561 (9th Cir. 1974). Yet Exxon's reprehensible conduct put hundreds of maritime businesses into bankruptcy or in dire financial straits. Exxon, by contrast, has assured the district court that paying even the $5 billion jury verdict "would not have a material impact on the corporation." SJA334sa.

II. The Clean Water Act Does Not Preclude The Common Law Remedy Of Punitive Damages As Relief For A Claim That The Clean Water Act Indisputably Permits.

Exxon argues that the Clean Water Act occupies the field of regulation of oil spills in United States navigable waters and thus displaces punitive damages under federal common law. There is no merit whatsoever to this argument. First, as explained in Respondents' Brief, the argument was not preserved. Exxon contended unsuccessfully below that the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. §§ 1651-1656, preempted the negligence claim. TAPAA, not the Clean Water Act, was "*the* controlling statute with regard to trans-Alaska oil," *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991) (emphasis in original), and the lower courts held that TAPAA did not preempt Respondents' claims.

Even if the Clean Water Act were at issue, the cases on which Exxon relies would not support its sweeping argument that the Clean Water Act occupies the field of oil spill regulation. *See Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981). *Milwaukee* and *Sea Clammers* held that the Clean Water Act forecloses nuisance actions for effluent discharges under federal common law. In both cases, the Court was concerned that a federal common law cause of action for nuisance would interfere with the regulation of detailed effluent standards provided in the Clean Water Act. And, in both cases, the Court held that the underlying actions could, in effect, alter the effluent standards that would otherwise apply, and therefore directly interfere with the statutory scheme.

Here, by contrast, the Respondents' negligence claim poses no threat to the Clean Water Act's regulatory scheme for oil spills. *See* 33 U.S.C. § 1321. Nowhere does the Clean Water Act limit available remedies provided under private tort claims arising from oil spills. In fact, the Clean Water Act expressly *preserves* obligations arising from damage to private property. 33 U.S.C. § 1321(*o*). Exxon gives no good reason why Congress would preserve a cause of action for negligence, but limit the common law remedies available under that cause of action.

The Respondents' position is supported by this Court's Clean Water Act precedents. *See International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). In *Ouellette*, the Court assessed whether the Clean Water Act preempted Vermont common law to the extent the law imposes liability on a New York point source. 479 U.S. at 491. The Court held that the state law action at issue was precluded because a "serious interference" would result "if affected States were allowed to impose separate discharge standards on a single point source." *Id.* at 493. But the Court then expressly limited its holding by specifying that it "preclud[es] only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act." *Id.* at 497. The Court further explained that the Clean Water Act's savings clause specifically preserves other state actions and that aggrieved individuals can bring a nuisance claim pursuant to the law of the source State. *Id.* Thus, the plaintiffs had a claim with the full panoply of remedies.

Likewise, in *Askew*, the Court examined the preclusive effect of the Clean Water Act's oil spill liability provisions to determine if they precluded Florida's state regulation of oil spills. 411 U.S. at 328-37. The Court concluded that the Clean Water Act was directed at recouping federal cleanup costs while leaving room for state action in cleaning up waters of a State and recouping the State cleanup costs. *Id.* at 332. The Court remarked that the state and federal regulations were "harmonious parts of an integrated whole." *Id.* at 331.[12]

Here, there is no threat of "serious interference" with Congressional standards because the Clean Water Act's oil spill provisions do not create any standards that could be altered by a punitive award, and because those provisions do not limit the available remedies for private tort claims. *Cf. Ouellette*, 479 U.S. at 493. These provisions are directed at prohibiting the discharge of oil (as opposed to creating a permit system), and -- should a discharge occur -- collecting federal government clean-up costs and civil penalties. *See* 33 U.S.C. § 1321. Likewise, the Clean Water Act's citizen suit provision does not preclude the punitive damages award under the private tort action here because it allows individuals to sue only for injunctions to enforce the statute. 33 U.S.C. § 1365(a). Respondents' tort action arises from the private harm from an oil spill, while the Clean Water Act addresses the public harm. Along with state regulation, such private actions are "harmonious parts of an integrated whole." *See Askew*, 411 U.S. at 331.

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[12] Pursuant to *Askew*, many States have regulations governing toxic spills. At the time of the passage of the Oil Pollution Act of 1990, 24 states had oil spill liability and compensation laws, and 17 of them had liability without specified limits. Congress has recognized the importance of preserving the overlapping system of oil spill laws by taking care that federal statutes governing oil spills do not preempt state oil liability laws. The Oil Pollution Act of 1990 does not preempt state law and instead explicitly provides that states may impose additional requirements and liabilities. 33 U.S.C. § 2718. And as a Senate report explains, "[m]ore stringent State laws are specifically preserved in both the Clean Water Act (for cleanup of spills of oil) and in the Deepwater Port Act and title III of the Outer Continental Lands Act Amendments of 1978 (for cleanup and damages caused by spills of oil)." S. Rep. No. 101-94, at 6 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 727.

At bottom, Exxon's entire displacement argument proceeds from the same faulty premise: that the very existence of the Clean Water Act's statutory penalties for oil spills means that the Clean Water Act "fully addresse[s]" the public interest in punishing the reckless discharge of oil. Petrs. Br. 38. Contrary to Exxon's argument, penalty schemes under federal statutes do not manifest a legislative intent to leave no room for remedies available under traditional maritime law, nor do they conflict with punitive damages available under maritime law. As this Court has held:

> Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984) (holding that a civil suit for punitive damages "does not conflict" with a federal remedial scheme that imposed civil penalties); *see also Herman & MacLean v. Huddleston,* 459 U.S. 375, 382-83 (1983) (holding that an express civil remedy under the 1933 Securities Act does not preclude a cause of action for fraud under Section 10(b) of the 1934 Act).

The reality is that it is commonplace for the law to impose multiple punishments for the same conduct in order to address different harms. *See People v. McFarland,* 765 P.2d 493, 495 (Cal. 1989) (noting that multiple punishment is permissible when a single act of violence harms multiple victims). For example, recovery of punitive damages for assault and battery is not precluded merely because the defendant has been punished criminally for the same offense. *See Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages,* 98 A.L.R.3d 870 (1980). *See, e.g., Roshak v. Leathers,* 277

Ore. 207 (1977); *Wagner v. Gibbs*, 80 Miss. 53 (1902). Imposing multiple punishments for the same conduct in order to address different harms is all that the Clean Water Act, other federal statutes, and maritime law jointly accomplish here.

State laws directed at oil spills appropriately protect state interests in avoiding harm from oil spills. Even several decades ago, the Court recognized the "damage to state interests already caused by oil spills, the increase in the number of oil spills, and the risk of ever-increasing damage by reason of the size of modern tankers." *Askew*, 411 U.S. at 335. As the Court noted, oil spillage is "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." *Askew*, 411 U.S. at 328-29.

In sum, there is no merit to Exxon's contention that the Clean Water Act precludes the recovery of punitive damages here.

CONCLUSION

The Amici States ask the Court to affirm the judgment of the courts below.

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IN THE
Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF AMICUS CURIAE[1]

Amicus Professor Arthur R. Miller has devoted much of his almost 50-year career to the study of civil procedure in the federal courts. Prior to joining New York University School of Law as a University Professor in 2007, he was the Bruce Bromley Professor of Law at Harvard Law School, where he taught since 1971. He is the author of numerous books and articles on civil procedure, including the multi-volume *Federal Practice and Procedure* (with C.A. Wright, some with E.H. Cooper, M.K. Kane, and R. Marcus; 1968-2008, West Publishing Co.).

Professor Miller files this brief on behalf of himself individually, and not as a member of the NYU School of Law, to identify certain procedural errors by the Ninth Circuit that, if ratified by this Court, threaten to undermine the district courts' authority to manage their dockets in complex actions.

SUMMARY OF ARGUMENT

After the *Exxon Valdez* oil spill in 1989, thousands of plaintiffs filed lawsuits in state and federal court, most of which eventually were consolidated into a massive action in the United States District Court for the District of Alaska. After five years of complex litigation, the parties and issues were winnowed down to essentially two points: the amount of compensatory damages due to various groups of plaintiffs, and the liability of Exxon for, and the amount of, any punitive damages. These claims eventually were tried to a jury, which awarded the plaintiffs $5 billion in punitive damages (eventually reduced to $2.5 billion after several appeals). The Ninth Circuit would later remark that the district court did "a masterful job of managing this very complex case." *In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001).

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or his counsel, made a monetary contribution to its preparation or submission. The parties have filed blanket waivers consenting to the filing of all *amicus* briefs.

Over a year after both the trial and the stipulated deadline for filing any post-trial motions, Exxon sought leave to file a "Motion and Renewed Motion by Defendants Exxon Corporation and Exxon Shipping Company for Judgment on Punitive Damages Claims," in which it argued, for the first time in the six years since the inception of litigation, that punitive damages were unavailable in part because they would go beyond the scope of liability allowed by the Clean Water Act ("CWA"). The district court refused Exxon's request to file the motion.

On appeal, Exxon again advanced its argument that the award of common law punitive damages was inconsistent with the CWA. Over the plaintiffs' objection, the Ninth Circuit held that it would not treat the argument as waived, and instead went on to decide the issue on the merits. The Ninth Circuit held that the CWA does not displace punitive damages.

The Ninth Circuit's decision to reach the argument on the merits, rather than simply affirm the district court's rejection of the motion, was error. To the extent that Exxon's motion properly was categorized as a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, Exxon's failure to raise the argument prior to submission to the jury was a fatal error that courts do not have discretion to overlook. Moreover, even if Exxon's motion was not subject to the mandatory requirements of Rule 50, district courts have broad latitude to manage their dockets, and their supervisory decisions, including scheduling and determinations of waiver, are subject to abuse of discretion review. This discretion particularly is critical when they manage the sort of exceedingly complex action at issue here. The Ninth Circuit, rather than reviewing the district court's refusal to allow Exxon to file its motion for abuse of discretion, instead disregarded the district court's ruling entirely and reached its own de novo determination on waiver. In so doing, the Ninth Circuit usurped the proper role of the trial court and set an inappropriate precedent for future second-guessing of district court case management decisions. This Court should not ratify the Ninth Circuit's error by reaching the issue on the merits, but instead should affirm on the alternative ground that the district court did not abuse its discretion by rejecting Exxon's motion.

PROCEDURAL HISTORY

On March 24, 1989, the *Exxon Valdez* ran aground on Bligh Reef, releasing 11 million gallons of crude oil into Prince William Sound. In the wake of the spill, thousands of named plaintiffs filed lawsuits in both state and federal court, causing then-Chief Judge H. Russel

Holland of the District Court for the District of Alaska to remark that the litigation had "the potential for being the largest and most complex ever filed in this court" that would "call for an extraordinary level of effort and cooperation on the part of all counsel to the end that the rights of all plaintiffs and defendants may be promptly and effectively determined." Pretrial Order No. 1, Clerk's Docket No. ("CD") 130 (Apr. 25, 1989), at 9. In December 1989, the district court and the state court each issued similar pretrial orders establishing the plaintiffs' case management team and the responsibilities of its members, appointing Lead Counsel, members of the Executive Committee, the Discovery Committee, the Law Committee, the Damages Committee, the Government Liaison Committee, and Liaison Counsel. Pretrial Order No. 9, CD 748 (Dec. 22, 1989); Pretrial Order No. 6, Dec. 22, 1989, *Exxon Valdex Oil Spill Litig.*, Case No. 3AN-89-2533 Civil (Consolidated), Superior Court for the State of Alaska, Third Judicial District at Anchorage. The two sets of cases proceeded on coordinated discovery schedules. Discovery Order No. 2, CD 806 (Feb. 9, 1990); Pretrial Order No. 13 (Discovery Plan), Feb. 9, 1990, *Exxon Valdez*, Case No. 3AN-89-2533. Although in response to the disaster, Congress amended the CWA by passing the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761, which created a new scheme of liability for oil spills, that Act did not apply retroactively, and thus could not govern the proceedings in the *Exxon Valdez* cases.

By mid-March of 1991, there were over 150 state court actions with over 3,000 plaintiffs, and over 50 federal court actions with over 1,000 named plaintiffs; by October 1992, after several removals from state court, the federal consolidated cases consisted of over 150 direct actions on behalf of over 4,000 named plaintiffs, and five certified class actions with estimated membership in the tens of thousands.

In the earliest years of litigation, there were repeated removals by the various defendants (which included Exxon as well as the Alyeska Pipeline Service Company and related entities) from state to federal court, and subsequent motions by plaintiffs to have the cases remanded. In light of the increasingly chaotic docket, in April 1992 the district court indicated its intention to keep a tight rein on motion practice by issuing Order No. 74, which stated:

> The parties to this consolidated litigation ... have had ample opportunity to propose a case management plan. For whatever reasons, they were unable to do so. The court has had to undertake this task for the time being. ...
>
> It is neither an efficient use of judicial resources nor a good practice for this court to rule on motions in cases that have pending motions to remand. ...
>
> Motion practice (except as to discovery) in those consolidated cases which are in this court by reason of removal is stayed and any deadlines previously established with respect to motion practice are stayed until further order of the court.

CD 2423 (Apr. 7, 1992), at 4-6.

In September 1992, the district court denied certain plaintiffs' unopposed motion to lift the stay on motion practice.[2] As the court explained:

> The court is unwilling to simply vacate Order No. 74 . . . unless and until a meaningful case management plan is developed for this case. As counsel are well aware, there have been severe difficulties in the development of such a plan, many of which are directly attributable to the defendants' efforts to move the center of gravity of this litigation from state court to federal court while the plaintiffs are attempting to do just the opposite through motions to remand. It would appear to the court useful for the parties and the court to take up those matters which are most likely to affect the siting of cases for the purposes of the continuation of this litigation. To that end, the stay imposed by Order No. 74 is lifted with respect to motions to dismiss by any plaintiff in this consolidated litigation.

Order No. 98, CD 2871 (Sept. 28, 1992), at 2.

In March and April 1993, the court commented on proposed case management plans and defendants' request to lift the stay on dispositive motion practice. In Order No. 138, the court stated:

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[2] In its order, the court observed that the motion did not specify which plaintiffs were parties to the motion, and admonished counsel to exercise "greater attention to this kind of detail which, if unattended, causes delay and uncertainty for everyone." Order No. 98, CD 2871 (Sept. 28, 1992), at 1 n.1.

> The court's largest concern is over the extensive motion practice contemplated by the proposed case management order. . . . The court is extremely concerned about the filing of fact-oriented motions for summary judgment. For this reason, the court will not lift the stay on motion practice. To keep this case manageable, the court needs to maintain control over the motions filed. The court will conduct an initial screening of any motion filed to determine if the motion is fact-based . . .
>
> Another concern of the court's is regarding motions based upon the doctrine enunciated in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). . . . [in light of a pending interlocutory appeal], this court is inclined to not render any rulings on the subject until the Ninth Circuit does so.

CD 3395 (Mar. 30, 1993), at 2-3. In Order No. 141, the court ordered that the proposed case management plan be modified to include a provision that legal, issue-oriented dispositive motions would proceed only in accord with a specified schedule, and that parties seeking to file additional such motions seek relief from the stay by submitting "a memorandum explaining in summary fashion the appropriateness and timeliness of the motion – that is, how it fits into the orderly development of the case for trial." CD 3460 (Apr. 21, 1993), at 5. The court explained the necessity for such a provision:

> By so doing, the court does not mean to stifle legitimate motion practice which will advance the ultimate disposition of this case. The court does, however, feel the need to exercise considerable control over the flow of business in order that it may be timely managed.

Id. at 4. Ultimately, in May 1993, the district court approved a case management plan that, among other things, stayed issue-oriented dispositive motion practice except as to seven specific summary judgment motions scheduled to be filed throughout 1993. Order No. 143, CD 3522 (May 10, 1993). Prior to the issuance of the plan, the district court already had issued three orders addressing various motions for partial summary judgment, judgment on the pleadings, and judgment under Rule 54(b). *See* Order No. 38, CD 1178 (Feb. 8, 1991); Order No. 121, CD 3194 (Dec. 23, 1992); Order No. 139, CD 3421 (Apr. 8, 1993). Ultimately, the defendants would file over 15 fact-based and legal-oriented motions for summary judgment in 1993 alone.

The first summary judgment motion contemplated by the case management plan was the defendants' motion for "Partial Summary Judgment on Claims for Punitive Damages Based on TAPAA Displacement of General Maritime Law." JA60. The motion argued that the federal Trans-Alaska Pipeline Authorization Act ("TAPAA") created a "comprehensive remedial scheme" for oil spills that could not be "supplemented" with additional remedies under maritime law. JA64.

In support of this position, the defendants pointed out that the "narrow scope" of the TAPAA savings clause was "confirmed by comparison with the broader savings clause" of the Federal Water Pollution Control Act (which includes the CWA). JA87 n.9. The defendants explained that the FWPCA savings clause, "[i]n marked contrast to its TAPAA counterpart," preserved state authority to impose "liabilities." *Id.* That the TAPAA savings clause had not done so, the defendants contended, provided further support for its argument that the statute foreclosed claims for punitive damages. *Id.*

Simultaneous with their motion for partial summary judgment based on TAPAA displacement, the defendants also filed a motion for partial summary judgment on the ground that previous settlements had a res judicata effect on plaintiffs' punitive damages claims. The district court denied both motions on October 21, 1993. Order No. 158, CD 3982 (Oct. 21, 1993); Order No. 159, CD 3983 (Oct. 21, 1993).

During this period, as the parties continued to litigate various issues, several interlocutory appeals were filed with the Ninth Circuit, concerning such matters as the propriety of the removals from state court and the availability of various types of damages. *See Exxon*, 270 F.3d at 1224 n.12. In early November 1993, after the Alyeska defendants settled with the plaintiffs, Exxon agreed to stipulate to its liability for negligence and that its negligence proximately had caused the spill. As a practical matter, then, "Exxon's liability for compensatory damages was undisputed, but the amount of plaintiffs' losses was controverted. Exxon's liability for punitive damages was vigorously litigated." Order No. 365, CD 7837 (Jan. 29, 2004).

With the disputed issues so narrowed, the parties filed their first proposed trial plan, which provided for a four-phase trial structure predicated on the court's earlier conclusion that punitive damages were legally available. Phase I would be devoted to establishing the negligence of individual defendants, and the "reckless indifference" of Exxon and Defendant Joseph Hazelwood. If "willful misconduct" was established in Phase I, then liability for, and the amount of, punitive damages would be established in Phase III. Phases II and IV would address the amount of damages proximately caused by the spill for certain groups of plaintiffs. Proposed Joint Trial Plan, CD 4032 (Nov. 3, 1993), at 4-7.

In the trial plan, Exxon also identified 14 "Issues of Law to Be Resolved," of which seven concerned the propriety of any punitive damages award – including the issue of TAPAA displacement, res judicata, and Exxon's contention that liability for punitive damages would have to be established by clear and convincing evidence. The trial plan did not include any contention that punitive damages were precluded by the federal CWA. *Id.* at 40-43. The day after the plan was filed, Exxon moved for an order requiring that the elements of a punitive damages claim be proved by clear and convincing evidence; the district court eventually denied the motion in Order No. 171 on January 13, 1994. Motion in Limine, CD 4035 (Nov. 4, 1993); Order No. 171, CD 4405 (Jan. 13, 1994).

Even though the trial plan was revised on several occasions, the basic four-phase structure remained, as did Exxon's various challenges to any punitive damage awards. The Third Amended Revised Trial Plan, which eventually became the final pretrial order, ultimately was filed on March 30, 1994, and similarly did not list displacement by the CWA as a legal issue in contention. JA195-97. The plan was approved by the district court on June 22, 1994. JA1410.

The trials in Phases I, II(a) (concerning damages to fishermen), and III ran approximately four months from May to September 1994; the parties reached a settlement on Phase II(b) (concerning Native American subsistence damages) on July 25, 1994. Prior to the trials, the defendants filed more motions for summary judgment regarding the various phases, and, after the close of evidence in each phase, the defendants made oral Rule 50(a) motions. Reporter's Tr., CD 5220 (June 3, 1994), at 3938-49; Reporter's Tr., CD 5224 (July 11, 1994), at 6821-32; Reporter's Tr., CD 5770 (Aug. 29, 1994), at 7547-48.

After the jury returned a verdict of $5 billion in punitive damages on September 16, 1994, the parties entered a stipulation requiring that post-trial motions be filed by September 30, 1994. JA 1410. On that date, Exxon filed 11 motions for new trials and for judgment as a matter of law involving all three phases, objecting to, among other things, the jury instructions in Phase I, the validity of a blood test used in Phases I and III, the weight of the evidence in Phases I and III, and the amount of the punitive damages award. Defendant Hazelwood filed an additional 11 motions in support of a new trial and judgment as a matter of law for all three phases. In none of these motions did either Exxon or Hazelwood contend that the CWA displaced any of plaintiffs' remedies. The district court denied these motions on January 27, 1995. Order Nos. 264-75, CD 6231-42 (Jan. 27, 1995).

On October 23, 1995 – nearly 13 months after the stipulated deadline for post-trial motions had passed, and more than six years since the inception of litigation – Exxon moved to lift the stay on motion practice to allow it to file what it called a "Motion and Renewed Motion by Defendants Exxon Corporation and Exxon Shipping Company for Judgment on Punitive Damages Claims." BIO App. 30a Exxon contended that the motion was brought pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, but also included a provision that it was made, "to the extent they may be applicable, pursuant to Rules 50(b), 56(b), 56(d), 59(a), and 59(e)." *Id.* at 31a.[3] The request to lift the stay stated that the grounds for the motion were recent decisions in the Ninth and Fifth Circuits (identified in the accompanying brief lodged with the court as *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995) (which had been decided four months earlier), and *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc)). Bio App. 31a; Memo in Support, CD 6496 (Oct. 23, 1995), at 1. In its brief, Exxon conceded that neither *Glynn* nor *Guevara* actually addressed the question of punitive damages in the context of maritime oil spills.[4] Memo in Support, at 1-2. On November 2, 1995, the district court denied Exxon's request to lift the stay to file its motion. BIO App. 35a.

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[3] Rule 58 has now been reorganized and reworded.

[4] In fact, neither *Glynn* nor *Guevara* discussed the CWA or its relationship to punitive damages at all; both cases concerned
(Cont'd)

In January 1996, the parties reached a settlement on the compensatory damages issues slated for resolution in Phase IV. After the entry of final judgment, Exxon and some plaintiffs appealed to the Ninth Circuit.

On appeal, Exxon argued that the CWA displaced any common law claims for punitive damages. The Ninth Circuit, rejecting plaintiffs' contention that the argument had been waived, stated:

> "We conclude that the issue should not be treated as waived. Exxon clearly and consistently argued statutory preemption as one of its theories for why punitive damages were barred as a matter of law, and argued based on the CWA prior to entry of judgment. Because the issue is massive in its significance to the parties and is purely one of law, which requires no further development in district court, it would be inappropriate to treat it as waived in the ambiguous circumstances of this case."

Exxon, 270 F.3d at 1229. After the Ninth Circuit concluded that the CWA did not displace punitive damages claims, this Court granted certiorari.

(Cont'd)

punitive damages for failure to pay "maintenance and cure," a cause of action limited to seamen's relationships with their employers. *See Exxon*, 270 F.3d at 1226-1227.

ARGUMENT

THIS COURT SHOULD NOT PASS UPON THE ISSUE OF CWA DISPLACEMENT OF PUNITIVE DAMAGES

The Supreme Court ordinarily will review only issues that were raised properly before the court of appeals, or passed upon by the appellate court "in an appropriate exercise of its appellate jurisdiction." *United States v. Williams*, 504 U.S. 36, 42-43 (1992) (citations omitted). In this case, the Ninth Circuit abused its discretion and exceeded its authority under the Federal Rules by disregarding the district court's refusal to allow Exxon to file its October 1995 challenge to the punitive damage award. This Court should not ratify the Ninth Circuit's error.

A. The Ninth Circuit Erred in Concluding that Exxon Had Preserved the Issue for Appeal Because the Requirements of Rule 50 Cannot Be Waived

Though Exxon styled its motion as brought pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, neither of these rules is, in and of itself, a vehicle for seeking judgment as a matter of law. Rule 49(a) provides only that juries may be requested to return "special verdicts" with separate findings on each issue of fact, *see* Fed. R. Civ. P. 49(a); Rule 58(2), at the time of Exxon's motion, provided only that a court "must promptly approve the form of the judgment" returned by a jury, *Blazak v. Ricketts*, 971 F.2d 1408, 1409 n.2 (9th Cir. 1992). Neither rule addresses permissible motion practice; to the contrary, Rule 49 was created merely to provide alternative procedures to the traditional general verdict, *see* 9B Wright & Miller, *Federal Practice & Procedure*: Civil 3d, § 2501, at 88-89, and Rule 58 was added to eliminate uncertainty as to the precise date of judgment for the purpose of allowing proper calculation of time, *see* 11 Wright & Miller, *Federal Practice & Procedure*: Civil 2d, § 2781, at 9. In fact, despite Exxon's invocation of Rules 49 and 58, the only Federal Rule that would permit the relief Exxon sought – judgment as a matter of law *after* a jury verdict – is Federal Rule of Civil Procedure 50(b).[5] Therefore, Exxon's motion must be evaluated under Rule 50's strictures.[6]

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[5] The only other potentially applicable rule, Federal Rule of Civil Procedure 59(e), permits a court to "alter or amend a judgment." That Rule, however, "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 Wright & Miller, *supra*, § 2810.1, at 127-28. (Federal Rule of Civil Procedure 56, addressing summary judgment, contains no time-limit but is generally conceived as a pretrial motion. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 251 (1986); it could hardly be otherwise, else it would render Rule 50 redundant.)

[6] To be sure, in the ordinary case, "a party may assert on appeal any question that has been properly raised in the trial court," 11 Wright & Miller, *supra*, § 2818, at 186; thus, as courts have observed, various errors that do not implicate the sufficiency of evidence, such as the improper admission of evidence or collateral estoppel, may be asserted on appeal even in the absence of a proper Rule 50 motion. *See, e.g.*, *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2007); *Ruyle v. Cont. Co.*, 44 F.3d 837, 841 (10th Cir. 1994). However, in these cases,

(Cont'd)

Federal Rule of Civil Procedure 50(a) provides that a litigant may move for judgment as a matter of law at any time before a case is submitted to a jury. Rule 50 further states that

> "If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment . . . the movant may file a renewed motion for judgment as a matter of law."

Fed. R. Civ. P. 50(b). Thus, according to the text of the rule, post-verdict motions for judgment as a matter of law are permissible only if they renew motions on similar grounds made prior to jury submission. *See* 9B Wright & Miller, *supra*, § 2537, at 603-04. This requirement cannot be waived, either by a district court or at the appellate level. *See Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 & 404 (2006). For this reason alone, the Ninth Circuit was without power to consider Exxon's argument, and its decision should be affirmed on the alternative ground that the district court did not abuse its discretion in rejecting it.

(Cont'd)

proper objections were raised prior to a jury verdict, using various other procedural avenues. Here, Exxon raised no objection; thus its motion can be evaluated only as a (failed) Rule 50 motion.

B. The Ninth Circuit Improperly Substituted its Judgment for that of the District Court

Even if Exxon's motion was not subject to the mandatory constraints of Rule 50, the Ninth Circuit still abused its discretion by holding that it would not "treat" the argument as waived.[7] This is because the district court already made that determination when it refused to accept Exxon's motion; the Ninth Circuit erred by ignoring the district court's ruling.

Although "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), there are limits to an appellate court's discretion to consider issues not passed upon below. *See id.* One important limitation is the principle that a district court's determination that an argument has been waived is reviewed for abuse of discretion. *See, e.g., Rates Tech., Inc. v. Nortel Networks Corp.*, 399 F.3d 1302, 1307 (Fed. Cir. 2005); *Rogers v. Samedan Oil Corp.*, 308 F.3d 477, 483 (5th Cir. 2002); *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1022 (9th Cir. 2000) (citing *Tell v. Trs. of Dartmouth Coll.*, 145 F.3d 417, 419-20 (1st Cir. 1998)).

This review of waiver determinations under an abuse-of-discretion standard arises from the "bedrock" principle of procedure that "trial judges have an abiding responsibility for the efficient management of the cases on their dockets." *Torres v. Puerto Rico*, 485 F.3d 5, 10 (1st Cir. 2007). Courts have an inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," a process that "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *see Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988) (issues that concern the "supervision of litigation" fall within the district court's discretion).

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[7] The issues involved in this case actually concern forfeiture, rather than waiver; however, because "jurists often use the words interchangeably," *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004), this brief will attempt to avoid confusion by employing the term "waiver."

To that end, Federal Rule of Civil Procedure 16(b) requires that district courts issue a scheduling order "as soon as practicable." Fed. R. Civ. P. 16(b). The scheduling order "must limit the time to . . . file motions." *Id.* In creating the schedule, trial judges have "significant discretionary authority" to set filing deadlines in accordance with the Federal Rules of Civil Procedure. *Perez-Cordero v. Wal-Mart P.R.*, 440 F.3d 531, 533 (1st Cir. 2006); *see also Smith v. Insley's, Inc.*, 499 F.3d 875, 879 (8th Cir. 2007); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997).

A necessary corollary to the authority to set schedules is the authority to enforce them. *See Perez-Cordero*, 440 F.3d at 533. "Courts set such schedules to permit the court and the parties to deal with cases in a thorough and orderly manner, and they must be allowed to enforce them, unless there are good reasons not to." *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005). As the First Circuit put it, "[A] district judge must often be firm in managing crowded dockets and demanding adherence to announced deadlines. If he or she sets a reasonable due date, parties should not be allowed casually to flout it or painlessly to escape the foreseeable consequences of noncompliance." *Mendez v. Banco Popular de P.R.*, 900 F.2d 4, 7 (1st Cir. 1990). On this issue, as well, a district court's refusal to accept a tardy filing is reviewed for abuse of discretion. *See Torres*, 485 F.3d at 9-10; *Reasonover v. St. Louis County*, 447 F.3d 569, 579 (8th Cir. 2006); *Wong*, 410 F.3d at 1062; *Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 208-09 (5th Cir. 1992).

The district court's discretion to reject new legal or factual contentions is perhaps at its zenith when a party raises the issue after the adoption of the final pretrial order. In that situation, specifically, a district court has discretion to reject new arguments not included in the order. *See, e.g.*, *Trinity Carton Co. v. Falstaff Brewing Corp*, 767 F.2d 184, 192 n.13 (5th Cir. 1985) (district court has discretion to reject amendments to the final pretrial order except when "manifest injustice" otherwise would result),[8] *see also Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 900 (9th Cir. 2000); *Sosa v. Airprint Sys.*, 133 F.3d 1417, 1418 (11th Cir. 1998); *Daniels v. Bd. of Educ. of Ravenna City Sch. Dist.*, 805 F.2d 203, 210 (6th Cir. 1986).

In this case, the Ninth Circuit found that the district court had done "a masterful job of managing this very complex case." *Exxon*, 270 F.3d at 1225. Over the course of several years, the district court worked diligently with the parties to manage a sprawling litigation, to resolve dispositive legal issues as quickly as possible, and to narrow the scope of the issues for trial. As the district court emphasized on several occasions, it believed that to accomplish this feat it was obliged to "exercise considerable control over the flow of business in order that it may be timely managed" by setting specific schedules for dispositive legal motions, from which either party could seek relief. Order 141, *supra*. Given this history, the district court seems to have acted well within its discretion in refusing to accept a motion proposing a new legal argument – one that was fully available to Exxon at least as far back as 1993 (as evidenced by the fact that Exxon maintained its argument regarding TAPAA displacement consistently throughout the case) – offered for the first time 13 months after the jury verdict. Indeed, no one – not Exxon, and not the Ninth Circuit – ever has contended that the trial court abused its discretion by rejecting the filing, and it is difficult to see how such an argument could be made.

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[8] Presumably, if "manifest injustice" resulted from the refusal to allow an amendment, the district court would necessarily have exceeded its discretion.

To be sure, appellate courts, as well as district courts, have discretion to consider arguments that were not raised below. *See, e.g., Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005). However, this is not a situation in which a matter was raised for the first time on appeal; rather, this is a case in which the argument was presented to – and rejected by – the district court. The Ninth Circuit was required to consider Exxon's argument in that context. *Cf. Torres*, 485 F.3d at 9 (disposition of judgment on the pleadings ordinarily is reviewed de novo; when motion is disposed of as a matter of case management, the decision is reviewed for abuse of discretion).

C. By Disregarding the District Court's Refusal to Allow the Filing, the Ninth Circuit Undermined Trial Courts' Authority to Manage Complex Litigation

District courts explicitly are encouraged to oversee complex cases actively by managing them closely, setting reasonable deadlines, and by resolving legal issues early so as to prevent waste of judicial resources. *See* 6A Wright & Miller, *Federal Practice & Procedure*: Civil 2d, § 1530, at 302-04; *Manual for Complex Litigation (Fourth)* § 10.13 (2004); *Manual for Complex Litigation* § 11.66. It was precisely this concern that large, protracted cases were clogging judicial dockets that led the Coordinating Committee for Multiple Litigation of the United States District Courts to develop the Manual for Complex Litigation in the late 1960s. *See* 6A Wright & Miller, *supra*, § 1530, at 304. The Manual explains that effective management of a complex action requires that:

> [o]nce established . . . schedules are met, and, when necessary, appropriate sanctions are imposed . . . for derelictions and dilatory tactics . . . The judge's role is crucial in developing and monitoring an effective plan for the orderly conduct of pretrial and trial proceedings . . . [E]ach plan must include an appropriate schedule for bringing the case to resolution.

Manual for Complex Litigation § 10.13. This is exactly how the district court proceeded; it worked with the parties to develop a case management plan, the plan provided ample opportunity for the parties to raise their legal arguments, and the court refused to accept a filing that was grossly out of time. The district court's authority to manage its docket would be meaningless if appellate courts were free to examine the merits of rejected arguments without regard for the district court's own case management rulings.

Moreover, this was a particularly poor case to overlook Exxon's tardiness. Ordinarily, appellate courts will decide issues not raised below only in limited circumstances, such as when the law is clear, when the issue is of exceptional importance, or when manifest injustice otherwise would result. *See, e.g.*, *Singleton*, 428 U.S. at 121; *Bagot*, 398 F.3d at 256; *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990). In this case, the issue was one of first impression: no federal court before (or since) had occasion to decide the issue, and the Ninth Circuit believed that the issue was "close." *See Exxon*, 270 F.3d at 1230. Moreover, the CWA no longer governs oil spills, and did not even do so at the time of the Ninth Circuit's ruling. The issue thus had little relevance in 2001, and the lack of further legal development on the subject in the intervening years demonstrates it has even less importance today. Finally, Exxon was a well-financed litigant that vigorously defended its interests, and the trial was structured and predicated, to a large degree, on the assumption that punitive damages were legally available under maritime law. Exxon's unexplained failure to raise its argument at an earlier date potentially added years to the litigation and consumed immeasurable judicial resources. Under these circumstances, the Ninth Circuit arguably would have abused its discretion even if the district court had not itself previously rejected Exxon's filing; in the face of the district court's own refusal to allow the motion, the Ninth Circuit's failure even to acknowledge the trial court's exercise of its discretion manifestly was improper.

D. This Court Should Not Ratify the Ninth Circuit's Abuse of Discretion

If this Court reaches the issue of CWA displacement of maritime law, it implicitly would endorse the Ninth Circuit's usurpation of the district court's proper role in managing the litigation. The references to irrelevant Federal Rules by Exxon in its October 1995 motion may have obscured the desirability of enforcing the legitimate management controls of the district court and the desirability of honoring trial court discretion in highly complex cases. That should not be validated by the Court's effectively giving credence to such tactics (or appellate courts' riding roughshod over these policies) by compounding the Ninth Circuit's error. Given the enormous challenges of this litigation and the broad discretion of a district court to manage its docket, this Court should affirm the Ninth Circuit's decision on the alternative ground that the district court did not abuse its discretion in rejecting Exxon's untimely filing.

CONCLUSION

This Court should hold that the district court acted within its discretion in rejecting Exxon's October 1995 motion, and that therefore Exxon's argument will not be considered.

Respectfully submitted,

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Supreme Court of the United States

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EXXON SHIPPING COMPANY, et al.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, ALASKA FEDERATION OF NATIVES, ALASKA INTER-TRIBAL COUNCIL, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, RURAL ALASKA COMMUNITY ACTION PROGRAM, NORTH SLOPE BOROUGH, INDIGENOUS PEOPLES COUNCIL FOR MARINE MAMMALS, AND ADDITIONAL ALASKA NATIVE ORGANIZATIONS, CORPORATIONS AND TRIBES IN SUPPORT OF RESPONDENTS

(Full listing of *Amici Curiae* in Appendix)

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ALASKA STATUTES § 16.05.940(33) 8

OTHER AUTHORITIES

72 Fed. Reg. 13648, 13651-13652 (March 22, 2007) 7

Berger, T., *Village Journey*, Hill and Wang, New York (1985) 7

Cohen's Handbook of Federal Indian Law, LEXIS-NEXIS Matthew Bender, NJ (2005) 7

Davidson, A., *In the Wake of the Exxon Valdez*, Serria Club Books, San Francisco (1990) 13, 31, 32

TABLE OF AUTHORITIES – Continued

Page

Exxon Valdez Oil Spill Trustee Council, Exxon Valdez Exxon Restoration Plan – Update on Injured Resources 2006, November 2006 http://www.evostc.state.ak.us/Policies/restplan.htm (2008) 20, 24, 25

Fall, James A., *Exxon Valdez Oil Spill Restoration Project Final Report – Update of the Status of Subsistence Uses in Exxon Valdez Oil Spill Communities*, Alaska Department of Fish and Game – Division of Subsistence" (August 2006) ....*passim*

Fall, James, Affidavit, Paragraph 17, Plaintiff's Opposition to Motion for Summary Judgment on Economic Damages May 9, 1994, Docket #A89-095-CV (HRH) 9

Gill, D.A.P., and Picou, J.S., *The Day the Water Died; Cultural Impacts of the Exxon Valdez Oil Spill, in the Exxon Valdez Disaster; Readings on a Modern Social Problem* (J. Steven Picou, ed., 1997) 16, 17

Impact Assessment, Inc., *Exxon Valdez Oil Spill, Clean-up and Litigation: a Collection of Social-Impacts Information and Analysis, Final Report Volume II: Final Analysis of Social Factor by Social Factor Basis*, U.S. Department of the Interior Minerals Management Service, Environmental Studies Section, Anchorage, Alaska (August 2001).............8, 9, 26, 29, 30

Page

Impact Assessment, Inc., *Exxon Valdez Oil Spill, Clean-up and Litigation: a Collection of Social-Impacts Information and Analysis, Final Report Volume I: Final Analysis of Social Factor by Social Factor Basis*, U.S. Department of the Interior Minerals Management Service, Environmental Studies Section, Anchorage, Alaska (August 2001) 17, 28

U.S. Census Bureau – American Indian and Alaska Native Area, and Alaska Native Regional Corporation; GCT-P16; Alaska Native Village Statistical Area, Total Population, Data Set: Census 2000 Summary File 4 (SF 4) Sample Data 3

Palinkas, L.A., *Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill*, Am. J. Psychiatry 1993; 150:1517-1523 28

Smithsonian, *5 Handbook of North American Indians*, Sturtevand, ed., Smithsonian Institution (1984) 5, 6, 8

Thorne, R.E., & Thomas, G., *Herring and the "Exxon Valdez" Oil Spill: an Investigation into Historical Data Conflicts*, ICES Journal of Marine Science, 65:44-50 (2008) 24, 25

Webster's Third New International Dictionary, Unabridged, Merriam-Webster, 2002. http://unabridged.merriam-webster.com (24 Jan. 2008) 7

TABLE OF AUTHORITIES – Continued

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Wolfe, R., and Ellanna, L., *Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities*, ADF&G Division of Subsistence (March 1983) 10

INTEREST OF *AMICI*

Amici National Congress of American Indians, Alaska Federation of Natives, Alaska Inter-Tribal Council, Rural Alaska Community Action Program, North Slope Borough, Association of Village Council Presidents, Indigenous Peoples Council for Marine Mammals, and several other Alaska Native Tribes, Corporations and Marine Mammal Commissions submit this brief to describe the centuries-old subsistence way of life that prevails across rural Alaska and to highlight the enormous impact the *Exxon Valdez* disaster had on that way of life. *Amici* support the punitive damages recovery below in light of the deep but uncompensated injury to the subsistence way of life suffered by thousands of Alaska Native people. The *Amici* are described in greater detail in the attached Appendix.[1]

◆

STATEMENT OF THE CASE

This Court has held that in maritime settings a party must suffer direct physical harm in order to recover for economic losses arising out of a maritime tort. *Robins Dry Dock & Repair v. Flint*, 275 U.S. 303

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

(1927). The appellate courts have recognized a limited exception to the *Robins Dry Dock* requirements for commercial fisherman who may recover economic damages without a showing of actual physical harm. *Union Oil v. Oppen*, 501 F.2d 558 (9th Cir. 1974). The lower courts concluded in this case that the Alaska Native Class fit within the *Oppen* exception because:

> [W]here commercial fisherman survive by catching an aquatic resource and selling it, native subsistence harvesters survive by catching an aquatic resource and eating it.

Order 222 J. A. at 7. *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997).

Under the *Oppen* exception, the Alaska Native Class was able to obtain compensation only for the commodity value of the fish and game that its members would have taken absent the spill. The class members did not recover any compensation for the dire consequences of the oil spill on their cultures, communities and unique way of life. This brief describes those consequences in detail.

◆

SUMMARY OF ARGUMENT

Some 69,000 Alaska Natives live in more than 200 villages along the remote and sinuous coasts of

Alaska's oceans and rivers.[2] They are the largest intact population of traditional, aboriginal cultures in the United States and perhaps the world. Despite modern changes, they live largely off the sea and the land in still-unique cultures whose world view attributes an animistic spirit to all life. Their communities are literally knit together by a reverence for the lives of the animals that sustain them and the reciprocal responsibilities, borne out of time immemorial, to share the lives of animals taken or harvested with their extended families and others in the village. These villages are federally recognized tribes whose subsistence rights are supported by long-standing federal policies in Alaska. Those subsistence rights remain as important today to the village members as the air they breathe.

Petitioners repeatedly assert that the punitive damages class members were fully compensated for the injuries they suffered as a result of the wholly avoidable wreck of the *Exxon Valdez*. Pet. Br. at 17, 41, 47 *et seq.* This is a remarkably shallow, and callous, claim. Based on its intimate familiarity with the facts, the district court found that: "The huge oil spill obviously caused harm beyond the purely economic . . . [including] a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress." Pet.

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[2] U.S. Census Bureau – American Indian and Alaska Native Area, and Alaska Native Regional Corporation; GCT-P16; Alaska Native Village Statistical Area, Total Population, Data Set: Census 2000 Summary File 4 (SF 4) Sample Data.

App. 150a-151a, *In re Exxon Valdez*, 296 F.Supp.2d 1071 at 1094 (D. Alaska 2004). The Alaska Native Class has not been compensated for any of that loss.

This brief describes the "non-economic" (but devastating) injuries suffered by Alaska's Native subsistence communities as a result of the *Exxon Valdez* oil spill. Properly acknowledged, those injuries underscore the egregiousness of Exxon's actions and the corresponding appropriateness of the punitive damages award in this case. They further underscore the need for deterrence embodied in the award. Another marine disaster like the *Exxon Valdez* anywhere on Alaska's vast coast will cause further devastating, non-compensable damage to Alaska's unique Native subsistence communities. No award can fully reflect the searing nature of the harm that Petitioners have inflicted on the Alaska Natives' subsistence way of life, but this award is certainly an appropriate step in that direction.

◆

ARGUMENT

I. THE *EXXON VALDEZ* OIL SPILL WAS A TECHNOLOGICAL DISASTER THAT WREAKED INCALCULABLE DAMAGE AND LOSS ON THE ALUTIIQ SUBSISTENCE COMMUNITIES IN ITS PATH.

A. The Alutiiq Subsistence Communities

Anthropologists document some 58 historic, Alutiiq (formally called "Pacific Eskimo") villages that at the end of the 19th century clung to Kodiak Island

and Alaska's North Pacific Coast.[3] By 1980, following an all-too-familiar history of disease and exploitation, 15 occupied villages remained, stretching from Tatitlek located in Prince William Sound just outside the Port of Valdez to Ivanof Bay, some 600 miles to the southwest on the Alaska Peninsula.[4] The Alutiiq are the "southernmost village Eskimo" and are located in four distinct geographic areas, running northeast to southwest from Prince William Sound (Tatitlek and Chenega Bay), to the southern Kenai Peninsula (Port Graham and English Bay),[5] to the Kodiak Island archipelago, known today as the "Koniag" region (Ouzinkie, Port Lions, Larsen Bay, Old Harbor, Karluk, Akhiok) and finally the western Alaska Peninsula villages (Chignik, Chignik Lagoon, Chignik Lake, Perryville and Ivanof Bay).[6] All 15 of

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[3] Smithsonian, *5 Handbook of North American Indians*, Sturtevand, ed., Smithsonian Institution (1984) at 198-199.

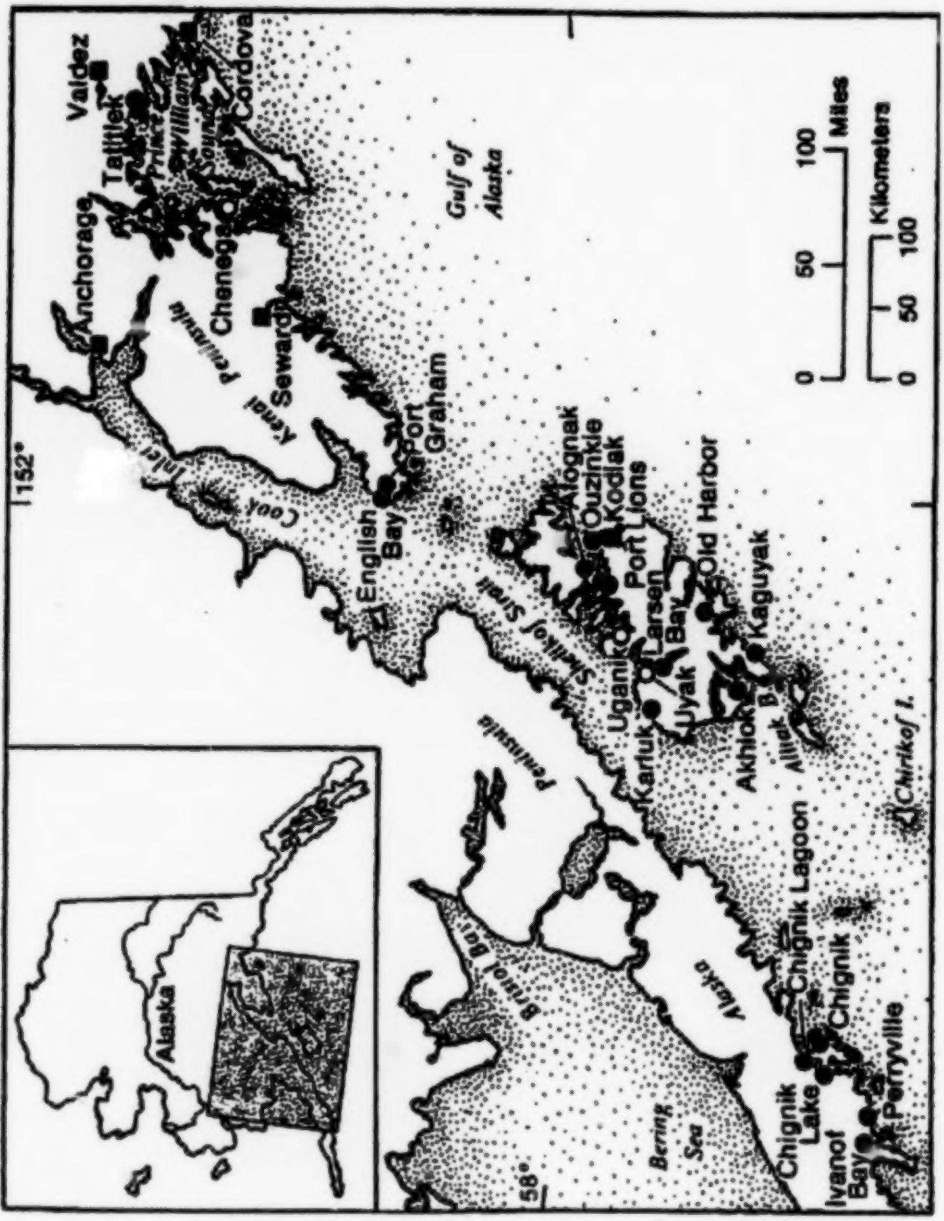
[4] *Id. See* Map at Figure 1 enlarged and adapted from *5 Handbook of North American Indians* at 198.

[5] *Id.* English Bay is now called by its traditional Alutiiq name "Nanwalek." Chenega is shown at Figure 1 in its old location and is now located a little further south at Chenega Bay. The 1964, Good Friday earthquake and Tsunami destroyed the original Chenega village site. The village was reconstructed at Chenga Bay in 1984, just five years prior to the Good Friday grounding of the *Exxon Valdez*.

[6] Natives from all of the villages may also be found in the larger south central Alaska towns of Anchorage, Valdez, Cordova, Seward and Kodiak City. *5 Handbook of North American Indians* at 199.

Fig. 1. Pacific Eskimo villages.

Source: 5 Handbook on North American Indians at 198 (1984).


Valdez
Tatitlek
Prince William Sound
Cordova
Anchorage
Chenega
Kenai Peninsula
Seward
Gulf of Alaska
152°
Cook Inlet
Port Graham
English Bay
Afognak
Ouzinkie
Kodiak
Port Lions
Old Harbor
Larsen Bay
Kaguyak
Shelikof Strait
Uganik
Uyak
Karluk
Akhiok
Alitak B.
Chirikof I.
Chignik Lagoon
Chignik
Chignik
Chignik Lake
Ivanof Bay
Perryville
Alaska Peninsula
Bristol Bay
Bering Sea
58°
Alaska
0
50
100
Miles
0
50
100
Kilometers

these villages are governed in some respect by tribal governments duly recognized by the United States Department of the Interior.[7]

B. The Scope and Significance of Alutiiq Subsistence

Alutiiq communities and culture are centered on the cluster of activities collectively called "subsistence." To many people, "subsistence" connotes the bare eking out of an existence.[8] To the Alutiiq and all other Alaska Natives living off the water and land, "subsistence" is an entire way of life, a rich way of living. It defines not only an economy, but also the identity of the people in the community and their relationships to one another.[9]

The Alaska Department of Fish and Game ("ADF&G") has a "Division of Subsistence" created by statute in 1978.[10] Its broad mandate is to compile existing data and to gather information on all aspects of the role of subsistence in the life of the state's residents. Both Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA") and Alaska law define subsistence in substantially the same terms as:

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[7] *See* 72 Fed. Reg. 13648, 13651-13652 (March 22, 2007), listing tribes as required under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. §§ 479a, 479a-1.

[8] "Subsist" 1 a: to have existence : be or remain alive. 2 *archaic*: to exist in a particular way or condition or have a particular form. 3: to be maintained with food and clothing : have the necessities of life. *Webster's Third New International Dictionary, Unabridged*, Merriam-Webster (2002). http://unabridged.merriam-webster.com (January 24, 2008).

[9] *See generally* T. Berger, *Village Journey*, Hill and Wang, New York (1985) at 48-72 ("*Subsistence More Then Survival, A Way of Life*"). See also *Cohen's Handbook of Federal Indian Law*, LEXIS-NEXIS Matthew Bender, NJ (2005), at § 4.07[3][c] "*Native Hunting and Fishing Rights.*"

> the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicrafts articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113; ALASKA STATUTES § 16.05.940(33).

Beyond these statutory definitions lie the realities of subsistence for these 15 Alutiiq villages. The first is their isolation. They are not connected by roads to cities and grocery stores and of necessity depend on the sea and land for their food.[11] Prior to the wreck of the *Exxon Valdez,* it was well established that virtually all of the residents of the 15 Native communities affected by the spill participated in extensive subsistence activities.[12]

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[10] ALASKA STATUTES 16.05.094.

[11] *5 Handbook of North American Indians* at 198.

[12] Impact Assessment, Inc., *Exxon Valdez Oil Spill, Cleanup and Litigation: a Collection of Social-Impacts Information*

(Continued on following page)

Unlike sport hunting and fishing familiar to mainstream Americans, subsistence is not an individual activity. Nor is it a question of "fair chase" or "fun," or even of providing food to just one's own family. Rather "sharing" is the most common word used by Natives to describe their participation in subsistence. Hence, it is typical of the Native subsistence community that:

> Subsistence harvests in these communities are characterized by intricate and extensive kinship-based methods of production, distribution and sharing. While the vast majority of households participate in subsistence harvest, the majority of the harvest is accomplished by a relatively small group of very productive households. Fish and game products are distributed and exchanged by these "super households" community-wide, supplying subsistence food to the elderly and others unable to provide for themselves.[13]

The word "sharing" is not really adequate to the task of describing what this means. Dr. Robert Wolfe,

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and Analysis, Final Report Volume II: Final Analysis of Social Factor by Social Factor Basis, U.S. Department of the Interior Minerals Management Service, Environmental Studies Section, Anchorage, Alaska (August 2001) at Section 4.3. (Hereinafter "MMS, Vol. II").

[13] James Fall Affidavit, Paragraph 19, Plaintiff's Opposition to Motion for Summary Judgment on Economic Damages May 9, 1994, Docket #A89-095-CV (HRH).

then the Director of Research for the ADF&G Subsistence Division, explained it this way:

> Subsistence uses appear to be elements of a socio-economic system that is larger than the individual participant. The cases show that in subsistence-based economic systems fishing and hunting commonly occur *within cooperative and extended kinship groups linking several households*. Fish and game products are distributed and exchanged along community-wide, non-market networks. The community is *dependant socially and economically* on the productive activities in the *non-market* fishing and hunting sector. These traditional and customary modes of production, distribution, and exchange *provide the social and economic integration of entire communities.*[14]

The human reality behind such academic phases as "subsistence-based economic systems" and "cooperative and extended kinship groups linking several households" is that whole households in extended families ("super households" in Dr. Fall's terms)[15] are

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[14] R. Wolfe and L. Ellanna, *Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities*, ADF&G Division of Subsistence (March 1983) at 3-4; Exhibit F. Plaintiff's Opposition to Motion for Summary Judgment on Economic Damages May 9, 1994, Docket #A89-095-CV (HRH).

[15] James A. Fall, *Exxon Valdez Oil Spill Restoration Project Final Report – Update of the Status of Subsistence Uses in Exxon Valdez Oil Spill Communities*, Alaska Department of Fish and

(Continued on following page)

working together to provide for themselves and the entire community. These collective efforts are a source of individual identity as well as of community prosperity. That is the real significance of the Alaska Native, and specifically here the Alutiiq, subsistence culture.[16]

The composition of subsistence resource harvests varies by region, but the subsistence way of life in coastal villages universally depends on the health of the water and the resources found therein. In general, Alutiiq communities rely on salmon, halibut, cod, rockfish, herring, herring roe, shrimp, octopus, clams, mussels, harbor seals, sea lions, deer, and moose. In Chenega Bay, prior to the spill (1985/86), the subsistence harvest consisted of 21.1% salmon, 16.6% other fish, 37.5% marine mammals, 1.9%

Game – Division of Subsistence (August 2006) at Chapter IV – "Tatitlek" (hereinafter, "Fall 2006").

[16] Congress has long recognized the importance of Alaska Native subsistence rights. In a variety of statutes it has accorded significant protection to those rights. As one example, the Marine Mammal Protection Act ("MMPA") generally prohibits the taking of marine mammals. Under the Act, however, unless a marine mammal species or stock is listed as endangered or threatened under the Endangered Species Act, Alaska Natives enjoy the exclusive right to the unregulated taking of these mammals for subsistence purposes, including the manufacture, trade and barter of traditional clothing, arts and crafts, and food. 16 U.S.C. § 1371(b).

marine invertebrates, 20.9% land mammals, 1.3% wild plants, and 0.8% birds and eggs.[17]

C. The Effect of the Oil Spill on Alutiiq Subsistence

The *Exxon Valdez* spill wreaked havoc on the subsistence culture of the Alutiiq, triggering a severe decline in the availability of subsistence resources that persists to this day. After first explaining the delight of the typical traditional spring harvest, Walter Meganack, Sr., the Chief of the Village of Port Graham at the time of the spill, described the damage in poignant terms:

> When the days get longer, we get ready. Boots and boats and nets and gear are prepared for the fishing time. The winter beaches are not lonely anymore, because our children and grownups visit the beaches in the springtime and gather the abundance of the sea: the shellfish, the snails, the chitons. When the first salmon is caught, our whole village is excited. It is an annual ritual of mouth-watering delight. When our bellies are filled with the fresh new life, then we put up the food for the winter. We dry and smoke and can hundreds of fish to feed each family.

But when the *Exxon Valdez* grounded on Good Friday 1989:

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[17] Fall 2006 – Chapter II: "Chenega Bay" at 21-41.

> It was the early springtime. No fish yet. No snails yet. But the signs were with us. The green was starting. Some birds were flying and singing. The excitement of the season had just begun. And then we heard the news. Oil in the water – lots of oil, killing lots of water. It's too shocking to understand. Never had we thought it possible for the water to die. But it is true. We walk our beaches. And the snails and the barnacles and the chitons are falling off the rocks. Dead. Dead water.
>
> We caught our first fish – the annual first fish, the traditional delight of all – but it got sent to the state to be tested for oil. No first fish this year. We walk our beaches, but instead of gathering life, we gather death. Dead birds. Dead otters. Dead seaweed.[18]

In the aftermath of the devastation, the Alutiiq communities suffered enormous declines in their subsistence harvesting. For example, the village of Tatitlek harvested 644 pounds of subsistence resources per capita in 1988, but saw harvests drop by two-thirds to 215 pounds in 1989 and to 153 pounds in 1990. There was an increase to 346 pounds in 1991

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[18] Chief Walter Meganack, Sr., quoted in A. Davidson, *In the Wake of the Exxon Valdez* (1990) at 288-289 (hereinafter "Davidson"). See photos of the dead on following pages.

Alaska. Valdez. Volunteers try to save oil coated birds (dead Loon) following the Exxon Valdez oil spill. Photographed at one of the many beaches of Prince William Sound. © (April) 1989 Ken Graham

Casualty – A dead sea otter found by cleanup workers in 1989. Photo downloaded from the Exxon Valdez Oil Spill Trustee Council Website – http://www.evostc.state.ak.us/Universal/Images/GalleryImages/spill/downloadable%20.jpgs/WLO_015.jpg (2008)

but harvests receded to 270 pounds in 1993 with the crash of the herring fishery.[19]

The decline in subsistence resources of Tatitlek was matched elsewhere. In Chenega Bay, for example, harvests of subsistence resources dropped by more than half from 374 pounds per person in 1985 (the year the village was last surveyed prior to the spill) to 148 pounds in 1989 and to 139 pounds in 1990. There was an increase in 1991 and 1992, but, as with Tatitlek, harvests fell again in 1993.[20] Cordova also experienced a steady decline in the harvest of subsistence resources, with a drop from 233.8 pounds per person in 1988 to 189.2 in 1991, 163.5 in 1992, and 127.8 in 1993.[21] Data from a sample of Alaska Natives in Cordova revealed that in 1991 over half of all respondents could no longer obtain subsistence foods they had previously consumed.[22] Almost

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[19] The herring run in 1993 was about half of what it was expected to be, and village residents observed abnormal behavior and physical deformities in the herring that spurred even greater fears about the safety of food and the health of the ecosystem. D.A.P. Gill and J.S. Picou, *The Day the Water Died; Cultural Impacts of the Exxon Valdez Oil Spill, in the Exxon Valdez Disaster; Readings on a Modern Social Problem* (J. Steven Picou, ed., 1997), at 176, available at: http://www.jomiller.com/exxonvaldez/articles/picougill1.html (hereinafter "Gill and Picou"). The concern was particularly acute because herring is a keystone species that affects the health of many other resource populations. Fall 2006 at 385.

[20] Gill and Picou at 176.

[21] Fall 2006, at 61.

[22] Gill and Picou at 178.

75 percent reported engaging in fewer subsistence pursuits than they had prior to the oil spill.[23]

Further south, the Alutiiq communities on Kodiak Island likewise endured sharp declines in the harvest of subsistence resources from the sea. The oil reached Kodiak Island about 7 weeks after the spill, and the Natives of Larsen Bay struggled vainly to save their shellfish beaches with kitchen utensils and paper towels, all they had available for the purpose.[24] In Ouzinkie, salmon harvests plummeted from 1986 levels of 192.7 pounds per person to 29.4 in 1989, 75.5 in 1990-91, and 88.5 in 1991-92. Marine mammal consumption dropped from 30.0 pounds per person in 1986 to 8.6 in 1989-90, 10.4 in 1990-91 and 6.9 in 1991-92.[25] Ouzinkie's 1989 overall subsistence harvest was 76.6% less than its average in previous study years.[26] Karluk saw marine mammal harvests drop 78% from 25.4 pounds per person in 1986 to 5.6

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[23] *Id.*

[24] See photos of Larsen Bay "clean-up" on following pages.

[25] Fall 2006 at 245.

[26] Impact Assessment, Inc., *Exxon Valdez Oil Spill, Clean-up and Litigation: a Collection of Social-Impacts Information and Analysis, Final Report Volume I: Final Analysis of Social Factor by Social Factor Basis*, U.S. Department of the Interior Minerals Management Service, Environmental Studies Section, Anchorage, Alaska (August 2001) at Section 3.2.1.6. (Hereinafter "MMS, Vol. I").

May 14, 1989. On Mother's Day the villagers of Larsen Bay tried to clean up the crude oil that had washed up on their shellfish beaches. ©1989 Natalie Fobes, www.fobesphoto.com

Table 1: *Historical and current overview of the status of injured resources and services during each reassessment year.* Source: EVOS Council website (2008)

Resource	**1996 Status**	**1999 Status**	**2002 Status**	**2006 Status**
Archaeological Resources	Recovering	Recovering	Recovered	Recovered
Bald Eagles	Recovered	Recovered	Recovered	Recovered
Black Oystercatchers	Unknown	Recovering	Recovered	Recovering
Clams	Unknown	Recovering	Recovering	Recovering
Common Loons	Unknown	Not Recovering	Not Recovering	Recovered
Common Murres	Recovering	Recovering	Recovered	Recovered
Cormorants	Not Recovering	Not Recovering	Not Recovering	Recovered
Cutthroat Trout	Unknown	Unknown	Unknown	Unknown
Designated Wilderness	Unknown	Unknown	Recovering	Recovering
Dolly Varden	Unknown	Unknown	Unknown	Recovered
Harbor Seals	Not Recovering	Not Recovering	Not recovering	Recovered
Harlequin Ducks	Not Recovering	Not Recovering	Not recovering	Recovering
Intertidal Communities	Recovering	Recovering	Recovering	Recovering
Killer Whales	Not Recovering	Not Recovering	Recovering	Recovering
Kittlitz's Murrelets	Unknown	Unknown	Unknown	Unknown

Marbled Murrelets	Not Recovering	Recovering	Recovering	Unknown
Mussels	Recovering	Recovering	Recovering	Recovering
Pacific Herring	Not Recovering	Recovering	Not recovering	Not recovering
Pigeon Guillemots	Not Recovering	Not Recovering	Not recovering	Not recovering
Pink Salmon	Recovering	Recovering	Recovered	Recovered
River Otters	Unknown	Recovered	Recovered	Recovered
Rockfish	Unknown	Unknown	Unknown	Unknown
Sea Otters	Not Recovering	Recovering	Recovering	Recovering
Sediments	Recovering	Recovering	Recovering	Recovering
Sockeye Salmon	Recovering	Recovering	Recovered	Recovered
Subtidal Communities	Recovering	Recovering	Unknown	Unknown
Human Service				
Commercial Fishing	Recovering[a]	Recovering	Recovering	Recovering
Passive Use	Recovering[a]	Recovering	Recovering	Recovering
Recreation and Tourism	Recovering[a]	Recovering	Recovering	Recovering
Subsistence	Recovering[a]	Recovering	Recovering	Recovering

[a] *Classified as "Lost or Reduced Service" in 1996 Update, meaning that the service was negatively indirectly impacted by the spill due to its connection with impacted natural resources*

In 1996, the bald eagle was the only species that the Trustee Council deemed to have "recovered" from the spill. In March 1999, species that it classified as "not recovering" included killer whales, harbor seals, harlequin ducks, the common loon, cormorants, and pigeon guillemots. The only "recovered" species were bald eagles and river otters. In 2002, the Trustee Council deemed 6 species to have recovered from the effects of the oil spill; 14 species had not yet recovered; and the recovery of 5 species was considered unknown. By 2006, a full 17 years after the spill, the EVOS Council deemed only 9 species to have recovered. Eight species were still designated as recovering, but pigeon guillemots and herring are not recovering at all. The recovery of 5 species is still unknown. See EVOS Council Table 1, *supra*.

The Trustee Council has also studied the recovery of 4 "human services": commercial fishing, passive use, recreation and tourism, and subsistence. In 2006, the Council did not find any of these "services" to have yet recovered – like many of the resources in the Sound, they are still suffering from the dreadful damage inflicted by the *Valdez* spill. See EVOS Council Table 1, *supra*.

The status of subsistence resources and activities in Prince William Sound and adjacent waters is well exemplified by the Pacific herring. As noted above, herring are a critical ecological and commercial species in the Sound ecosystem. "They are central to the marine food web, providing food to marine mammals, birds, invertebrates and other fish. Herring are also commercially fished for food, bait, sac-roe and spawn on kelp."[29] Prior to the spill, herring populations in the Sound were increasing as recorded by record harvests in the late 1980s.[30] However, in 1993, a near-total collapse of the fishery occurred, as herring born in 1989 proved to be one of the smallest cohorts on record to return as spawning adults.

Recent data suggests that the oil spill was the primary catalyst for the collapse of the Pacific herring in Prince William Sound and that the oil spill had an even broader and more profound impact than previously realized.[31] Researchers have concluded that the herring were "highly vulnerable" to surface toxins from the oil spill and that this likely led to the premature hatching, low larval weights, reduced growth, and elevated morphological and genetic abnormalities observed in Prince William Sound in the years after 1989.[32] The exposure to surface oil in herrings' gills leading to mechanical suffocation could have caused an even greater number of fish to die than the effects of oil toxicity itself.[33] The study also found a "notable similarity" between the pattern of sea lion decline and the herring disappearance between 1989-1994 and a highly detrimental effect on many marine birds because of the herring decline.[34] The herring population has never recovered. As a result, the herring fishery in the Sound has been closed for 11 of the 17 years since the spill, including every year since 1999. No signs of recovery have been observed.[35]

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[29] Trustee Council 2006 at 25.

[30] *Id.*

[31] R. E. Thorne and G. Thomas, *Herring and the "Exxon Valdez" Oil Spill: an Investigation into Historical Data Conflicts*, ICES Journal of Marine Science, 65:44-50 (2008).

[32] *Id.* at 48.

[33] *Id.*

The spill severely injured many other subsistence resources, including clams, mussels, and various species of marine mammals, that continue to evidence significant ill effects today. As the Trustee Council concluded in November 2006: "For these reasons, subsistence continues to recover from the effects of the oil spill, but has not yet recovered."[36] A well-respected researcher concluded to similar effect in 2003:

> In the Alaska coastal ecosystem, unexpected persistence of toxic subsurface oil and chronic exposures, even at sublethal levels, have continued to affect wildlife . . . Oil persisted beyond a decade in surprising amounts and in toxic forms, was sufficiently bioavailable to induce chronic biological exposures, and had long-term impacts at the population level.[37]

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[34] *Id.*

[35] Trustee Council 2006 at 25.

[36] *Id.* at 38.

[37] Fall 2006 at 384, citing Peterson, Charles H., Stanley D. Rice, Jeffrey W. Short, Daniel Esler, James L. Bodkin, Brenda E. Ballachey, and David B. Irons. 2003. *Long-Term Ecosystem*

(Continued on following page)

The science is clear: the entirely avoidable grounding of the *Exxon Valdez* wreaked massive havoc on Alutiiq subsistence from which the Alutiiq way of life still suffers nearly twenty years later.[38]

D. The Effect of the Oil Spill on the Alutiiq People

The experts and the courts below all uniformly acknowledge that the wreck of the *Exxon Valdez* had long term, painful sociological consequences for the Alutiiq communities.[39] Household surveys reflected a 48% increase in drinking problems, a 40% increase in drug problems and a 49% increase in domestic violence for those highly exposed to the spill and relatively high numbers even for individuals who were

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Response to the Exxon Valdez Oil Spill. Science 302:2082-2086. Peterson et al. (2003:2082).

[38] See EVOS Council Table 1, noting that clams and other intertidal species are still recovering. See EVOS Photo "Lingering Oil," *infra*.

[39] This is, sadly, not uncommon in a technological disaster. The essential reality of a technological disaster is that it is human caused. It raises issues of blame and responsibility for what is often, as in this case, an entirely preventable event. As in the case of the *Exxon Valdez*, a technological disaster often causes a release of toxic substances and engenders debilitating sociological consequences. Social scientists identify 14 such consequences characteristic of technological disasters that are described as some form of "alienation." As discussed *infra*, the Alutiiq communities suffered most of these consequences. See MMS, Vol. II at § 2.2.2.

Lingering Oil – A worker's hand reveals the persistent nature of oil contamination on a beach (*circa* 2000). Photo downloaded from the Exxon Valdez Oil Spill Trustee Council Website – http://www.evostc.state.ak.us/Universal/Images/GalleryImages/spill/downloadable%20.jpgs/CLE_190.jpg (2008)

not as directly exposed to the spill's effects.[40] A psychological study conducted one year after the wreck of 599 men and women found that members of the high-exposure group were 3.6 times more likely than those not exposed to have generalized anxiety disorder, 2.9 times more likely to have posttraumatic stress disorder and 2.1 times more likely to have depressive symptoms.[41] The study also concluded that Alaska Natives were particularly vulnerable to depressive symptoms despite no significant difference in levels of exposure to the effects of the spill.[42]

The federal Minerals Management Service ("MMS") used the term "alienation" to define this complex of issues, concluding that: "[T]he process of alienation organizes many of the disrupted relationships experienced by Native communities" as a result of the *Exxon Valdez* oil spill.[43]

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[40] MMS Vol. I at § 5.4.2.

[41] L. A. Palinkas, *Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill*, Am. J. Psychiatry 1993; 150:1517-1523. Level of exposure was assessed on the basis of responses to 6 different questions: 1) Did you or anyone in your household use, before the spill, areas along the coast that were affected by the spill? 2) Did you work on any of the shoreline or water cleanup activities of the oil spill? 3) Are there any other ways that you came into contact with the oil spill or cleanup activities, such as during recreation, hunting, fishing, or gathering activities? 4) Did you have any property that was lost or damaged because of the oil spill or cleanup? 5) Did the oil spill cause any damage to the areas where you or other household members fish commercially? 6) Has the oil spill directly affected the hunting, fishing, or gathering activities of any members of this household?

[42] *Id.*

According to MMS:

> Individuals were alienated from meaningful social activities such as subsistence harvesting and the sharing of subsistence resources, which forms a basis for social integration in these communities. Individuals were also alienated from meaningful cultural values about respect for nature and the continuity between subsistence practices and a Native identity. Furthermore, the social activities and practices such as harvesting resources, engaging children in subsistence as a way of life, sharing harvested resources and consuming preferred foods were alienated from cultural values about the meaningfulness and significance of wild foods in Native ways of life.[44]

MMS concluded that:

> Alienation of any one of these connections could be socially significant. But, when individuals perceive an alienation of themselves from their culture and social activities; and, simultaneously cultural values are alienated from the social activities, then the combined effect is potentially traumatic and disruptive. This trauma itself exists within the context

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[43] MMS Vol. II at § 4.0.

[44] *Id.* (Citations omitted).

> of the culture, which has experienced other "cultural traumas" in their dealings with non-Native societies. Indeed, the [*Exxon Valdez* oil spill], for many Natives, becomes another assault from non-Natives on the cultural integrity of their communities.[45]

> The federal district court put it more directly:

> *The social fabric of Prince William Sound and lower Cook Inlet was torn apart.* "[R]esearch on the community impacts of the *Exxon Valdez* Oil Spill clearly delineate a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress." Communities affected by the spill "reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems and occupation related problems." Also, several studies found that a high percentage of the affected fisherman suffered from severe depression, posttraumatic stress disorder, generalized anxiety disorder, or a combination of all three. The spilling of 11 million gallons of crude oil in Prince William Sound and Lower Cook Inlet *disrupted the lives (and livelihood) of thousands of claimants and their families for years.*

Pet. App. 150a-151a. *In re Exxon Valdez*, 296 F.Supp.2d at 1094 (citations omitted; emphases added).

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[45] *Id.*

One observer writing contemporaneously to the oil spill noted that: "Kodiak's mental health workers reported a 700% increase in emotional problems in the months after the spill."[46] Dolly Reft, a Native leader from Kodiak explained why:

> If people don't have authority over their environment or themselves, their spirit and their will to live get weaker and they are more vulnerable to things they can normally handle. We are experiencing a high rate of alcoholism and suicide. This summer we have had eight suicides in six weeks.

Reft also noted that:

> The village people need their environment. Without it they cannot exist, can't be who they are. When you pick up these dead carcasses day after day after day, you go through a mourning process. It's not only death in your environment, but in a sense it is a death of yourself, because you are part of that environment.

When Exxon offered to fly fish into the villages, Reft observed:

> The outside world still needs to be educated on what subsistence is. When you send fish into a village, what you've done is taken the people's spirit away because they don't have that joy of going out and providing for their families and

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[46] Davidson at 201.

> getting the food. It'd be like me taking your job away with you having five children to feed. You'd have to go to a welfare system, and that would destroy your self-confidence.[47]

In sum, the *Exxon Valdez* disaster wreaked extended and continuing havoc on the vulnerable Alutiiq villages that lay in the path of Exxon's 11,000,000 gallon flood of crude oil. The punitive damages award in this case can never provide full redress to these Alutiiq villages for the damages they have suffered and continue to suffer, but it does appropriately reflect the egregious nature of the harm Exxon inflicted. It will also serve as an appropriate deterrent to future dereliction of the kind that led to such disastrous consequences here.

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[47] *Id.* Quoting Reft.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Descriptions of the Alaska Native and Native American Entities joining *Amici Curiae* Brief in Support of Respondents

The National Congress of American Indians ("NCAI") is the Nation's oldest and largest national organization formed to advocate for the protection of American Indian and Alaska Native interests, including the protection of the Alaska Native subsistence way of life. NCAI was formed in 1944 and has a membership of over 250 federally recognized tribes situated in Alaska and over 30 other States.

The Alaska Federation of Natives ("AFN"), the Rural Alaska Community Action Program, Inc. ("RurAl CAP") and the Alaska Inter-Tribal Council ("AI-TC") are statewide Alaska Native organizations committed to educational activities and to advocacy before regulatory agencies, Congress and the courts to protect the integrity and continuation of the subsistence way of life in all Alaska Native communities. AFN was formed in the 1960s to advocate for passage of the Alaska Native Claims Settlement Act, 43 U.S.C. §1601 *et seq.* ("ANCSA"). Today, its membership includes over 200 villages, both federally-recognized tribes and ANCSA village corporations, the 13 regional Alaska Native corporations formed under ANCSA, and the 12 regional nonprofit and tribal consortiums that contract and run federal and state social service programs.

AI-TC, a voluntary association of 180 Alaska Native tribes, was formed in significant part to advance and protect the subsistence interests of Alaska Native tribes and their members. Most of AI-TC's member tribes are located on Alaska's extensive coastline or along major rivers, reflecting the fact that over sixty percent of their subsistence diet is from fish and other aquatic resources.

The Rural Alaska Community Action Program ("RurAl CAP") is one of over 1,000 "Community Action Agencies" in the United States, but the only one in Alaska. Its goal is to promote maximum participation by people in overcoming all forms of poverty. RurAl CAP follows the belief that rural Alaskan communities have the right to maintain their cultural heritage and close relationship to the land while promoting their economic and human potential. RurAl CAP also provides information to the public about the vital importance of subsistence hunting, fishing and gathering to the nutritional, economic, spiritual and cultural lives of Alaska's indigenous peoples.

The Indigenous Peoples Council for Marine Mammals ("IPCoMM") is a statewide consortium of 16 regional and statewide Native marine mammal organizations representing Alaska Native interests in marine mammal conservation and co-management of subsistence uses. IPCoMM was formed in 1992 to advocate for full and equal participation by Alaska Natives in decisions affecting the subsistence uses of marine mammals.

The North Slope Borough is the Nation's largest and northern-most state chartered local government. It encompasses eight Inupiaq Native villages that depend upon pristine marine waters to continue their centuries-old subsistence-based traditions, including the hunting and sharing of whale and other marine mammals.

Sealaska Corporation and Koniag, Inc. are two of the regional corporations formed under ANCSA. Koniag owns lands throughout the Kodiak Island archipelago and Sealaska owns lands throughout southeast Alaska. The lands and adjacent waters owned by the corporations, like the lands and adjacent waters of most other regional corporations formed under ANCSA, provide critical habitat sustaining the subsistence way of life upon which their villages and member shareholders depend.

The Association of Village Council Presidents ("AVCP") is one of 12 regional Native nonprofit corporations in Alaska. Located in the Yukon-Kukokwim Delta, in the South Western region of Alaska, AVCP provides social services to 56 federally recognized Alaska Native tribes and approximately 6,000 Alaska Native residents of the region.

The Alaska Eskimo Whaling Commission, Aleut Marine Mammal Commission, Alaska Native Harbor Seal Commission, the Ice Seal Committee, the Sitka Marine Mammal Commission and the Alaska Sea Otter and Steller Sea Lion Commission, are Alaska Native commissions formed for the express purpose of preserving particular species of marine mammals that form the backbone of the subsistence way of life for most coastal Alaska Native communities.

The Aleut Community of St. George Island is a federally recognized tribe situated in the Bering Sea amidst one of the world's richest fishing grounds and home to fur seal, sea lion and other marine mammals critical to the subsistence way of life.

AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

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EXXON SHIPPING CO. and
EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF *AMICUS CURIAE* OF THE NATIONAL FISHERIES INSTITUTE IN SUPPORT OF RESPONDENTS

◆

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INTEREST OF *AMICUS CURIAE*[1]

Amicus National Fisheries Institute ("NFI") is the nation's leading seafood industry advocacy organization. It is committed to both the sustainable management of the nation's fisheries and the responsible stewardship of the marine environment. The NFI's nearly 400 members come from the East Coast, West Coast, and Gulf Coast, as well as Alaska and Hawai'i. They range from small, family-owned fishing vessels to large, nationally traded corporations, and include such diverse representatives of business, education and government as Wal-Mart Stores, Bumble Bee Foods, Gorton's Seafoods, Seattle Fish Co., Kona Bluewater Farms, Chesapeake Fish Co., Trident Seafoods Corp., Outback Steakhouse, Long John Silvers, The University of Florida, The Oregon State University Seafood Lab, the California Fisheries and Seafood Institute, the New York Sea Grant, the North Carolina State Department of Agriculture, the Gulf Oyster Industry Council, the University of Maryland, the Virginia Polytechnic Institute, the Alaska Sea Grant College Program, the Northwest Fisheries Organization, and the U.S. Department of Commerce.

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[1] This brief is being submitted with the consent of the parties. It was prepared on behalf of the NFI by its undersigned counsel. It was not authored, in whole or in part, by counsel for any party. No person or entity other than the NFI, or its counsel, made a monetary contribution to the preparation or submission of the brief.

The seafood handled by NFI members is caught throughout U.S. territorial waters and out on the high seas. Initial processing typically occurs offshore, either aboard the fishing vessel that made the catch, or upon sea-going tenders that sail with the fleet. Secondary processing generally occurs in shoreside plants. Wholesalers and distributors collect the processed seafood, and share it out to stores, restaurants, fish mongers and other retailers all over the country. Those retailers, in turn, sell their allotments directly to the consuming public. The NFI represents members from every link in that chain. This water-to-table diversity gives it an unusual perspective on all three questions for *certiorari*, but enables it to speak with particular authority on question No. 3. That is the question to which this brief will primarily address itself. The NFI would specifically like to answer Petitioners Exxon Shipping Co.'s and Exxon Mobil Corp.'s (collectively referred to as "Exxon") argument that this Court will not serve the "'fundamental interest giving rise to maritime jurisdiction'" – "'the protection of maritime commerce'"[2] – unless it further reduces the punitive damage award which the Ninth Circuit has already halved.

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[2] *Brief of Petitioners* at 46 quoting *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004).

SUMMARY OF ARGUMENT

This brief will argue four main points.

1. The general maritime law sets no special limits on punitive awards. Although punitive damages are no more common in admiralty than they are outside it, they have historically been available in any case involving actual malice, criminal indifference, a reckless disregard for the rights of others, or gross negligence.

2. "Smart," "vindictive," or "exemplary" damages were used to *compensate* intangible injuries until well into the 19th century, but today punitive awards generally serve the same two interests in admiralty as they do at common law; they are levied to punish past wrongs and deter future wrongdoing. In pollution cases like the one at bar, moreover, they are specifically imposed to protect the marine environment and preserve its bounty for everyone.

3. To achieve those objectives in this case, and to serve the fundamental purpose of protecting maritime commerce, this Court should consider whether the traditional tenets of admiralty law have allowed Exxon to escape liability for much of the far flung economic harm which the *Exxon Valdez* oil spill caused. Where the governing compensatory regime allows corporate wrongdoers like Exxon to escape full liability for all the damages its egregious conduct has caused, under-deterrence will result, undesirable conduct may be encouraged, maritime commerce will

be damaged, and the environment will not be fully protected.

4. Under-deterrence will result unless the Court affirms the punitive award in this case because, with very narrow exceptions, the well-settled maritime rule in *Robins Dry Dock*[3] permitted Exxon to escape liability for any economic damages that did not flow from direct physical contact with the oil it spilled onto Prince William Sound.

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ARGUMENT

I. The General Maritime Law Sets No Special Limits on Punitive Damages

The long and storied history of punitive remedies in American maritime law has been told well and in great detail elsewhere – particularly in University of Texas Law Professor David Robertson's exhaustive monograph on the subject, "Punitive Damages in American Maritime Law," 28 J. MAR. L. & COM. 73 (1997). As this Court has repeatedly pointed out, "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to do so by established and inflexible rules." *Moragne v. United States Lines, Inc.*, 398 U.S. 375, 387 (1970), quoting *The Sea Gull*,

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[3] *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

21 F. Cas. 909, 910 (C. C. Md. 1865); see also *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990); *Sea-Land Services v. Gaudet*, 414 U.S. 573, 585 (1974). Far from establishing any special rules prohibiting or limiting "punitive," "exemplary," or "vindictive" damages, the general maritime law of the United States has, as Professor Robertson put it, "firmly recognized" the availability of such damages whenever "the defendant was guilty of gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct."[4] *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2nd Cir. 1972); see also *Gamma-10 Plastics, Inc. v. American President Lines*, 32 F.3d 1244, 1254 (8th Cir. 1994) ("Under maritime law, punitive damages are warranted where the defendant has acted with 'reckless or callous disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference.'").[5]

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[4] Robertson, 28 J. MAR. L. & COM. at 98.

[5] E.g. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 701 (1st Cir. 1995) (intentional destruction of property); *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 354 (1st Cir. 1988) (intentional infliction of emotional distress); *Churchill v. F/V Fjord*, 892 F.2d 763, 772 (9th Cir. 1988), cert. denied, 497 U.S. 1025 (1990) (collision caused by intoxication); *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d 1379, 1385 (9th Cir. 1985) (intentional destruction of property); *Pino v. Protection Maritime Ins. Co.*, 490 F. Supp. 277, 281 (D. Mass. 1980) (tortious interference with employment rights); *The Ludlow*, 280 F. 162, 163 (N.D. Fla. 1922) (malicious and unlawful arrest); *The Seven Brothers*, 170 F. 126, 127 (D.R.I. 1909) (intentional

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In short, if there is anything inherently distinctive about the use of punitive damages under judge-made maritime law, it is the long history which such damages have enjoyed in that body of jurisprudence. Exxon hopes to hide from that history behind this Court's ruling in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 36 (1990). Arguing that Congress itemized and codified all the federal remedies available in marine pollution cases when it passed the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, Exxon cites *Miles* for the proposition that, when an Act of "Congress has spoken directly" to the question of what damages are recoverable in a particular maritime context, "'the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.'" 498 U.S. at 31, quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

But as the Louisiana State Court of Appeal summed up when it rejected an argument identical to the one Exxon is making here, "*Miles* . . . does not . . . signify a call for universal uniformity of maritime tort

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property damage); *Ralston v. The States Rights*, 20 F. Cas. 201, 210 (E.D. Pa. 1836) (reckless steamboat racing); *Steamboat Co. v. Whilldin*, 4 Har. 228, 233 (Del. 1845) (grossly negligent collision). One admiralty court has awarded punitive damages for "a clear breach of contract caused either by the grossest carelessness, or by reckless cupidity." *Morrison v. The John L. Stephens*, 17 F. Cas. 838, 840 (N.D. Cal. 1861) (in which the owners of a steamship forced a married couple to berth with a stranger in a stateroom for which the couple had paid extra to reserve solely for themselves).

remedy, but rather emphasizes the importance of uniformity in the face of applicable *relevant* legislation." *Poe v. PPG Industries*, 782 So. 2d 1168, 1173 (La. App. 2001) (original emphasis). To borrow a pertinent quote from this Court's decision in *Yamaha Motor Corp. v. Calhoun,* which permitted a "nonseafarer" to pursue a state wrongful death remedy for a fatality which occurred on navigable, territorial waters, it is only when "Congress has prescribed a comprehensive tort recovery regime" that there is "no cause for enlargement of the damages statutorily provided." 516 U.S. 199, 215 (1996). Whatever Exxon might suggest, neither the CWA nor any other Federal statute prescribes such a regime here.[6]

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[6] Since Exxon's misuse of *Miles* bears on the second question for certiorari, and threatens to distract us from the third question – which is the focus of this brief – we will not belabor it, except to note that this Court did not address the issue of punitive damages in *Miles*. To quote the Louisiana State Court of Appeal's decision in *Poe* once again:

> The Supreme Court in *Miles* expressly stated that it was granting certiorari on only two issues, whether or not a non-dependent parent or a deceased seaman can recover for loss of society under the general maritime law, and whether the estate of a decedent is entitled to recover for the future lost earnings of a seaman. The Court's decision did not address the denial of the right of the seaman's mother to recover non compensatory punitive damages. The Supreme Court in *Miles* did deny recovery for loss of society, which is a form of nonpecuniary relief. The Court was trying to ensure a uniform scheme of recovery regardless of whether a wrongful death action was brought under the Death on the High Seas Act, 46 U.S.C. § 761, [currently codified

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> as 46 U.S.C.S. §§ 30301 *et seq.*], the Jones Act [currently codified as 46 U.S.C.S. § 30104] or general maritime law. Those statutes provide only for pecuniary relief.

Poe v. PPG Industries, 782 So. 2d 1168, 1172 (La. App. 2001).

The holding in *Miles* has produced some confusion among the lower courts. Cantilevering their decisions on what they describe as this Court's "analytical framework," a feat which Professor Robertson has called "something akin to sleight of hand," 28 J. MAR. L. & COM. at 164, the Fifth, Sixth, and Ninth Circuits have extended the holding in *Miles* to deny punitive recovery to seamen killed or injured in the course of their employment. See, e.g., *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir. 1993) (Jones Act case); *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir. 1994), reversed in part on reh'g, 59 F.3d 1496 (1995) (maintenance and cure case); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995) (same); see also *Wahlstrom v. Kawasaki Heavy Inds., Ltd.*, 4 F.3d 1084 (2nd Cir. 1993) (general maritime wrongful death case); *In re Amtrack etc. v. Warrior & Gulf Nav. Co.*, 121 F.3d 1421 (11th Cir. 1997) (same). These are the lower-court holdings on which Exxon's *Miles* argument are built.

But as Professor Robertson explained, the rickety analytical bridge which these decisions hammered together hangs from "unexamined lower-court assumptions that punitive damages are 'non-pecuniary' and that all non-pecuniary damages issues in seamen's Jones Act and unseaworthiness cases demand like treatment." 28 J. MAR. L. & COM. at 163. Seamen, after all, are the peculiar wards of admiralty. E.g., *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962).

> No one has suggested a justification in policy or principle for treating seamen worse than other maritime plaintiffs. Nor has anyone argued that it makes sense for the maritime law to be more restrictive of punitive liability than the prevailing land-based law.

Robertson, 28 J. MAR. L. & COM. at 164; see also Force, "The Curse of *Miles v. Apex Marine Corp.*: The Mischief of Seeking 'Uniformity' and 'Legislative Intent' in Maritime Personal Injury

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II. Punitive Awards Serve the Same Interests in Admiralty as They Do at Law – Punishment and Deterrence

Admiralty "courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages." *Lake Shore & S.M. Ry. v. Prentice*, 147 U.S. 101, 107 (1902). "Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001). But today, punitive damages in admiralty primarily "serve the purpose 'of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.'" *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767

Cases," 55 LA. L. REV. 745 (1995). As a consequence, the Eleventh Circuit recently rejected the unexamined lower-court assumptions on which Exxon cantilevers its arguments, and stood by its traditional holding that punitive damages are fully available in seamen's cases. *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007). There are pre-*Miles* State court decisions to the same effect still standing. See, e.g., *Baptiste v. Superior Court*, 106 Cal. App. 3d 87, 95-104, 164 Cal. Rptr. 789, 792-98 (Cal.App. 1980), cert. denied sub nom. *Chevron Shipping Co. v. Baptiste*, 449 U.S. 1124 (1981); *Weason v. Harville*, 706 P.2d 306, 310 (Ak.Sup.Ct. 1985). The cases are thus in conflict. The decision in this case could help resolve that conflict by rejecting Exxon's arguments and underscoring the limited scope of the holding in *Miles*.

F.2d 1379, 1385 (9th Cir. 1985); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); see gen. Robertson, 28 J. MAR. L. & COM. at 74-75; 1 Schoenbaum, *The Law of Admiralty*, § 5-17, p.243 (4th ed. 2001).

It follows that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North America v. Gore,* 517 U.S. 559, 575 (1996). Subject, of course, to the limitations imposed by constitutional due process, a punitive award "should reflect 'the enormity of his offense.'" *Id.* quoting *Day v. Woodworth*, 54 U.S. 363, 13 How. 363, 371, 14 L. Ed. 181 (1852). This, in turn, requires a careful consideration of the harm the defendant has caused.

III. To Determine Whether the Punitive Award in this Case Protected Maritime Commerce and Served the Traditional Purposes of Punishment and Deterrence, the Court Should Consider Whether Exxon Was Required to Pay for All of the Far-Flung Harm its Misconduct Caused

Since the Briefs of the Petitioners and Respondents have thoroughly addressed the "guideposts" which this Court has developed for assessing punitive awards, we will not revisit those guideposts here. It is enough for our purposes to note that:

> [B]oth State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 442, 460 (1993) (original emphasis); see also *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 581 (1996) ("the proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and the *harm likely to result* from the defendant's conduct as well as the harm that actually has occurred'") (original emphasis). This principle is especially important in the case at bar.

In a 1998 study underwritten by Exxon, Stanford Law and Economics Professor A. Mitchell Polinsky, and Harvard Law Professor Steven Shavell used economic reasoning to provide a relatively simple set of principles for determining how and when punitive awards will best meet their objectives of punishing past wrongdoers and deterring future wrongdoing. Polinsky and Shavell, "Punitive Damages: An Economic Analysis," 111 HARV. L. REV. 869 (1998). Their study concluded, *inter alia,* that:

> [A] crucial question for consideration is whether injurers sometimes escape liability for harms for which they are responsible. If they do, the level of liability imposed on them when they are found liable needs to exceed compensatory damages so that, on average, they will pay for the harm that they cause. This excess liability can be labeled 'punitive damages,' and failure to impose it would result in inadequate deterrence.

Id. at 873-74. We respectfully urge the Court to consider that question in this case.

IV. Under-Deterrence Will Occur in this Case Unless the Court Affirms the Award of Punitive Damages

In *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), this Court laid down "a bright-line rule of limitation which discards traditional precepts of foreseeability and . . . relies instead on whether the alleged pecuniary loss resulted from physical harm arising from the defendant's negligence." *In re Oriental Republic of Uraguay,* 821 F.Supp. 934, 939 (D. Del. 1993). This rule, in turn, has been generally applied to marine pollution cases, *id.*; see also, *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc), and was specifically applied by the district court to the case at bar. See, e.g., JA 132.

The clarity provided by the *Robins* rule has not come without a price:

> The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses.

People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 254 (1985); see also *Pruitt v. Allied Chemical*, 523 F.Supp. 975, 982 (E.D. Va. 1991). That was certainly the case here. See *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997) (refusing to reinstate claims for various economic injuries and emotional damages on ground they were too remote); see also Pet. App. 115a-16a; JA 118-16, 1384-90.

Admiralty courts faced with the widespread ruin which inevitably flows from a dramatic marine spill like this one have recognized a narrow and well-defined exception to the *Robins* Rule, for commercial fishermen, in deference to "the public's deep disapproval of injuries to the environment and the strong policy of preventing such injuries." *Union Oil Co. v. Oppen,* 501 F.2d 558, 569 (9th Cir. 1974). But that exception is *sui generis,* and does not extend to many other maritime plaintiffs – indeed, it does not even extend very far along the water-to-table processing chain that binds together the members of the NFI in particular, and the seafood industry in general. See, e.g., *In re Taira Lynn Marine Ltd. No. 5, LLC*, 444 F.3d 371, 378-80 (5th Cir. 2006); *Nautilus Marine,*

Inc. v. Niemela, 170 F.3d 1195, 1196-97 (9th Cir. 1999); *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc.*, 638 F.2d 700, 702 (4th Cir. 1981); *Slaven v. B.P. America, Inc.*, 786 F. Supp. 853, 861 (C.D. Cal. 1992); *In re Glacier Bay*, 865 F. Supp. 629, 638 (D. Alaska 1991); *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975, 979-80 (E.D. Va. 1981).

As *In re Oriental Republic of Uruguay* lamented, when it pondered the effect of the *Robins* Rule in a Shipowners' Limitation case arising out of a marine oil spill in Delaware: "Obviously the number and variety of different forms of economic harm arguably resulting from [the] negligent discharge of oil into the Delaware River are limited only by the boundaries of human imagination." 821 F.Supp. at 939. That lament is truer and more poignant still in this case. It may thus not go too far to suggest that the *Robins* Rule has enabled Exxon to escape liability for the lion's share of the harm this spill caused.

It necessarily follows that the well-settled deterrence objective of punitive awards in admiralty will not be served unless this Court upholds the award which the Ninth Circuit has already halved.

◆

CONCLUSION

"[T]he fishing industry is clearly part of traditional maritime activity; and to assert otherwise would amount to a repudiation of much of maritime history." *Oppen*, 501 F.2d at 561. Yet Exxon's reprehensible conduct put hundreds of maritime businesses into bankruptcy or dire financial straits. Many of those businesses had no right to compensatory damages under *Robins*, and will have no indication that the law either recognizes their predicament or intends to deter future such calamities unless Exxon is punished for this spill. Exxon, by contrast, has assured the district court that paying even the $5 billion jury verdict "would not have a material impact on the corporation." SJA 334 sa. The special principles of admiralty law, and that law's well-established interest in protecting maritime commerce, call upon this Court to reject Exxon's arguments and affirm the decision of the Court of Appeals.

Respectfully submitted,

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In The
Supreme Court of the United States

◆

EXXON SHIPPING CO. and
EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF FOR THE PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND THE INSTITUTE FOR FISHERIES RESOURCES, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

◆

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Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 30, 32

Coryell v. Phipps, 317 U.S. 406 (1943) 28

Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd*, 509 F.3d 1168 (9th Cir. 2007) 15

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GMAC v. Froelich, 273 F.2d 92 (D.C. Cir. 1959) 24

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Laboratory Corp. of America Holdings v. Chiron Corp., 384 F.3d 1326 (Fed. Cir. 2004) 33

Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001) 28

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 30

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The Amiable Nancy, 16 U.S. 546 (1818) 11, 13, 14

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United States v. Locke, 529 U.S. 89 (2000) 5

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33 U.S.C. § 1321(o)(1) (2002)..38

33 U.S.C. § 2718 (2002)..27

46 U.S.C. §§ 30501-35012 (2002)..................................28

49 C.F.R. § 173.1 (2007)..20

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LEGISLATIVE MATERIALS

S. REP. NO. 101-94 (1989), *reprinted at* 1990 U.S.C.C.A.N. 722..5

Hearing on H.R. 1465 – To Establish Limitations on Liability for Damages Resulting from Oil Pollution, To Establish a Fund for the Payment of Compensation for such Damages, and for Other Purposes Before Subcomm. on Coast Guard and Navigation, House Comm. on Merch. Marine & Fisheries, 101st Cong. 187 (May 11, 1989) 26

Pending Oil Spill Legislation, Hearing on S. 686, S. 1066, and S. 1223 Before Subcomm. on Envtl. Prot., Senate Comm. on Env't and Pub. Works, 101st Cong. 128 (July 21, 1989).........26

135 Cong. Rec. H8133 (Nov. 8, 1989).........................27

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OTHER AUTHORITIES

ROBERT GREENHALGH ALBION, THE RISE OF NEW YORK PORT (1939) 19

EUROPEAN MARITIME SAFETY AGENCY, EMSA ACTION PLAN FOR HNS POLLUTION PREPAREDNESS AND RESPONSE (2007) 21, 22

EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, HERRING RESTORATION STEERING COMMITTEE BACKGROUND AND STATUS REPORT (2007), *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/HerringCommittee-ExecSummary.pdf 8, 9

EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, UPDATE ON INJURED RESOURCES AND SERVICES (2006), *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/2006IRSUpdate.pdf 8, 31

EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, EXXON VALDEZ OIL SPILL RESTORATION PLAN (1994), *available at* http://www.evostc.state.ak.us/Policies/restplan.cfm 7

IRVING E. FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS (1997) 14

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Stephen E. Flynn et al., Navigating the Uncertain Waters of the 21st Century: The Role of New Technologies in Building a Competitive and Secure Maritime Infrastructure (1998), *available at* http://www.ion.org/ionsite/search/view_abstract.cfm?jp=p&idno=1231 16

L.S. Howeth, History of Communications: Electronics in the United States Navy (1963), *available at* http://earlyradiohistory.us/1963hw.htm 14

John J. Kircher and Christine M. Wiseman, Punitive Damages: Law and Practice (2d ed. 2000) 12

William Meade Fletcher, Cyclopedia of the Law of Private Corporations (rev. vol. 2001) 23

International Marine Organization, IMO and Dangerous Goods at Sea (1996) 19, 20, 21

Jonathan L. Ramseur, Congressional Research Service, Oil Spills in U.S. Coastal Waters (2007) 5, 22, 30

Charles Alan Wright & Arthur R. Miller, 5 Fed. Prac. & Proc. Civ. 3d (2007) 34, 35

United States General Accounting Office, Adequacy of Preparation and Response to the Exxon Valdez Oil Spill (1989) 5, 6

Restatement (Third) of Agency (2006) 12

Restatement (Second) of Torts (1979) 12, 29

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Danielle Droitsch, *Muddy Waters: Clarifying the Line Between Public and Private Recovery of Natural Resource Damages*, VT. J. ENTVL. LAW (1998), http://www.vjel.org/essays/roscoe98a.html 21

Edgar Gold, *Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom*, 14 J. MAR. L. & COM. 1 (1983) 18

Richard E. Thorne and Gary L. Thomas, *Herring and the "Exxon Valdez" oil spill: an investigation into historical data conflicts*, 65 ICES J. OF MARINE SCIENCE 44 (2007) 9

Jeffrey W. Short et al., *Slightly Weathered Exxon Valdez Oil Persists in Gulf of Alaska Beach Sediments After 16 Years*, 41 ENVIRON. SCI. TECHNOL. 1245 (2007) 7

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Colin Nickerson, *For Ships, End of the Dotted (and Dashed) Line*, BOSTON GLOBE, Jan. 31, 1999, at A1 15

European Space Agency, *Low Cost Internet Access at Sea*, Apr. 19, 2006, http://www.esa.int/esaTE/SEMMAWNFGLE_index_0.html 15

Exxon Valdez Oil Spill Trustee Council, *History*, http://www.evostc.state.ak.us/History/PWSmap.cfm 5

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Exxon Valdez Oil Spill Trustee Council, *History*, http://www.evostc.state.ak.us/History/excerpt.cfm 6

Exxon Valdez Oil Spill Trustee Council, *History FAQ*, http://www.evostc.state.ak.us/history/faq.cfm 5, 30

Exxon Valdez Oil Spill Trustee Council, *Injured Resources and Services*, http://www.evostc.state.ak.us/Publications/injuredresources.cfm 6, 7, 31

Exxon Valdez Oil Spill Trustee Council, *Lingering Oil*, http://www.evostc.state.ak.us/Habitat/lingering.cfm 6, 30

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INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*

The parties' consent to the filing of this brief was lodged with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Founded in 1976, the Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest trade association of working commercial family fishermen and women on the west coast of the United States. PCFFA is a nonprofit federation and trade association dedicated to protecting the rights of individual fishermen and fighting for the long-term survival of commercial fishing as a productive livelihood and way of life. It consists of seventeen different port associations, fishermen's marketing associations, and commercial fishing vessel owner's associations spanning the Pacific coast from San Diego to Alaska, with a combined membership of about 2,000 commercial fishing vessels.[2]

PCFFA's members include small- and medium-sized family businesses whose operations range from commercial fishing vessels in distant grounds to small, trailerable boats that work nearshore waters. They harvest a wide variety of ocean seafood, including fresh wild salmon, Dungeness and rock crab, squid, herring, swordfish, shark, blackcod, rockfish, albacore, sea cucumber, California halibut and flounder, urchin and abalone.

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[1] In accordance with Supreme Court Rule 37.6, *Amici Curiae* certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than *Amici Curiae*, has made a monetary contribution specifically for the preparation or submission of this brief.

[2] A complete list of PCFFA member organizations is included in the Appendix.

PCFFA commercial fishing members are professionals who derive their incomes largely from harvesting the sea. They may operate small or large vessels; they may be full or part-time. But all share a common commitment to preserving their businesses, which all depend on ensuring the future of sustainable fisheries resources.

In order to better preserve and protect their members' livelihoods, PCFFA established the Institute for Fisheries Resources ("IFR") in 1992. IFR is a separate nonprofit organization dedicated to the protection and restoration of marine and anadromous fish resources throughout the west coast. In particular, IFR manages PCFFA's sustainable fishery conservation and restoration programs. Many PCFFA commercial fishing industry members are also members of IFR.

These organizations have a clear interest in this case. "This is a case about commercial fishing," Pet. App. 59a, and, in particular, the economic harm to commercial fishing and other businesses resulting from the EXXON VALDEZ spill. As commercial fishing families, *amici* will be uniquely impacted by the decision in this case. Just like other maritime businesses, "the fishing industry is clearly a part of traditional maritime activity." *Union Oil Co. v. Oppen*, 501 F.2d 558, 561 (9th Cir. 1974). One goal of maritime law is to protect and promote the interests of fishermen and women and the owners of fishing vessels. *See id.*; *cf. Askew v. American Waterways Operators*, 411 U.S. 325, 333 n.5 (1973) ("[T]he importance of the fishing industry within the world's economy is not in doubt and is steadily increasing").

The livelihoods of commercial fishermen and women depend on healthy fisheries. As a result, they support federal maritime rules that will punish those who engage in egregious conduct similar to that of Petitioners Exxon Shipping Company and Exxon Mobil Corporation (collectively "Exxon") in this case, and that will provide adequate deterrence to prevent in the future the extraordinary and long-lasting harms of the sort that resulted from the EXXON VALDEZ spill. In so doing, the members of PCFFA and IFR are particularly interested in rules (1) that reflect the reality of modern maritime business with respect to both modern technology and modern cargo and (2) that are consistently applied to all maritime businesses and therefore give no advantage to large corporations like Exxon.

◆

STATEMENT

1. For many years, Exxon knew that its employee, Joseph Hazelwood, had a drinking problem that interfered with his work on Exxon supertankers.

Pet. App. 63a-64a; 121a. In 1985, after Exxon received reports of Hazelwood's drinking problem, Hazelwood went to an alcohol treatment program that lasted 28 days, after which Hazelwood was reinstated to command supertankers. Pet. App. 63a; *see* Pet. App. 121a. Shortly after his reinstatement, however, his superiors at Exxon received reports that Hazelwood had returned to drinking. Pet. App. 64a; 121a. Despite many such reports, Exxon left Hazelwood in command of the EXXON VALDEZ. Pet. App. 64a; 121a.

On March 24, 1989, the terrible but all-too-predictable consequence of Exxon's behavior happened. Although the supertanker was freshly loaded with 53 million gallons of crude oil, Exxon's known-alcoholic captain – the only officer aboard licensed to navigate through the difficult parts of Prince William Sound – was drunk and left his post. *See* Pet. App. 61a-64a; 120a-122a. The fatigued Third Mate, who was not licensed to steer the ship in those waters, was left in charge and eventually the ship ran into Bligh Reef. Pet. App. 63a-64a; 120a-121a. As Exxon acknowledged and stipulated to in the district court, Hazelwood "was negligent in leaving the bridge of the vessel on the night of the grounding, [his] negligence was a legal cause of the oil spill, and . . . the Exxon defendants are responsible for this act of negligence." JA212.

The grounding of the EXXON VALDEZ spilled nearly 11 million gallons of oil into Prince William Sound. Pet. App. 64a; 122a. The oil eventually spread across several hundred linear miles and impacted over 10,000 square miles of the surrounding coastal saltwater ecosystem, including well over 1,000 miles of coastline. *See* Exxon Valdez Oil Spill Trustee Council, *History*, http://www.evostc.state.ak.us/History/PWSmap.cfm. This astounding spill is one of the largest spills to date in American waters, *United States v. Locke*, 529 U.S. 89, 94 (2000); JONATHAN L. RAMSEUR, CONGRESSIONAL RESEARCH SERVICE, OIL SPILLS IN U.S. COASTAL WATERS at CRS-1 (2007), and "it is widely considered the number one spill worldwide in terms of damage to the environment." *See* Exxon Valdez Oil Spill Trustee Council, *History FAQ*, http://www.evostc.state.ak.us/history/faq.cfm.

The oil companies' contingency plan for Prince William Sound had long recognized that even a properly conducted response would not be able to contain a spill of this size. SJA62sa. Making matters worse, however, Exxon's and the government's response to the spill was "unreasonably slow [and] confused," *see* S. REP. NO. 101-94, at 2 (1989), *reprinted at* 1990 U.S.C.C.A.N. 722, 723-24, and "was clearly inadequate to contain and recover the spilled oil." UNITED STATES GENERAL ACCOUNTING OFFICE, ADEQUACY OF PREPARATION AND RESPONSE TO THE EXXON VALDEZ OIL SPILL 1 (1989). The problems identified with the inadequate response "ranged from a shortage of equipment and skilled personnel to inadequate communications and organizational structures." *Id.* at 14. One key problem was the lack of preparedness for this type of spill. *Id.* at 1 ("Major problems were encountered because no one had realistically prepared to deal with a spill of that magnitude in Prince William Sound."). Another significant problem was the ineffectiveness of the recovery techniques that were used: "[R]ecovery efforts were . . . hampered by breakdowns in equipment and by techniques rendered ineffective by such factors as weather and water conditions." *Id.* at 2.

The harms that resulted from the spill have been well-documented. *See, e.g.,* Exxon Valdez Oil Spill Trustee Council, *Injured Resources and Services*, http://www.evostc.state.ak.us/Publications/injuredresources.cfm. Although no human lives were lost as a direct result of the spill, four deaths are associated with the cleanup. Exxon Valdez Oil Spill Trustee Council, *History*, http://www.evostc.state.ak.us/History/excerpt.cfm. Beaches were heavily oiled by the spill and, to this day, "visually identifiable surface and subsurface oil persists at many locations." Exxon Valdez Oil Spill Trustee Council, *Lingering Oil*, http://www.evostc.state.ak.us/Habitat/lingering.cfm. One recent study's

> results indicate that the remaining subsurface oil may persist with little change for decades, even in sediments that are not anoxic. Such persistence can pose a contact hazard to intertidally foraging sea otters, sea ducks, and shorebirds, create a chronic source of low-level contamination, discourage subsistence in a region where use is heavy,

> and degrade the wilderness character of protected lands.

Jeffrey W. Short et al., *Slightly Weathered Exxon Valdez Oil Persists in Gulf of Alaska Beach Sediments After 16 Years*, 41 ENVIRON. SCI. TECHNOL. 1245, 1249 (2007). These losses to the natural environment of Prince William Sound and to those whose livelihoods depended on it have been devastating: "[T]he human and natural losses were immense – to fisheries, subsistence livelihoods, tourism, wildlife." Exxon Valdez Oil Spill Trustee Council, *History*, http://www.evostc.state.ak.us/History/excerpt.cfm.

The spill occurred at "just before the most biologically active season of the year," which placed "seaward migration of salmon fry, major migrations of birds, and the primary breeding season of most species of birds, mammals, fish, and marine invertebrates in the spill's path." Exxon Valdez Oil Spill Trustee Council, EXXON VALDEZ OIL SPILL RESTORATION PLAN 30 (1994), *available at* http://www.evostc.state.ak.us/Policies/restplan.cfm. In other words, a spill of this nature would always be devastating but this particular spill was made even worse because it occurred at nearly the worst time of year in terms of harm to species and those who depended on those species.

Thousands of marine animals were killed by direct oiling; thousands more have been impacted in the long-term by the lingering effects of the spill on future generations of the species as well as on their habitat: "Almost two decades after the *Exxon Valdez* oil spill, it is clear that some resident species injured by the spill have not fully recovered." *See* Exxon Valdez Oil Spill Trustee Council, *Injured Resources and Services*, http://www.evostc.state.ak.us/Publications/injuredresources.cfm. The most recent report of the Exxon Valdez Oil Spill Trustee Council indicates that Pacific herring are not recovering. EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, UPDATE ON INJURED RESOURCES AND SERVICES 6 (2006), *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/2006IRSUpdate.pdf. The lack of recovery of the herring population is particularly troubling to those in the fishing industry.

"Pacific herring are ecologically and commercially important species in the Sound ecosystem. They are central to the marine food web; providing food to marine mammals, birds, invertebrates and other fish. Herring are also commercially fished for food, bait, [and roe]." *Id.* at 25. Prior to the spill, the herring population was increasing in Prince William Sound, with record harvests recorded in the late 1980s. *Id.* The 1989 year class, however, "was one of the smallest cohorts" of spawning adults recorded, and by 1993, the fishery had collapsed with only 25% of the expected adults returning to spawn. *Id.* As a result of these losses, the herring fishery in the Sound has been closed for 11 of the last 17 years. *Id.* Although the precise "[r]easons for the population collapse and failure to recovery remain unknown," EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, HERRING RESTORATION STEERING

COMMITTEE BACKGROUND AND STATUS REPORT 1 (2007), *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/HerringCommitteeExecSummary.pdf, at least one study has concluded that "that the start of the herring decline was coincident with the oil spill, and that the decline took place over a 5-year period, rather than the single-year collapse previously reported." Richard E. Thorne and Gary L. Thomas, *Herring and the "Exxon Valdez" oil spill: an investigation into historical data conflicts*, 65 ICES J. OF MARINE SCIENCE 44, 44 (2007). Studies continue to examine the impact of the spill on the herring population and how the herring might, if ever, recover. *See* HERRING COMMITTEE, *supra*, at 2

2. After the spill, Exxon faced numerous lawsuits. Exxon was indicted by the United States on criminal charges and was sued civilly by both the United States and the State of Alaska. It resolved these claims in 1991 by pleading guilty to three environmental crimes. It also agreed to pay $900 million in natural resource damages as well as $25 million in fines.

Faced with the prospect of thousands of additional individual claims, Exxon set up a program under which it agreed to pay claims resulting from the spill. These settlements, however, did not fully compensate the plaintiffs for their losses. In particular, Exxon's payments to commercial fishermen and women under these agreements compensated them for losses due to cancelled fisheries in 1989 but did not compensate them (1) for the diminished prices of fish in 1989, (2) for the losses associated with the post-1989 harvests, or (3) for the decline in the value of fishing permits and vessels. This litigation – which involves the economic harms to 32,677 commercial fishermen, related individuals and businesses, private landowners, Native Alaskans, municipalities, and others – brought recovery for some, but not all, of the additional economic harm suffered by the plaintiffs. These plaintiffs, however, never recovered for their significant non-economic harm such as the "severe depression, post-traumatic stress disorder, [and] generalized anxiety disorder" that they suffered. Pet. App. 123a.

In the end, the compensable economic harm was calculated by the court of appeals to be over $500 million. Pet. App. 38a. After a reduction by that court, the total punitive damage award amounts to $2.5 billion. Pet. App. 42a.

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SUMMARY OF ARGUMENT

After almost two decades of litigation, Exxon has asked this Court to review the punitive damages awarded as a result of Exxon's reckless conduct that led to the grounding of the EXXON VALDEZ. Although Exxon has presented this as a complicated case, the issues are straightforward.

This Court should affirm the award because the rule applied by the courts below comports with the realities of the modern maritime industry, it is consistent with how other industries are treated in similar circumstances, and its results are fair to all maritime businesses. Moreover, this particular award, which amounts to average punitive damages of about $75,000 per plaintiff, is reasonable and consistent with the purposes for punitive damages. Finally, even if Exxon had not waived its Clean Water Act argument, that Act poses no bar to recovery of punitive damages for harms to the private economic interests of the more than 30,000 plaintiffs resulting from the EXXON VALDEZ oil spill.

◆

ARGUMENT

I. Just as With Land-Based Torts, Punitive Damages May Be Imposed Under Maritime Law When a Managerial Agent Acts Recklessly.

Federal maritime law presumptively follows the common law applicable to land-based torts. *Exxon Co. U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 835, 842 (1996) (affirming an admiralty judgment that "imput[ed]" the "extraordinary negligence" of an Exxon captain to Exxon, the shipowner). Just as tort law must conform to current conditions and norms, maritime law reflects the realities and conditions of the times in which it is determined. *See, e.g., The Amiable Nancy*, 16 U.S. 546 (1818).

Contrary to Exxon's contentions, the rules set forth in the RESTATEMENT (SECOND) OF TORTS § 909(c) are simply an example of the adaptive nature of the common law. That section provides that employers are liable for punitive damages for the reckless acts of managerial agents because businesses should hire their managerial agents carefully. *See* RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (1979) ("Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions.").

Today, most jurisdictions have accepted the logic of the Restatement approach: "[I]n most jurisdictions that have considered the issue of vicarious liability, punitive damages will be imposed upon a principal when a managerial employee commits an act within the scope of employment that, of itself, would justify imposition of punitive damages upon that agent" and that "rule has been applied without considering any fault of the principal in hiring or retaining the managerial agent." JOHN J. KIRCHER AND CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE, § 24:05, at 24-19 (2d ed. 2000). In fact, a slight majority of states allow corporations to be liable for punitive damages for reckless acts of **any** employee. RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e (2006) ("A slight majority of states hold that punitive damages may be awarded against a principal that is vicariously liable on the basis that an employee-agent acted within the scope of employment when committing a tort, without requiring any additional showing of culpability on the part of the employer."); *cf. American Soc'y of Mech. Eng'rs v. Hydro Level Corp.*, 456 U.S. 556, 575 n.14 (1982) ("A majority of courts, however, have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification.").

Given this legal landscape, if Captain Hazelwood had caused an accident and subsequent spill of this sort from a land-based operation under identical circumstances, Exxon would be liable for punitive damages in almost any jurisdiction under identical circumstances. Exxon, however, argues that this case is different, largely relying on anecdotes about the maritime industry from a time gone by. But Exxon has yet to offer any sound explanation as to why modern maritime businesses should be treated differently than modern land-based operations.

Indeed, instead of acknowledging and contemplating the dynamic nature of maritime business and tort law, Exxon relies on nineteenth-century and early twentieth-century cases to argue that punitive damages are never appropriate in the maritime context no matter what the circumstances. It centers its argument on dicta in *The Amiable Nancy*, 16 U.S. 546 (1818), a case involving a privateer. Privateer is a term most Americans are unfamiliar with because privateers – private warships authorized by a national government – went out of existence in the mid-1800s. Unlike Exxon's modern day transport of oil, privateers were permitted to attack the vessels of a declared national enemy for profit and not be held liable for what otherwise would have been maritime torts. Accordingly, the maritime landscape that that case envisions was peculiar to the particular setting of the case and does not exist today.

A. Modern Maritime Communications and Contact with Shore

Early maritime law developed under the premise that once a ship set sail, the captain was out of touch with the shore. When the United States Supreme Court decided *The Amiable Nancy*, naval ships could only communicate with a rudimentary flag signaling system requiring visual contact. *See* L.S. HOWETH, HISTORY OF COMMUNICATIONS: ELECTRONICS IN THE UNITED STATES NAVY (1963), *available at* http://earlyradiohistory.us/1963hw.htm. Without wireless communication – which was not available until late in the nineteenth century and was not in general use until World War I – vessels operated in complete isolation from developments on the shore. *See* IRVING E. FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS 90-93 (1997).

As a result, in the 1800s and early 1900s, the lack of communication between the owner and the ship captain usually meant that a ship was operated under the sole authority of the captain. Communications and contact between a ship's crew and those ashore today is much different. It simply is no longer true that ships sail for months with no contact with those left behind. Just as Wal-Mart "has a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a close and constant basis," *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004), *aff'd*, 509 F.3d 1168, (9th Cir. 2007), a ship's captain now has the ability to be in contact with the shore at anytime. A shipowner can simply lift a telephone and talk to the ship captain, and she can send the captain a fax or email to which the captain can instantly reply. *See* Colin Nickerson, *For Ships, End of the Dotted (and Dashed) Line*, BOSTON GLOBE, Jan. 31, 1999, at A1 ("[A]dvances in communications technology . . . have made e-mail, faxes and crystal-clear phone calls as commonplace on the bridge of a ship in the most remote sea as in a business office."). In fact, the lowered cost and increased reliability of these technologies means that they are now part and parcel of operations on vessels large and small. *See* European Space Agency, *Low Cost Internet Access at Sea*, Apr. 19, 2006, http://www.esa.int/esaTE/SEMMAWNFGLE_index_0.html. Most PCFFA members have access to or use these technologies in operating their businesses.

At the time of the spill, Exxon had many of these technologies at its disposal. In its written response to

THE 21ST CENTURY: THE ROLE OF NEW TECHNOLOGIES IN BUILDING A COMPETITIVE AND SECURE MARITIME INFRASTRUCTURE 87, 91 (1998), *available at* http://www.ion.org/ionsite/search/view_abstract.cfm?jp=p&idno=1231. But a shipowner can do more than just track its ship. With the advent of affordable video cameras and reliable wireless transmission of those images, a shipowner can now see what is happening on the ship as well as see what those on the ship see in real time.

For example, cameras can be installed at various places around a ship for monitoring on-ship conduct just as parents have been able to monitor their children's activities on nanny cams. In addition, cameras can be mounted at various places on the ship to view the ship's surroundings and any potential dangers. Images of this sort from a variety of vessels are available to the public at http://maritimematters.com/shipcams.html.

In short, these communication and navigational technologies have changed the role of a ship captain. As one maritime scholar wrote six years before the EXXON VALDEZ oil spill:

> There is no doubt that the traditional decision-making autonomy of masters no longer exists today. Like it or not, masters today are "ship managers" who have relatively few "command decisions" to make. Modern communication methods ensure that masters today are in constant contact with the owners/

> managers, and it is simply unrealistic to expect masters to disregard proper instructions. Whether such instructions are termed "advice" or "orders" are quite irrelevant. The master is expected to be a key member of a total "management team" and would disregard instructions at his own professional risk.

Edgar Gold, *Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom*, 14 J. MAR. L. & COM. 1, 13 (1983). Exxon, in fact, had recognized this changing role when it began a program to provide its fleet officers with management skills training in 1981 and implemented other measures to transform its captains into managers on board. *See* JA 896-98; SJA 285sa-290sa (Exxon Shipping President Iarossi's *Surrendering the Memories* speech).

Like land-based businesses such as Wal-Mart, ship captains and owners can and do stay in contact in real time, even over very long distances. Shipowners can monitor the travels of a ship through global positioning systems and other tracking technology; shipowners and captains can communicate by phone (as on that fateful night on the EXXON VALDEZ), fax, and email; and, when necessary, shipowners can observe the ship captain and others on the ship as well as see what those on the ship see through real-time cameras aboard the ship. Because direct contact and communication is as available between shipowner and captain as it is between owner and manager of a land-based operation, there is no justification for treating the maritime industry differently than land-based ones.

B. Modern Maritime Cargo

Not only does Exxon fail to acknowledge the very different communications and navigational technologies available to maritime businesses today, it also never acknowledges the very different nature of the cargo that is transported by modern ships. Just as maritime communications are unlike those in the 1800s, the cargo transported by ships, both in size and character, has drastically changed, particularly in the last fifty years.

In the mid-1800s, cotton was the principal American export, followed by gold bullion, tobacco, and flour. ROBERT GREENHALGH ALBION, THE RISE OF NEW YORK PORT 400 (1939). Woolen goods, silken goods, cotton goods, and sugar were the principal American imports, followed by coffee and iron. *Id.* at 401. Spills of these cargos would have been largely environmentally innocuous. Indeed, ships carried so few dangerous cargos during most of the nineteenth century that no special regulations were considered necessary. INTERNATIONAL MARINE ORGANIZATION, IMO AND DANGEROUS GOODS AT SEA 1 (1996).

Dangerous cargo was not even mentioned in maritime law until 1894, when the transport of explosive cargo on emigrant ships was prohibited in order to protect ship passengers. *Id.* International laws that governed for the next several decades were likewise directed at preventing the carriage of goods likely to endanger ship passengers. *Id.* at 3. Until 1948, the types and amounts of dangerous cargo transported by ships were too insignificant to justify more comprehensive regulation. *See id.*

Today more than half of all packaged goods and bulk cargo transported by sea are dangerous, hazardous, or harmful to the environment. *Id.* at 1. The transportation of dangerous cargo is extensively regulated at both the national and international level. *See* 49 C.F.R. § 173.1 (2007) (discussing the scope of national regulations for the transport of hazardous substances by sea and commenting that they are generally consistent with the International Maritime Dangerous Goods Code). The International Maritime Dangerous Goods Code recognizes nine classes of dangerous goods, which include explosives, gases, flammable liquids, flammable solids or substances, toxic and infectious substances, radioactive materials, corrosives, aerosols, fertilizers, asbestos, and other substances harmful to the marine environment. IMO, DANGEROUS GOODS, at 9-17.

In addition, with the advent of containerization, a single ship can carry a wide variety of dangerous goods at the same time. *See, e.g.*, Peter MacKay, *The Song Remains the Same*, THE HAZARDOUS CARGO BULL., Jan. 1, 2005 (discussing sinking of a ship with cargo including insecticides, matches, lead acetate, ammonia, paint and paint thinner, liquid chlorine, and butane propellant aerosols). As the world has industrialized, the transport by sea of a wide variety of dangerous cargo has grown exponentially. IMO, DANGEROUS GOODS, at 1.

Spills of dangerous cargo may still be harmful to a ship's crew and passengers. The real danger, however, is the potentially disastrous consequences to the surrounding environment as evidenced by the spill in this case. *See* Pet. App. 155a ("This is not someone hauling dry cargo, the spilling of which would have minimal impact on the fisheries and other uses of Prince William Sound. Rather, this is an employer deliberately permitting a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic, crude oil."). The acute effects of spills can be enormous, such as the "[a]pproximately 3,500-5,300 sea otters and between 260,000-580,000 birds" that died following the EXXON VALDEZ spill. Danielle Droitsch, *Muddy Waters: Clarifying the Line Between Public and Private Recovery of Natural Resource Damages*, VT. J. ENTVL. LAW (1998), http://www.vjel.org/essays/roscoe98a.html (citing *Summary of Injuries to Natural Resources as a Result of the Exxon Valdez Oil Spill*, 56 Fed. Reg. 14,687, 14,690-91 (Apr. 11, 1991)). Spills of dangerous cargo can also inflict long-term damage on marine ecosystems by causing critical changes in the environment. *See* EUROPEAN MARITIME SAFETY AGENCY, EMSA ACTION PLAN FOR HNS POLLUTION PREPAREDNESS AND RESPONSE 44 (2007). Such changes include variation in salinity and pH, and de-oxygenation when materials are broken down in the marine environment. *Id.* Even biologically inert material can impact the marine environment by smothering or by changing the physical nature of an area. *Id.* Releases of some dangerous substances, particularly metals and organic chemical compounds, can result in incorporation of the substances into biological pathways. *Id.* at 45.

With respect to oil in particular, it is estimated that "[o]il spills can cause impacts over a range of time scales, from days to years, or even decades." RAMSEUR, CRS, OIL SPILLS IN U.S. COASTAL WATERS at CRS-3 (2007), *available at* http://assets.opencrs.com/rpts/RL33705_20070823.pdf; *see also id.* at CRS-3 to -6 (detailing the myriad potential impacts of an oil spill). In addition to the environmental harms of an oil spill, many businesses, such as the fishermen in this case, are uniquely harmed by oils spills. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 333 n.5 (1973) ("'The uncertainty as to the actual extent of the damage done to marine life by oil pollution makes it difficult to estimate the economic effect of such damage, but the importance of the fishing industry within the world's economy is not in doubt and is steadily increasing.'" (quoting Louis Henkin, *Issues in Offshore Oil Production*, 10 HARV. INT'L L.J. 316, 321-323 (1969))). For example, in November 2004, the Salem Nuclear Plant was forced to halt operations when an oil spill in the Delaware River polluted the cooling water used by the plant. The plant claimed lost profits of $57 million as a result of the shutdown. RAMSEUR, *supra*, at CRS-6.

The days when ships were primarily loaded with simple cargo of cotton and flour are gone. The modern shipping industry regularly transports large quantities of dangerous cargo that have the capacity to cause enormous environmental disasters. The increased hazard posed by these ships and the ability of shipowners to monitor a ship's goings-on in real time make clear that the rule applied by the lower courts is the correct one. That rule encourages shipowners to use the utmost care in choosing captains of their ships, especially those ships that, like the EXXON VALDEZ, carry dangerous cargo.

C. The Rule Applied in This Case Is Fair to All Maritime Businesses

Any maritime rule regarding punitive damages should treat all maritime operators, large and small, fairly. Exxon, however, advocates a rule that would allow its policies – even though unenforced – and additional management layers to insulate it from liability for punitive damages. Petr. Br. at 26. Requiring plaintiffs to demonstrate that Exxon ratified or condoned Captain Hazelwood's actions is both inconsistent with the law, WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4942, at 640-641 (rev. vol. 2001) ("[m]erely stating or publishing instructions and policies is not sufficient to insulate a corporation from liability, and a corporation may be held responsible for acts of its agents even when they violate such policies"), and would serve to advantage large corporate maritime businesses over small ones. The rule applied in this case does not allow Exxon to benefit unfairly from its corporate form because the rule treats all maritime businesses the same.

As the United States Court of Appeals for the D.C. Circuit has pointed out:

> A corporation . . . , with offices in a number of cities and engaged in widespread activities, necessarily delegates authority to its agents to be used on its behalf. If these agents in the exercise of their delegated authority, acting through regular corporate channels, engage in conduct which, except for the corporate nature of their principal, makes out a case for punitive damages, the corporation is not shielded therefrom simply by the absence of explicit authorization or ratification of the particular conduct. A contrary rule would permit punitive damages against smaller concerns . . . but not against a large corporation whose size and ramifications make express authorization by the top executives of tortious acts of its working-level agents highly unlikely. The question is whether the wanton, reckless or malicious action of the agents or employees can fairly be said to be truly that of the principal.

GMAC v. Froelich, 273 F.2d 92, 94 (D.C. Cir. 1959).

Unlike Exxon, small commercial fishing enterprises like those run by *amici* are unlikely to have the resources needed to generate policies or to generate corporate layers between the ship captain and the shipowner. Instead, most family-run commercial fishing businesses consist of only a few members of the family who must spend the majority of their time fishing and selling their fish. They rarely have the time to produce comprehensive written policies on conduct – or anything else for that matter. The absence of any written policies combined with the close nature of the family relationship would make it quite difficult to show that a ship captain who is the daughter of a shipowner was not acting at her father's direction, or at the very least acting in a manner that was expected by her father.

The rule followed in this case requires all maritime businesses, big and small, to select ship captains with care because the reckless acts of **any** ship captain, when that captain is a managerial agent acting within the scope of his or her employment, can subject the shipowner to both compensatory and punitive damages. Because this rule is fair to all maritime businesses, the Court should reject Exxon's arguments to treat it, and other large corporate entities, in a fashion that allows them an unfair advantage.

D. Punitive Damages Under Maritime Law for Reckless Acts of a Managerial Agent Will Not Threaten Maritime Business

Some *amici* in support of Exxon at various stages before this Court have claimed that the imposition of vicarious punitive damages might harm the maritime industry, which would in turn damage the American economy. *See, e.g.*, Br. of *Amici Curiae* Transportation Inst., Int'l Ass'n of Indep. Tanker Owners, Int'l Ass'n of Dry Cargo Shipowners, and Overseas Ship-holding Group, Inc. in Supp. of Petrs. at 11-25 (merits stage); Br. of Am. Waterways Operators et al. as *Amicus Curiae* in Supp. of Pet. at 3-4, 9 (certiorari stage). Many of these same *amici*, however, made these same claims when they lobbied Congress to include language in the Oil Pollution Act of 1990 that would preempt state laws, including state laws that allow for unlimited liability for oil spills.

For example, the American Waterways Operators tried to convince Congress that unlimited liability would "destroy an industry which is so beneficial to American consumers." *Pending Oil Spill Legislation, Hearing on S. 686, S. 1066, and S. 1223 Before Subcomm. on Envtl. Prot., Senate Comm. on Env't and Pub. Works*, 101st Cong. 128 (July 21, 1989) (statement of Joseph Farrell, President American Waterways Operators). That group further claimed that "any prudent businessman is not going to stay in business facing unlimited liability." *Id.* at 58. The American Petroleum Institute complained that unlimited liability would make insurance very expensive or impossible to obtain. *Id.* at 58 (oral statement of Charles J. DiBona, President, Am. Petroleum Inst.) The American Institute of Marine Underwriters claimed then – as it does now – that the health of the maritime industry depends upon the application of one uniform and comprehensive system of laws. *See Hearing on H.R. 1465 – To Establish Limitations on Liability for Damages Resulting from Oil Pollution, To Establish a Fund for the Payment of Compensation* *for Such Damages, and for Other Purposes Before Subcomm. on Coast Guard and Navigation, House Comm. on Merch. Marine & Fisheries*, 101st Cong. 187 (May 11, 1989) (written statement of Am. Inst. of Marine Underwriters); Br. of Am. Inst. of Marine Underwriters as *Amicus Curiae* in Supp. of Pet. at 7-8. Even claims of harm to national security made it into the Congressional debate on the Oil Pollution Act. *See* 135 Cong. Rec. H8133 (Nov. 8, 1989) (statement of Rep. Lent, R-NY).

Congress rejected these unfounded claims and included a provision – typically referred to as the "non-preemption provision" – in the Oil Pollution Act that explicitly preserved the rights of states to impose additional requirements and liabilities. 33 U.S.C. § 2718 (2002). As such, shippers have been exposed to unlimited liability through a non-uniform patchwork of state and federal laws since 1990. Contrary to their claims during the hearings, however, the maritime industry continues to flourish in American waters. There is no reason to think that the same claims from the same groups are any more accurate today than they were in 1989. Accordingly, this Court ought to reject them.

Finally, many shipping *amici* that supported Exxon at the certiorari stage indicated that – unlike Exxon in this case – they use the utmost care in selecting ship masters. Br. of American Waterways Operators et al. at 7; Br. of Keystone Shipping Co. at 4. So long as they continue to do so, the prospect of any punitive damages is remote at best under the rule applied in this case. Moreover, the Limitation Act, 46 U.S.C. §§ 30501-35012, will likely protect most innocent shipowners from large punitive damage awards because, unlike Exxon's knowledge of Captain Hazelwood's drinking problem, the Act limits an owner's liability to the value of its interest in its vessel and cargo where the damage caused by the vessel is "without the owner's privity or knowledge." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001); *see also Coryell v. Phipps*, 317 U.S. 406, 412 (1943) ("One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred by an explosion during the period of storage, unless 'privity' or 'knowledge' are to become empty words."); *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 106-07 (1941) ("If, as alleged, over-filling of the stern tanks caused the loss without the privity or knowledge of respondent, it could limit liability."); *Hartford Accident & Indemnity Co. of Hartford v. Southern Pacific*, 273 U.S. 207, 214 (1927) ("[T]he great object of [the Limitation Act] was to encourage shipbuilding and to induce the investment of money in this branch of industry by limiting the venture of those who build the ship to the loss of the ship itself or her freight then pending, in cases of damage or wrong happening, without the privity or knowledge of the ship owner, and by the fault or neglect of the master or other persons on board."); *cf.* BIO App. 43a (acknowledging Exxon's privity and knowledge of Hazelwood's drinking).

II. This Particular Punitive Damage Award Is Permissible Under Maritime Law.

Not only is the rule that allowed for the award of punitive damages in this case the correct one under maritime law, but there is also nothing impermissible about the specific punitive damages awarded in this case.

To be clear, the punitive damages award at issue is $2.5 billion. When divided between all class members, this amounts to an average of roughly $75,000 per plaintiff. This is slightly less than five times the compensatory award to each plaintiff, which amounts on average to roughly $15,500 per plaintiff. This means that, in total, the average award to each plaintiff in the class is less than $100,000.

Nevertheless, Exxon contends that the punitive damages award here is excessive and urges this Court to reduce it because it "contravenes *all* maritime law policies." Petr. Br. at 51. It then proposes several "standards" for the Court to adopt as guides for maritime punitive damages awards. *Id.* at 51-55. These purported standards, however, largely disregard this Court's prior punitive damage jurisprudence. Most troubling of all, Exxon's proposal (and largely its briefing before this Court) ignores entirely the egregious nature of Exxon's actions with respect to the spill.

"Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like." RESTATEMENT OF TORTS (SECOND) § 908 cmt.b (1979). Instead, they are only awarded where the conduct is outrageous, *id.*, and they are "aimed at deterrence and retribution." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003). "[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting). They "embody [the] social outrage at the action of serious wrongdoers.'" *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 432 n.5 (2001) (quoting Cass Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2074 (1998)). The Exxon Valdez spill certainly qualifies as "especially reprehensible" and "serious wrongdoing."

As detailed at length in this litigation and several outside reports, books, and articles, the Exxon Valdez spill is one of "the largest and most expensive oil spill in U.S. waters to date." Ramseur, CRS, Oil Spills in U.S. Coastal Waters at CRS-1 (2007), *available at* http://assets.opencrs.com/rpts/RL33705_20070823.pdf. Because of its location, it is widely regarded as the **worst** spill of all time in terms of environmental and economic damage. *See* Exxon Valdez Oil Spill Trustee Council, *History FAQ*, http://www.evostc.state.ak.us/history/faq.cfm. Almost twenty years after the spill, thousands of gallons of oil remain. *See* Exxon Valdez Oil Spill Trustee Council, *Lingering Oil*, http://www.evostc.state.ak.us/Habitat/lingering.cfm. In simplest terms, the area affected by the spill has been devastated and, even after nearly two decades of effort, it remains unclear whether it will ever fully recover. *See* Exxon Valdez Oil Spill Trustee Council, *Injured Resources and Services*, http:// www.evostc.state.ak.us/Publications/ injuredresources.cfm ("Almost two decades after the Exxon Valdez oil spill, it is clear that some resident species injured by the spill have not fully recovered. The Trustee Council recognizes 30 resources and services as injured."); Exxon Valdez Oil Spill Trustee Council, Update on Injured Resources and Services 6 (2006), *available at* http://www.evostc.state.ak.us/ Universal/Documents/Publications/2006IRSUpdate.pdf (as of 2006, the majority of species and human services provided by the area are either still recovering or not recovering at all).

Here, the punitive damages award is entirely reasonable because the spill leading to this devastation was entirely predictable. Exxon retained a known-alcoholic as a captain and on March 23, 1989, allowed that employee to captain its ship containing 53 million gallons of crude oil through an area that only he was licensed to navigate. Pet. App. 26a ("[P]utting the relapsed alcoholic in charge of the tanker is a deliberate act"). The only real surprise here is that such a spill did not occur earlier.

Punitive damages in this instance are particularly fitting because maritime law continues to follow a restrictive model of compensatory damages. In general, maritime law does not allow for emotional distress awards or consequential economic damages. *See generally Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). In this case, for example, plaintiffs were unable to recover for any damages resulting from price losses in unoiled Alaskan fisheries that occurred due to the stigma attached to catch from the area as a result of the spill. *See Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997); JA 1155-56. Nor were they able to recover for emotional damages resulting from the spill. *Exxon Shipping*, 120 F.3d at 167 n.3; Pet. App. 123a; JA 149, 1384-90. As a result, the award of punitive damages in maritime law takes on the more traditional role of compensating for "intangible injuries, compensation which was not otherwise available under . . . [a] narrow conception of compensatory damages." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001).

III. The Clean Water Act Poses No Bar To Imposing Punitive Damages In This Case.

A. The District Court Did Not Err In Denying Exxon's Belated Attempt to Claim Clean Water Act Preemption As Untimely

Exxon's final challenge to punitive damages is its claim that the Clean Water Act preempts those damages under federal maritime law. The district court denied Exxon's very tardy attempt to raise this argument thirteen months **after** the jury verdict on punitive damages. *See* Pet. App. 73a (Exxon made motion on October 23, 1995); Pet. App. 7a (jury awarded punitive damages award on September 16, 1994). That decision was well within the district court's discretion.

District courts have broad power to manage the cases before them. *See, e.g., Kimble v. Hoso*, 439 F.3d 331, 336 (6th Cir. 2006) ("With good reason, district courts ordinarily enjoy broad discretion in matters of pretrial management, scheduling, and docket control."); *Laboratory Corp. of America Holdings v. Chiron Corp.*, 384 F.3d 1326, 1333 (Fed. Cir. 2004) ("District courts are granted broad latitude in managing the cases before them. We decline to find an abuse of discretion when the district court made an informed determination as to how it would manage the litigation pending before it based on sound reasoning and identified facts."); *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 817 (3d Cir. 1982) ("[M]atters of docket control and conduct of discovery are committed to the sound discretion of the district court. We will not interfere with a trial court's control of its docket except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant." (citation and internal quotation marks omitted)); *cf. Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936))); *American Federal Group, Ltd. v. Rothenberg*, 136 F.3d 897, 905 (2d Cir. 1998) (concluding that denial of untimely post-trial motion was within lower court's discretion). In this case, Exxon had multiple opportunities to raise its Clean Water Act argument but failed to do so at every turn. The district court was therefore within its discretion to deny Exxon leave to file its late motion.

Exxon's assertion in its motion was that the Clean Water Act "[d]isplaces," Petr. Br. at 31, any federal maritime law that might permit the imposition of punitive damages. That is, Exxon has claimed that any right to punitive damages under federal maritime law was extinguished by the passage of the Clean Water Act. This assertion sounds in preemption. *See* Petr. Br. at 29 (noting "'presumption *in favor of* preemption of federal common law whenever it can be said that Congress legislated on the subject.'" (quoting *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981))).

Rule 8(c) of the Federal Rules of Civil Procedure requires that the defendant plead an affirmative defense where the defendant seeks to "admit the allegations of the complaint but suggest some other reason why there is no right of recovery." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FED. PRAC. & PROC. CIV. 3D § 1271 (2007). Based on this logic, it is widely accepted that preemption is an affirmative defense. *Id.* Moreover, defenses need not extinguish plaintiff's entire claim but may simply bar some of the relief requested by plaintiff. *See A.D.E. Inc. v. Louis Joliet Bank and Trust Co.*, 742 F.2d 395, 397 (7th Cir. 1984) (Posner, J.) (holding that partial payment is an affirmative defense and noting that "there are partial as well as complete defenses (e.g., failure to mitigate damages, avoidable consequences, and, in states that have abandoned contributory negligence, comparative negligence) . . . [and therefore] there was no need for the rule's draftsmen to add 'in whole or part'"). Accordingly, if Exxon's Clean Water Act argument amounts to "an avoidance or affirmative defense" under Rule 8(c), in keeping with the well-known general rule, Exxon waived the defense by never pleading it in its answer and never seeking to amend its answer to include it. WRIGHT & MILLER, 5 FED. PRAC. & PROC. CIV. 3D § 1278 ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case."); *cf. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971) ("The purpose of . . . pleading [an affirmative defense] is to give the opposing party notice of the [defense] and a chance to argue, if he can, why the imposition of [the defense] would be inappropriate.").

Even if Exxon was not required to plead this as an affirmative defense, Exxon had a duty to raise the issue before trial and had several opportunities to do so. Exxon could have made this claim when it moved for summary judgment on April 15, 1993, on the basis of the alleged displacement of maritime punitive damages by the Trans-Alaska Pipeline Authorization Act. *See* JA 4, 63-93. It did not. More critically, Exxon should have presented this issue during briefing for the revised trial plan, which determined the law to be applied to the case at trial. *See* Fed. R. Civ. P. 16(b). It never did so. Instead, Exxon essentially asked to revisit that order in its motion for leave to file its Clean Water Act argument presented to the court two years after the order was entered and more than a year after the Phase III trial concluded. *Cf.* BIO App. 33a.

Notwithstanding its failure to raise the issue pretrial, during Phase III of the trial, Exxon might also have attempted to move for judgment as a matter of law under Rule 50(a) asserting that the Clean Water Act barred any punitive damages in the case. *See* Fed. R. Civ. P. 50(a). Again, it did not. Moreover, because it did not, Exxon could not move for judgment as a matter of law after the jury verdict. *See* Fed. R. Civ. P. 50(b). But even if Exxon could have made this argument post-trial under Rule 50 without raising it before – a dubious proposition – it missed the stipulated post-trial motion deadline by more than a year. *See* BIO App. 33a.

In sum, Exxon had ample opportunity to raise this argument over the more than five years it took from filing of the case to Phase III of the trial. Instead, it waited more than a year after the jury verdict to make its argument. In this complex and complicated case involving over 30,000 plaintiffs, the district court was required to intensively manage the case, including scheduling, in order for it to stay on track. Pet. App. 67a (noting that district court "did a masterful job of managing this very complex case."). Given Exxon's extraordinary and unexplained delay in raising this argument, the district court was within its broad discretion to deny Exxon's motion as untimely.

B. There Is No Merit to Exxon's Clean Water Act Preemption Defense

Even if the district court had abused its discretion in denying Exxon's motion, the Clean Water Act poses no bar to the punitive damage award here. Exxon does not dispute that the Clean Water Act does not bar the tort claims asserted by the over 30,000 plaintiffs here. *See generally International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (detailing Clean Water Act savings provisions and describing their preservation of several common law actions). Accordingly, it must demonstrate that the Clean Water Act "spoke directly to," Petr. Br. at 30, punitive damages (but not compensatory damages) resulting from the otherwise permissible tort causes of action for which it was found liable. It has failed to make this difficult showing.

As this Court has noted on several occasions with respect to state common law, "unless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes," it is assumed that the entire cause of action is available. *Int'l Paper*, 479 U.S. at 499 n.19; *see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law. . . . Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted."). There is simply no express evidence in the Clean Water Act that Congress intended to supplant punitive damages under maritime law. In fact, even if Exxon must only show, as it claims, "a clear and manifest purpose to displace common-law rules," Petr. Br. at 29 (citations and internal quotation marks omitted), Exxon has pointed to nothing in the Clean Water Act that can be said to embody an intention to displace punishment for *private economic* harm, the basis for the punitive damages here.

To the contrary, with respect to oil spills, the Clean Water Act specifically preserves much of the law that existed before it was enacted: "Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance." 33 U.S.C. § 1321(o)(1) (2002). As such, the Clean Water Act poses no bar to the award of punitive damages in this case.

◆

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Santa Cruz Fishermen's Marketing Association
Crab Boat Owners Association
Trinidad Bay Fishermen's Marketing Association
Washington Trollers Association
Moss Landing Commercial Fishermen's Association
Humboldt Fishermen's Marketing Association
Commercial Fishermen of Santa Barbara, Inc.
Half Moon Bay Fishermen's Marketing Association
Salmon Trollers Marketing Association
Monterey Fishermen's Marketing Association
Port San Luis Commercial Fishermen's Association
Small Boat Commercial Salmon Fishermen's Association
Federation of Independent Seafood Harvesters
Fishermen's Marketing Association of Bodega Bay
California Herring Association
Salmon for All

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IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BMW of N. Am., Inc. v. Gore,
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Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposals, Inc., 492 U.S. 257 (1989) 10,12-13,19,24

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 29-30

Clark v. Chrysler Corp.,
436 F.3d 594 (6th Cir. 2006) 26-27

Cooper Indus. Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 15

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Grant v. McDonogh,
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In re the Exxon Valdez,
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Ogden v. Gibbons,
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United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207 (10th Cir. 2000) 5

TABLE OF AUTHORITIES
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Page(s)

United States v. Reliable Transfer Co.,
421 U.S. 397 (1975) 2

Wash. Gas-Light Co. v. Lansden,
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Wilkes v. Wood,
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Zazu Designs v. L'Oreal, S.A.,
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CONSTITUTION

U.S. Const. art. III, § 2, cl. 1 2

OTHER AUTHORITIES

2 Am. L. Inst., *Reporters Study, Enterprise Responsibility for Personal Injury* (1991) 31

Kenneth S. Abraham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. Legal Stud. 415 (1989) 31-32

Dan D. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831 (1989) 6-7

Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982) 8

A.C. Ewing, *Morality of Punishment* (1929) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Margaret Cronin Fisk, *A Typical Verdict Last Year Was Way up, but Nothing like This One*, 22 Nat'l L.J. No. 27, p. A1 (Feb. 28, 2000) 23

Georg Hegel, *Philosophy of Right* (1958) 12

Immanuel Kant, *The Philosophy of Law* (W. Hastie trans. 1887) 12

Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, Ins. L.J. 257 (May 1980) 22

J.D. Mabbot, *Punishment, in The Philosophy of Punishment* 39 (H. Acton ed. 1969) 12

W.G. Maclagan, *Punishment and Retribution*, 14 Philosophy 290 (1939) 12

Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 (1927) 11

Herbert L. Packer, *The Limits of the Criminal Sanction* (1968) 8

Mark A. Peterson, Syam Arma & Michael G. Stanley, *Punitive Damages: Empirical Findings* (1987) 22

A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Cass A. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998) 10

Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919 (1989)..................................9

INTEREST OF *AMICUS CURIAE*[1]

Product Liability Advisory Council, Inc. (PLAC) is a nonprofit association with 124 corporate members constituting a broad cross-section of manufacturers that seek to contribute to the development of sound legal principles, especially those affecting the liability of manufacturers. (A list of PLAC's corporate members is attached as Appendix A.) In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

This case is of interest to PLAC because it presents broad questions about common-law limitations on excessive punitive damages awards: what they were when this nation was founded; what their rationales were; and how they should continue to develop and be applied. The most breathtaking punitive damages awards have occurred in the last 30 years, all against business entities, including PLAC members. Accordingly, PLAC has a strong interest in providing this Court with information and analyses that may help protect against awards that, like the one in this case, contravene the common-law safeguards against arbitrary and excessive punitive damages.

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus*, its members, and their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court granted *certiorari* in part to consider whether the $2.5 billion punitive damages award approved by the Ninth Circuit comports with the principles limiting punitive damages awards under general maritime law. To the extent not governed by congressional statute, maritime law is true federal common law, of which this Court is the ultimate arbiter. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) (observing that "Congress ha[s] largely left to this Court the responsibility for fashioning the controlling rules of admiralty law") (citation omitted); U.S. Const. art. III, § 2, cl. 1. Although it has discussed common-law limitations on punitive damages in other contexts, this Court has not previously had occasion to apply them to general maritime law. There is no sound reason why those limitations, found necessary to guard against arbitrary and excessive punitive awards in all other areas of common law, should not provide similar safeguards in the federal common law of admiralty.

Here, the $2.5 billion punitive damages award against Exxon[2] violates the common-law principles limiting punitive awards to an amount reasonably necessary to serve the legitimate purposes of punishment and deterrence. Given the huge sums Exxon paid in compensatory damages, settlements, fines, and cleanup costs, and given Exxon's loss of its own vessel and cargo, no multi-billion-dollar punitive damages award is necessary to *legitimately* serve the common-law goals of punishment and deterrence.

---

[2] Petitioners Exxon Shipping Co. and Exxon Mobil Corp. are collectively referred to herein as "Exxon."

The common law also did not permit increased punitive damages based on a corporate defendant's financial status, yet the jury here was presented with, and told to consider, evidence of Exxon's large income and net worth for that very purpose. Respondents told the jury that $5 billion was insignificant to Exxon and that only a huge award would "get them a message." (Tr. at 7573-84.) That evidence, the argument based on it both at trial and on appeal, and the resulting punitive damages judgment, violated the common-law requirement that the amount of punitive damages be reasonably necessary to the purposes of punishment and deterrence.

ARGUMENT

Long before the development of this Court's due process jurisprudence with respect to punitive damages, the common law required judicial review providing safeguards against arbitrary and excessive punitive damages awards. Such review aimed to ensure that punitive awards were reasonably necessary to further the goals of deterrence and punishment. Those common-law limiting principles should apply in admiralty because they are sound safeguards and because, "[d]rawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986).

The $2.5 billion punitive damages award approved by the Ninth Circuit violates those principles. The award is unnecessary and excessive because the court of appeals failed to consider properly that Exxon incurred costs in excess of $3.4 billion as a result of the oil spill from the *Valdez*. The imposition of another $2.5 billion in punitive damages, urged by Respondents on the basis of Exxon's income and net worth, cannot be explained as reasonably necessary under any recognized theory of deterrence or punishment.

I. THE COMMON LAW HAS LONG RECOGNIZED THAT PUNITIVE DAMAGES MUST BE LIMITED TO AN AMOUNT REASONABLY NECESSARY TO ACHIEVE APPROPRIATE DETERRENCE AND PUNISHMENT

For as long as courts have allowed punitive damages at common law, the amount of such awards has been subject to judicial review for reasonableness in light of the purposes of punishment and deterrence. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) ("Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable."). Any award that fails to comport with deterrence and punishment principles is arbitrary and excessive. *See, e.g.*, *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 144 (Ohio 2002) (holding that, while not unconstitutionally excessive, punitive damages award was excessive under Ohio common law: "While certainly a higher award will always yield a greater punishment and a greater deterrent, the punitive damages award should not go beyond what is necessary to achieve its goals. The law requires an effective punishment, not a draconian one.").

A. Since Their Inception, Punitive Damages Awards Have Been Subject to Judicial Review for Excessiveness in Light of Punishment and Deterrence Principles

Common-law courts have reviewed punitive damages awards for excessiveness since before this nation was founded. *See Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763). In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), this Court recognized that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Id.* at 421. Other courts considering challenges to punitive damages awards have likewise recognized common-law limitations on the amount of such awards, separate and apart from any constitutional due process limitations. *See, e.g.*, *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232 (10th Cir. 2000) ("The question of whether the punitive damages award comports with state law is separate from the determination of whether it complies with the Due Process Clause of the Fourteenth Amendment."); *McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) (setting aside verdict as "in excess of what may justly be regarded as compensation to plaintiff . . . or as punishment to defendant, or both"); *State ex rel. Atchinson, T. & S. F. Ry. Co. v. Ellison*, 186 S.W. 1075, 1078 (Mo. 1916) ("[T]he trial court had the right to set this verdict aside on the ground that the weight of the evidence in the whole case did not support the amount of punitive damages found by the trier of fact.").

Deterrence and punishment, or retribution, are the only purposes of punitive damages recognized as legitimate at common law. *See, e.g.*, *Lake Shore & M.*

S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) (punitive damages can be imposed "as a punishment to the guilty [and] to deter from any such proceeding for the future") (quoting *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 (K.B. 1763)); *Smith v. Wade*, 461 U.S. 30, 54 (1983) (observing that under the common law "[t]he focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards"); *Thompson v. Morris Canal & Banking Co.*, 17 N.J.L. 480, 484 (1840) (punitive damages are awarded "by way of punishment for wanton mischief or malicious and revengeful actions, sometimes called exemplary damages to deter men from such kind of conduct"); *Grable v. Margrave*, 4 Ill. (3 Scam.) 372, 373 (1842) (punitive damages are awarded "for the double purpose of setting an example, and of punishing the wrong-doer"); *Titus v. Corkins*, 21 Kan. 722, 723 (1879) ("[P]unitive damages mean more than compensation; they imply punishment, and are to deter the wrong-doer . . . ."). Plainly, a punitive award cannot *legitimately* promote either deterrence or punishment if it is larger than what is reasonably necessary under recognized deterrent and retributive principles.

> We could set a good example to induce safe driving by sentencing the traffic offender to hang . . . even though he could be deterred by much less severe punishment. By this example, others might well be deterred from speeding . . . . That benefit notwithstanding, to punish the guilty beyond their guilt is not different from punishment of the innocent,

> and it cannot be done in a manner consistent with ordinary notions of justice.

Dan D. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 854 (1989).

Accordingly, the purpose of judicial review of the size of punitive damages awards must be to ensure that the awards reasonably comport with such principles. *See, e.g., Mayer v. Frobe*, 22 S.E. 58, 63 (W. Va. 1895) ("But if the damages assessed as compensatory are sufficient in amount to operate at the same time as a punishment and a warning, the jury are not authorized to add still a further and greater sum, and thus subject the defendant to a double punishment in the same case for the same wrong."); *cf., e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1996) ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve the goal."). As this Court has put it in the due process context, the procedures employed must "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 21; *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003) ("While we do not suggest there was error in awarding punitive damages based upon [the defendant's] conduct towards the [plaintiffs], a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.").

Judicial review of punitive damages awards in light of the rational principles underlying the purposes of "deterrence" and "punishment" is particularly important to sound common law, in admiralty and otherwise, for two reasons. First, in most cases, as in this one, the jury is never instructed on the legal meaning of either word or, more importantly, on the limiting principles dictated by those purposes. Accordingly, it is extraordinarily unlikely that the jury will somehow divine and scrupulously adhere to those limiting principles. Second, unless judicial review applies principles based on recognized, rational theories of deterrence and punishment, reviewing courts will merely substitute their own subjective notions for those of juries, resulting in "an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts." *2-D's Logging, Inc. v. Weyerhaeuser Co.*, 632 P.2d 1319, 1326 (Or. Ct. App. 1981).

B. The Common Law Recognized That Punitive Damages Should Not Exceed an Amount Reasonably Necessary to Deter the Wrongful Conduct in Question

The basic premise of deterrence is that actors will rationally weigh their gains and losses likely to result from the wrongful conduct they are contemplating. *See* Herbert L. Packer, *The Limits of the Criminal Sanction* 45-48 (1968); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 23-24, 43-53 (1982). Threatened adverse consequences will deter a rational actor from engaging in wrongful conduct if the adverse consequences expected by the actor exceed the benefits that the actor expects to derive from the conduct. Because corporations are purely economic actors, not individuals acting to satisfy a range of human emotions, a punishment should deter a corporation from acting wrongfully if it removes the prospect of monetary gain from the wrongful behavior.[3] Therefore, punitive damages awards greater than necessary to cause the corporate defendant to conclude that engaging in similar misconduct in the future would be unprofitable violate this basic deterrence principle.[4] *Cf. Haslip*, 499 U.S. at 21 (review of punitive damages awards must ensure that the amounts of such awards are "rational in light of their purpose to punish what has occurred and to deter its repetition").

Such awards are particularly harmful to the public where, as here, the corporate defendant is engaged in socially beneficial, albeit inherently risky, behavior. *See In re the Exxon Valdez*, 270 F.3d 1215, 1244

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[3] For instance, if a manufacturer is deciding whether to make a defectively designed product, the manufacturer will correct the defect if the manufacturer's expected economic detriment resulting from the defect outweighs the manufacturer's expected economic benefits to be derived from selling the product with the defect. *See, e.g.*, Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-51 (1989) ("[A] rational, risk-neutral, profit-motivated corporation, regardless of its size, will refrain from any act that has associated expected costs exceeding the associated expected gains for the corporation. If the selection of a defective design will generate a net loss of one dollar, it will be as unattractive to [a large corporation] as to [a smaller one].").

[4] Corporations differ from individuals in this regard. Individuals can realize both monetary gain and non-monetary pleasures from a variety of socially undesirable conduct. To achieve optimal deterrence of individuals, therefore, an award exceeding the individual's expected monetary gain is more likely to be appropriate.

(9th Cir. 2001) (*Punitive Damages Opinion I*) (recognizing that "fuel for the United States at moderate expense has great social value"). If a punitive award too greatly exceeds any benefit the corporate defendant could have expected to gain by engaging in the wrongful conduct, the punishment will over-deter the defendant and cause it to take socially inefficient precautions, or even to decline to make beneficial services and products available to the public. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposals, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (punitive damages greater than reasonably necessary for punishment or deterrence hurt society by discouraging socially desirable activity); *see also Wade*, 461 U.S. at 60 (Rehnquist, C.J., dissenting) ("[T]he alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined."). *See also* Cass A. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2077 & nn.22, 23 (1998) ("[A] risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies . . . ."); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 873 (1998) (same).

In determining whether a punitive damages award is excessive in light of its deterrent purpose, it is important to bear in mind that the detriment incurred by a defendant—and thus the deterrent force—is not only the amount of the punitive award.

Rather, the detriment—and thus the deterrent force—includes *all* costs incurred by the defendant as a result of its wrongful conduct, including lost time of employees whose attention is diverted to litigation, lost goodwill, legal fees and litigation costs, sales opportunities and other business opportunities lost due to adverse publicity, and, in this case, staggering mitigation and cleanup costs, massive fines, and the cost of a lost ship and its cargo. *See, e.g.*, *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (noting that a tortfeasor's "entire penalty includes extra-judicial consequences").

Furthermore, as this Court has recognized, compensatory damages both deter and punish wrongful conduct. *Wade*, 461 U.S. at 54 (stating that the focus is on whether the tortfeasor's conduct "is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards"); *see Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence . . . operates through the mechanism of damages that are compensatory") (emphasis omitted). Other courts, as well as legal scholars, have long recognized that compensatory damages provide deterrence and punishment. *See, e.g.*, *Mayer*, 22 S.E. at 63 (stating that compensatory damages can be "sufficient in amount to operate at the same time as a punishment and a warning"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1182-83 (1927).

To achieve reasoned, socially desireable deterrence, therefore, punitive damages should be imposed only in an amount that is reasonably necessary, when added to compensatory damages awards, litigation costs, loss of business opportunity and goodwill, and other detriments, to eliminate the company's financial incentive to repeat the wrongful conduct. Any larger sum is unjustified by deterrence principles. *See Gore*, 517 U.S. at 584 ("The sanctions imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

C. Proportionality Between Punishments and Wrongs Was a Fundamental Common-Law Requirement to Protect Against Arbitrary and Excessive Punishment

Retributivism has for centuries rested on the principle that the punishment inflicted on a wrongdoer must be proportional to the moral gravity of the offense. *See* Immanuel Kant, *The Philosophy of Law* 194-98 (W. Hastie trans. 1887); Georg Hegel, *Philosophy of Right* 71 (1958); A.C. Ewing, *Morality of Punishment* 39-40 (1929); W.G. Maclagan, *Punishment and Retribution*, 14 Philosophy 290-92 (1939); J.D. Mabbot, *Punishment, in The Philosophy of Punishment* 39, 39-41 (H. Acton ed. 1969). It finds perhaps its oldest expression in the Biblical passage, "Eye for eye, tooth for tooth, hand for hand, foot for foot." *Exodus* 21:24. Its common-law roots extend back to at least 1215, when Magna Carta limited the imposition of amercements, the progenitor of punitive damages, by stating:

> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentment; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall

> be likewise amerced, saving his wainage, if he fall into our mercy.

Browning-Ferris, 492 U.S. at 288-89 (O'Connor, J., dissenting) (quoting Magna Carta ch. 20 (1215)). Thus, Magna Carta required punitive awards to be proportioned to the "manner of the fault."

For more than a century in this country, state courts applying common law have recognized proportionality as a fundamental limit on the amount of punitive damages. *See, e.g.*, *Flannery v. Baltimore & Ohio R.R. Co.*, 15 D.C. 111, 125 (1885) (remitting punitive award that court deemed "out of all proportion to the injuries received"); *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) (remitting verdict and stating that "exemplary damages should bear some proportion to the real damage sustained"); *McCarthy*, 22 Minn. at 91-92 (setting aside verdict as "in excess of what may justly be regarded as . . . punishment to defendant"). This Court has recognized that the requirement of proportionality between punishments and the wrongs for which they are inflicted is a principle "deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983); *accord Gore*, 517 U.S. at 575 ("As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.'") (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 478-79 (1993) (O'Connor, J., dissenting) ("[C]ourts historically have required that punitive damages awards bear a reasonable relationship to the actual harm imposed."); *see Mass. Bonding & Ins. Co. v. United States*, 352 U.S. 128, 133 (1956) ("By definition, punitive damages are based upon the degree of the defendant's culpability.").

Although the requirement is one of proportionality between punishment and culpability, it often has been framed as mandating proportionality between punitive damages and the harm caused or, even more particularly, between punitive damages and compensatory damages. *See Gore*, 517 U.S. at 580 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."); *TXO*, 509 U.S. at 459 (plurality opinion) ("[S]tate courts have long held that exemplary damages allowed should bear some proportion to the real damage sustained." (quotation marks omitted)); *Mayer*, 22 S.E. at 61 ("[T]he principle of punitive damages assessed in proportion to the evil intent of the wrongdoer is declared established."); *Saunders v. Mullen*, 24 N.W. 529 (Iowa 1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large."); *Flannery*, 15 D.C. at 125 (remitting punitive award that court deemed "out of all proportion to the injuries received"); *Grant*, 7 La. Ann. at 448 ("[E]xemplary damages allowed should bear some proportion to the real damages sustained."). Undoubtedly, this is because the nature and scope of harm caused by wrongful conduct usually provides at least a rough measure of the conduct's reprehensibility and the amount of deterrence needed, and compensatory damages are the monetary measure of the harm.[5]

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[5] This was not always so. In early common law, when compensatory damages could not be awarded for many types of intangible harms, the amount of a compensatory award inadequately reflected the reprehensibility of the defendant's conduct, and

Because the basic retributive principle requires that punishment be proportional to the moral gravity of the wrongdoing, any intentional increase of a punishment beyond the level necessary to achieve the required proportionality is, for the retributive purpose, arbitrary and unjustifiable.

II. THE $2.5 BILLION PUNITIVE DAMAGES AWARD APPROVED BY THE NINTH CIRCUIT IS EXCESSIVE IN LIGHT OF THE COMMON- LAW REQUIREMENT THAT THE AWARD BE REASONABLY NECESSARY TO ACHIEVE APPROPRIATE DETERRENCE AND PUNISHMENT

A. The $2.5 Billion Punitive Damages Award Violates the Common-Law Requirement of Being Reasonably Necessary to Achieve Deterrence

The court of appeals ordered that the $4.5 billion punitive damages award approved by the district

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punitive damages were needed to achieve the proportionality dictated by "eye for eye." *See, e.g., Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."); *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) (same). As the common-law conception of compensatory damages has evolved to provide compensation for a greater array of intangible harms, compensatory damages have come to provide a more reliable proxy for the measure of the conduct's reprehensibility. *See State Farm*, 538 U.S. at 426 (observing that "a major role of punitive damages" is to condemn conduct that causes "outrage and humiliation" and that compensatory damages for intangible harms "already contain this punitive element").

court be remitted by $2 billion. *See In re the Exxon Valdez*, 490 F.3d 1066, 1073 (9th Cir. 2007) (per curiam) (*Punitive Damages Opinion II*). One of the primary reasons the court ordered the remittitur was that, "in assessing the reprehensibility of Exxon's misconduct," there were several "mitigating facts," including the "prompt action taken by Exxon both to clean up the oil and to compensate the plaintiffs for economic loss." *Id.* The court determined that these mitigating facts "mollify" the "reprehensibility in economic terms of Exxon's original misconduct." *Id.*

Although the court of appeals certainly was correct in stating that the $2.1 billion Exxon expended to clean up the oil spill must be taken into account, the manner in which the court did so failed to give appropriate weight to the expenditures' deterrent effect on Exxon. Specifically, a correct analysis does not lead merely to the conclusion reached by the court—*i.e.*, that Exxon's conduct related to the oil spill was less reprehensible than it would have been had it done nothing after the spill occurred. Instead, a correct analysis shows that the deterrent effect of having to incur those enormous costs makes any punitive damages award wholly unnecessary and contrary to deterrence principles.

Under this Court's due process analysis and deterrence principles, the more reprehensible the defendant's conduct *that caused the plaintiff's harm*, the larger the constitutionally permissible ratio between compensatory damages and punitive damages may be. *Gore*, 517 U.S. at 575-76. Thus, it is neither logical nor consistent with the purposes of punitive damages to determine reprehensibility—greater or lesser—based on actions or omissions that occurred *after* the misconduct that caused the harm for which a plaintiff seeks compensatory and punitive damages and *after* the harm for which compensatory damages are awarded occurred.

The analytical awkwardness of trying to shoehorn Exxon's salutary, mitigating post-accident steps into the reprehensibility prong of the due process analysis would have been avoided had the court of appeals considered the cost of those actions to Exxon in light of the traditional common-law limitations on punitive damages awards. Specifically, the court of appeals would have recognized that the more than $3.4 billion in costs that Exxon incurred as a result of the oil spill must be considered an important detriment to the defendant—*i.e.*, *an important part of the deterrent force.*

As stated above at page 9, because corporations are purely economic actors, a punishment suffices to deter a corporation if it removes the prospect of monetary gain from wrongful behavior. To determine whether the prospect of monetary gain has been removed from a corporate defendant's wrongful behavior, it is necessary to identify *all* economic detriments incurred by the defendant in connection with the behavior. Such economic detriments include *all* costs incurred as a result of the tortious conduct. *See, e.g.*, *Zazu Designs*, 979 F.2d at 508 (noting that a tortfeasor's "entire penalty includes extra-judicial consequences"). To achieve optimal deterrence, punitive damages should be imposed only in the amount that must be added to compensatory damages awards and any "extra-judicial consequences" to eliminate the company's financial incentive to repeat the wrongful conduct.

Here, the costs Exxon incurred because of its wrongful conduct include the millions of dollars in judgments, settlements, and other recoveries that various plaintiffs obtained as a result of the oil spill; the $900 million settlement Exxon paid to the government to restore natural resources; the $125 million fine and restitution; the $2.1 billion Exxon paid in cleanup costs; the $46 million in damage to the ship and in lost cargo; the undetermined amounts Exxon paid in litigation costs; and loss of business opportunity and goodwill. These amounts, totaling more than $3.4 billion, are more than sufficient to remove any prospect of gain from its wrongful behavior, when the only benefit to Exxon, if any, of engaging in a similar future act would be the much smaller amount that Exxon might save by, for example, not having to hire ship captains more reliable than, but at least as skilled as, Captain Hazelwood. The Ninth Circuit, in an earlier opinion remanding the original $5 billion punitive damages award in this case, appeared to embrace these concepts:

> The cleanup expenses Exxon paid should be considered *as part of the deterrent already imposed.* Depending on the circumstances, a firm might reasonably, were there no punishment, be deterred, in some cases but not all, by its actual expenses. For example, a person painting his trim may not carefully mask window glass, because it is cheaper and easier to scrape the paint off the glass than to mask it carefully. But if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him "only" $10,005 and he was not otherwise punished.

> Exxon's casualty losses for the vessel and cargo (approximately $46 million), the costs of clean up (approximately $2.1 billion), the fine and restitution ($125 million), settlement with the government entities (approximately $900 million), settlements with private parties (approximately $300 million), and the net compensatory damages (approximately $19.6 million) totaled over $3.4 billion . . . . A company hauling a cargo worth around $25.7 million has a large incentive to avoid a $3.4 billion expense for the trip. This case is like the ink on the rug example, not the paint on the window example. *Just the expense, without any punishment, is too large for a prudent transporter to take much of a chance, given the low cost of making sure alcoholics do not command their oil tankers.*

Punitive Damages Opinion I, 270 F.3d at 1244 (emphasis added).

It contravenes basic deterrence principles to permit juries to award punitive damages in an amount greater than necessary to deter the defendant from again engaging in the wrongful conduct in question. Because any punitive damages on top of the $3.4 billion already incurred by Exxon would constitute massive over-deterrence, no punitive damages could have been awarded in this case consistent with the deterrence rationale. *See, e.g.*, *Gore*, 517 U.S. at 584 ("The sanctions imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."); *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) (exemplary exactions that are greater than reasonably necessary for punishment or deterrence hurt society by discouraging socially desirable activity); *see also Wade*, 461 U.S. at 59 ("[T]he alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined.") (Rehnquist, C.J., dissenting).

B. The Punitive Damages Award Violates the Requirement of Being Reasonably Necessary to Achieve Proportionality That Comports with Retributive Principles

In calculating the amount of harm to Respondents, both the district court and the court of appeals aggregated the $287 million jury verdict with the judgments, settlements, and other recoveries various plaintiffs obtained from Exxon as a result of the oil spill. *See Punitive Damages Opinion II*, 490 F.3d at 1089-93. The Ninth Circuit ultimately settled on $504.1 million as the total amount of economic harm resulting from Exxon's wrongful conduct to be used in arriving at a constitutionally appropriate ratio between the harm resulting from Exxon's wrongful conduct and the amount of punitive damages that should be awarded. *Id.* at 1093.

In determining the ratio of punitive damages to actual harm for its due process analysis, the court of appeals referenced this Court's observation in *State Farm* that substantial compensatory damages counsel in favor of a lesser ratio, and that even a punitive award equal to compensatory damages "might mark the outer limits of due process." *Id.* Nevertheless, the Court ultimately concluded that, because Exxon's conduct was "particularly egregious," a punitive award approximately five times the compensatory damages was constitutionally sound. *Id.* at 1094.

Even if the Ninth Circuit correctly applied the required constitutional due process analysis,[6] its decision is nevertheless flawed because it failed to consider whether the punitive damages award comports with the common law's retributive limitation of proportionality. In approving the $2.5 billion punitive award, the Ninth Circuit acknowledged that the costs incurred by Exxon as a result of Exxon's actions were "significant," *id.* at 1093-94, but misunderstood the import of that fact. Only in instances when compensatory damages and other costs incurred by a defendant as a result of its misconduct do not reflect the reprehensibility of the misconduct—for example, an unsuccessful attempt to cause harm to a person or property—is proportionality served by a punitive award in addition to the compensatory award. And the common-law retributive "outer limits" could be zero or a fraction, rather than a multiple, of the compensatory damages, regardless of what the due process "outer limits" might be.

Exxon incurred billions of dollars in other costs on top of the compensatory damages award, so the costs incurred by Exxon as a result of its misconduct vastly exceeded the harm its misconduct caused Respondents. Therefore, without any punitive damages award, and certainly without a multi-billion-dollar punitive damages award, the cost to Exxon was for retributive purposes proportional to the harm caused. No punitive award was reasonably necessary to achieve retributive proportionality.

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[6] We disagree that Exxon's conduct was "particularly egregious," and instead endorse the analysis of Exxon's conduct provided in the brief of *amici curiae* American Petroleum Institute, American Chemistry Council, American Tort Reform Association, National Association of Manufacturers, and Western States Petroleum Association.

III. ALLOWING JURIES TO INCREASE PUNITIVE DAMAGES BASED ON A CORPORATE DEFENDANT'S NET WORTH DISSERVES DETERRENT AND RETRIBUTIVE PURPOSES

For several decades after our country's founding, the common law did not permit juries to increase punitive damages based on a defendant's financial status. The traditional common-law requirements of reasonable necessity and proportionality dictated by deterrent and retributive principles have eroded, however, and the result in recent years has been historically unprecedented blockbuster punitive damages verdicts driven by prejudice against, and a desire to "take down," corporations with substantial net worth.[7]

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[7] Researchers at the RAND Institute for Civil Justice have empirically determined that "[c]orporate defendants are . . . more likely than individuals or public agencies to be the target of [punitive damages] awards." Mark A. Peterson, Syam Arma & Michael G. Stanley, *Punitive Damages: Empirical Findings* iii (1987). In 1955 an award of $75,000 was the largest punitive damages verdict in California history and one of the two largest in the history of the United States. Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, Ins. L.J., May 1980, at 257, 259 (1980). In 2000, in a product liability case arising out of a crash of a 14-year-old Chevrolet Malibu, a jury rendered a ver-

That desire is evident here. Respondents' entire focus in Phase III of the trial was on Exxon's income and net worth. In closing, Respondents urged the jury to "get them a message" and suggested that only an outsized verdict could affect such a large company. (*See, e.g.*, Trial Tr. at 7560 (referring to Exxon's "mahogany-polished boardroom" and "boards of director's rooms throughout the world"), 7564 (discussing Exxon's $10-12 billion cash flow), 7575-85 (referring to Exxon's and its officers' wealth, stating that $5 billion is nothing to Exxon, and telling the jury to "get them a message").) Respondents continued this tactic before this Court, pointing out on the first page of their Brief in Opposition to Petition for a Writ of Certiorari that the $2.5 billion punitive damages verdict "represents barely more than three weeks of Exxon's current net profits." The argument that a huge punitive damages judgment is appropriate because of Exxon's substantial net worth is an emotional plea that conflicts with basic common-law principles.

There is no legitimate deterrent or retributive basis for allowing a jury to impose greater punishment on a corporate defendant with more net worth than on one with less. That is especially so when, as here, the wrongful act in issue has cost the company more than $3.4 billion in judicial and extra-judicial expenditures without any punitive damages; when any similar wrongful act in the future could readily result in similar costs should another oil spill result; and when the only benefit to Exxon, if any, of engaging in a similar act would be the relatively trivial ad-

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dict against General Motors of $107.6 million in compensatory damages and $4.9 *billion* in punitive damages. Margaret Cronin Fisk, *A Typical Verdict Last Year Was Way up, but Nothing like This One*, 22 Nat'l L.J. No. 27, p. A1 (Feb. 28, 2000).

ditional amount that Exxon might have to pay to hire ship captains more reliable than, but at least as skilled as, Captain Hazelwood. The total cost imposed should be adequate to punish proportionately to the culpability and to deter future similar conduct, but not over-deter; and that metric has nothing to do with the size of the corporate defendant.

A. Allowing Juries to Increase Punitive Damages Based on a Corporate Defendant's Net Worth Violates the Common-Law Requirement of Proportionality

As discussed above at 12, ensuring the common-law retributive requirement of proportionality dates at least back to Magna Carta. *See Browning-Ferris*, 492 U.S. at 288-89 (O'Connor, J., dissenting) (quoting Magna Carta ch. 20 (1215)). Moreover, "[a]fter Magna Carta, the amount of an amercement was initially set by the court. A group of the amerced party's peers would then be assembled to *reduce* the amercement in accordance with the party's ability to pay." *Id.* (emphasis added). Thus, liability was determined, a punishment proportional to the wrongdoing was selected, and only then was the defendant's financial status considered, potentially to reduce, not increase, any punitive damages.

This common-law principle prevailed for decades after this nation was founded: reviewing courts generally applied the traditional proportionality test and did not allow evidence of wealth as a factor to be considered in increasing punitive damages. As late as 1868 the Supreme Court of Iowa stated:

> [W]hile some of the cases have held, that the pecuniary condition of a defendant may be shown, when plaintiff is entitled

> to vindictive damages, or in case of malicious torts, yet it is believed that the weight of authority is the other way. . . . Aside from the exceptional cases of slander and breach of promise to marry, courts should hesitate long before receiving such evidence, or allowing the jury to take into consideration the defendant's pecuniary ability, even under circumstances of aggravation, insult or cruelty, or of vindictiveness and malice.

Hunt v. Chicago & N.W.R.R., 26 Iowa 363, 373-74 (1868). The court added that if defendants' wealth were allowed into evidence, "damages will be recovered, not according to the extent of the injury sustained, but the means of defendant to pay. . . . Such cannot be the rule." *Id.* at 374; *cf. Day*, 54 U.S. (13 How.) at 371 ("It is a well-established principle of the common law, that . . . a jury may inflict what are called exemplary, punitive . . . damages upon a defendant, *having in view the enormity of his offence* . . . . [A]nd the damages assessed depend on the circumstances, *showing the degree of moral turpitude or atrocity of the defendant's conduct.*" (emphasis added)).[8] It was not until 1899 that any case reached this Court in which evidence of a defendant's wealth had been allowed to increase a punitive damages award, and in that case the Court reversed on narrower grounds without considering whether the procedure was allowable. *See Wash. Gas-Light Co. v. Lansden*, 172 U.S. 534 (1899).[9]

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[8] In *Bennett v. Hyde*, 6 Conn. 24 (1825), the court allowed consideration of the defendant's wealth in a slander action because of a belief that defamatory statements, when made by wealthy defendants, could cause more harm, and therefore be more reprehensible and warrant more deterrence, than those made by less wealthy defendants. One earlier decision sanctioned such a use of the defendant's wealth, but it was reversed for unspecified reasons. *See Ogden v. Gibbons*, 5 N.J.L. 518, 539, *rev'd,* 5 N.J.L. 853 (1819).

In short, the common-law retributive rule in England and in this country required that punitive damages be proportional to the wrong committed and did not permit juries to ignore that requirement and use a defendant's wealth to increase punitive damages awards. It is only in recent history that courts have destroyed this safeguard, sometimes encouraging juries to consider wealth and then upholding massive punitive damages verdicts with the justification that such outsized verdicts are the only way to "get the attention" of large corporations. That reasoning is illogical and inconsistent with more than a century of early common law.

It is simple logic that if the punishment for a wrong is to be proportional to the nature of the offense (or the "manner of fault"), the focus must be on the offense, not on a corporate defendant's net worth. *See Clark v. Chrysler Corp.*, 436 F.3d 594, 604 (6th

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[9] The case was a libel action in which a corporation and four of its executives were joined as defendants. Under the applicable state law, each defendant was liable for the full amount of any judgment and could not obtain contribution from the others. The Court held that under those circumstances the trial court had erred by admitting evidence of the corporation's wealth to be considered in setting the amount of punitive damages to be imposed against the corporation because "there is no justice in allowing the recovery of punitive damages, in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only." *Wash. Gas-Light*, 172 U.S. at 553.

Cir. 2006); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003). From a proportionality standpoint, if one assumes comparable actions by two companies, the punitive award should not be greater for a Fortune 100 company than for a Fortune 1000 company, or for a highly profitable company versus one in financial distress.

Consistent with that logic, the three guideposts established by this Court under its due process jurisprudence to ensure proportionality and reasonableness in punitive damages awards make no mention of the corporate defendant's net worth or income. *See Gore*, 517 U.S. at 574-75. Instead, all three are undermined by the use of evidence of a corporation's financial status to increase punishments. The first guidepost, reprehensibility of the defendant's conduct, focuses on the nature of the wrong, and so by definition cannot include consideration of corporate net worth or income. The second guidepost, the ratio of actual damages to punitive damages, also does not mention or involve the company's financial status. The third guidepost provides another check on reasonableness and proportionality by comparing the punitive award to legislatively enacted punishments for the same acts, again with no consideration of corporate net worth or income. Thus, any use of a corporate defendant's financial status to increase an award that satisfies the guideposts would logically violate them.

Further, the common-law principle of proportionality carries with it a notion that comparable actions by different persons should not yield arbitrary punitive results. *See Gore*, 517 U.S. at 588 (Breyer, J., concurring); *Haslip*, 499 U.S. at 20. Allowing the use of corporate net worth to increase punitive damages does just the opposite, inviting juries to "express biases against big businesses, particularly those without strong local presences." *Oberg*, 512 U.S. at 432. That was certainly the case here, where Respondents argued to the jury at length about the need to punish the large out-of-state company, with its chairman and his "$14 million in stock options" and its "mahogany-polished boardroom in Houston, Texas," because

> Exxon Corporation has no soul and has no body, and its language and the language of the people in boards of director's rooms throughout the world is [money], this is their language. . . . 5 billion is the average yearly net profit. 7.92 billion was the cash flow the year of the spill. This 5 billion, Exxon, because of its size and wealth, can sustain a 5 billion dollar award and shrug their shoulders.
>
> Your job is to look at these numbers and to come up with a number that . . . punishes the conduct . . . in light of the wealth of the defendant.
>
> You're going to punish the conduct, you're going to get them a message.

(Tr. at 7573-84.) Such facts and arguments "had little to do with the actual harm sustained by the [plaintiffs]," *State Farm*, 538 U.S. at 427, and they have no logical place in determining any award of punitive damages against a publicly-held corporation.

Thus, any intentional increase of a punishment beyond the level necessary to achieve the required proportionality is, as to the retributive purpose, arbitrary and discriminatory. If a particular punishment is determined to be properly proportional to the moral gravity of a particular offense, the basic retributive principle would be violated by inflicting more punishment simply because the corporate defendant happens to have a large net worth.

Seeking to punish a publicly-held corporate entity presents additional logical disconnects. More than 25 years ago, this Court explained:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. . . . Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers. Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981). The Court then stated: "Whatever its weight, the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages." *Id.* at 268.

Those observations apply with equal force to a publicly-held corporation like Exxon, with its millions of disparate shareholders.[10] First, a punitive award against such companies "'punishes' only the [shareholders], who took no part in the commission of the tort." *Id.* at 264. Second, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing [shareholders]." *Id.* Third, a corporation "can have no malice independent of the malice of its [officers, directors, managing agents, and employees]." *Id.* "Damages awarded for punitive purposes, therefore, are not sensibly assessed against the [corporate] entity itself." *Id.* Furthermore, with large, publicly-held corporations, by the time a case has been tried to verdict, punitive damages assessed, appeals decided, and a final judgment entered, the shareholders who suffer the resulting loss of market value or a reduced dividend may be substantially different, or even entirely different, from the shareholders who benefited from the wrongful conduct many years earlier.

Thus, consideration of net worth to increase punitive damages against corporate defendants violates the basic retributive requirement of proportionality between punishments and wrongs. Any punitive damages award based on such evidence should be precluded under federal common law.

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[10] As this Court said of the ship owners in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558-59 (1818), where the number of owners undoubtedly was far smaller than the number of Exxon's shareholder-owners, "They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances . . . they are not bound to the extent of vindictive damages."

B. Allowing Juries to Increase Punitive Damages Based on a Corporate Defendant's Net Worth Violates Basic Deterrence Principles

It is not irrational to allow greater punitive damages against wealthier individuals than against poorer individuals who have committed torts that are not economically motivated, such as assault or defamation, to attain the degree of deterrence needed to prevent additional wrongs. Because it is generally accepted that a dollar is less important to persons of great wealth than to persons of modest means, greater punishment may be needed to deter a multimillionaire from, say, punching or making a defamatory statement about another person. *See Zazu Designs*, 979 F.2d at 499.

Publicly-held corporations, however, are not sentient beings; they are entities that exist to generate monetary profits for their shareholders. They are literally incapable of realizing any type of personal, non-monetary gain, such as wrongfully satisfying a sexual urge or a sadistic desire to inflict pain. Accordingly, the effect of liability in deterring future behavior should not differ based on the size of the company: each such company, regardless of size or net worth, should be deterred from wrongful conduct if the punishment is sufficient to show the company that it should expect the result of similar future wrongful behavior to be a monetary loss of even one dollar, rather than a monetary profit. *See, e.g.*, 2 Am. L. Inst., *Reporters Study, Enterprise Responsibility for Personal Injury* 254-55 (1991); Kenneth S. Abraham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. Legal Stud. 415, 417 (1989). Thus, it is irrational, in the name of deterrence, to impose greater punishments based on greater corporate net worth.

The facts of this case present a perfect example. Exxon did not derive any great economic benefit from leaving Captain Hazelwood in charge of its tanker, rather than, for example, seeking out, and perhaps paying a somewhat higher salary to, a more reliable and at least equally skilled officer. But it incurred billions of dollars in losses as a result of its decision. The court of appeals offered no coherent explanation, under any recognized deterrence theory, of why Exxon's multi-billion-dollar loss would fail to deter Exxon from hiring officers like Captain Hazelwood, but would succeed in doing so if Exxon's net worth were, say, half of what it actually is. Put differently, the court offered no explanation of why Exxon would be any less deterred by the multi-billion non-punitive-damages losses than any existing smaller shipping company would be. The now-experienced and readily-predictable costs of an oil spill should deter any similar conduct by *any* rational corporate entity, even one ten times wealthier than Exxon, and the court of appeals was unable to explain why this is not so.

The structure of a publicly-held corporation further shows why deterrence does not require, and cannot justify, greater punishments based on corporate net worth:

> Corporations are abstractions; investors own the net worth of the business. . . . Corporate assets finance ongoing operations and are un-

> related to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings?

Zazu Designs, 979 F.2d at 508. Justices Breyer, Souter, and O'Connor have recognized this point, noting that the defendant's financial condition would have little relevance to a state's "interest in deterrence, given the more distant relationship between a defendant's wealth and its responses to economic incentives." *Gore*, 517 U.S. at 591 (Breyer, J., concurring).

Still further, increasing punitive damages based on a corporation's net worth causes larger companies to pay a larger share of their net worth. If, for example, Toyota recklessly uses a defective design in a million cars and Subaru, one-tenth Toyota's size, makes 100,000 identically defective cars, if one of every 50,000 of these cars has an accident caused by the defect, and if each punitive award is set at one percent of the defendant's net worth as of a specific date, Subaru will lose two percent of its net worth, but Toyota will lose twenty percent of its net worth. Thus, increasing punitive damages to reflect a company's size leads to disproportionate deterrence.

Finally, linking punitive damages to a corporate defendant's net worth cannot be justified on deterrence grounds by the notion that the punitive award has to be massive to ensure that the company's board of directors will "get the message" about a need for a change. Here, for example, it is beyond ludicrous to suggest that any company's board of directors would be oblivious to $3.4 billion in costs, and the massive negative publicity, incurred by the company as a result of a decision made by one of its officers or employees. Even when much lesser sums are involved, the performance reviews of a company's employees who cause a major loss to the company are sure to be adversely affected. Employees therefore will have strong incentives to "get the message" without any imposition of punitive damages on their corporate employer, because the large compensatory damages and extra-judicial costs will readily be seen as resulting from their actions and omission.

In sum, considering corporate net worth in determining the amount of punitive damages is a relatively recent development and conflicts with more traditional common-law principles that hew far more closely to the fundamental principles of deterrence and retribution. Therefore, in deciding what the rule of federal common law should be with respect to punitive damages, this Court should rule that evidence of corporate net worth should not be allowed as a basis to increase punitive damages.

CONCLUSION

Federal maritime common law should embrace and emphasize the traditional common-law safeguards requiring the imposition of only such punitive damages as are reasonably necessary to meet deterrent and retributive goals. Because the punitive damages award approved by the court of appeals violates those principles, the judgment should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

Corporate Members of Product Liability Advisory Council

3M

A.O. Smith Corporation

Altec Industries

Altria Corporate Services, Inc.

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Appleton Papers, Inc.

Arai Helmet, Ltd.

Astec Industries

BASF Corporation

Bayer Corporation

Bell Sports

Beretta U.S.A. Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Boeing Company

Bombardier Recreational Products

BP America Inc.

Bridgestone Americas Holding, Inc.

Briggs & Stratton Corporation

Brown-Forman Corporation

CARQUEST Corporation

Caterpillar Inc.

Chevron Corporation

Chrysler LLC

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

The Dow Chemical Company

E & J Gallo Winery

E.I. DuPont De Nemours and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

Exxon Mobil Corporation

Ford Motor Company

Freightliner LLC

Genentech, Inc.

General Electric Company

General Motors Corporation

GlaxoSmithKline

The Goodyear Tire & Rubber Company

Great Dane Limited Partnership

Harley-Davidson Motor Company

The Heil Company

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works, Inc.

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Jarden Corporation

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc., Joy Mining Machinery

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Koch Industries

Kolcraft Enterprises, Inc.

Komatsu America Corp.

Kraft Foods North America, Inc.

Lincoln Electric Company

Lyondell Petrochemical Company

Magna International Inc.

Mazda (North America), Inc.

Medtronic, Inc.

Merck & Co., Inc.

Michelin North America, Inc.

Microsoft Corporation

Mine Safety Appliances Company

Mitsubishi Motors North America, Inc.

Nintendo of America, Inc.

Niro Inc.

Nissan North America, Inc.

Nokia Inc.

Novartis Consumer Health, Inc.

Novartis Pharmaceuticals Corporation

Occidental Petroleum Corporation

PACCAR Inc.

Panasonic

Pfizer Inc

Porsche Cars North America, Inc.

PPG Industries, Inc.

Purdue Pharma L.P.

Putsch GmbH & Co. KG

The Raymond Corporation

Raytheon Aircraft Company

Remington Arms Company, Inc.

Rheem Manufacturing

RJ Reynolds Tobacco Company

Sanofi-Aventis

Schindler Elevator Corporation

SCM Group USA Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Synthes (U.S.A.)

Terex Corporation

Textron, Inc.

TK Holdings, Inc.

The Toro Company

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Automotive

UST (U.S. Tobacco)

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Watts Water Technologies, Inc.

Whirlpool Corporation

Wyeth

Yamaha Motor Corporation,
U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.

AMICUS
CURIAE
BRIEF

82

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IN THE
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EXXON SHIPPING CO. and EXXON MOBIL CORP.,
Petitioners,

v.

GRANT BAKER, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF PROFESSOR THOMAS J. SCHOENBAUM IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. May punitive damages be imposed under maritime law against a shipowner for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clear Water Act, but has not provided for punitive damages, may judge-made federal maritime law expand the penalties Congress provided by adding a punitive damages remedy?

3. Is this $2.5 billion punitive damages award within the limits allowed by federal maritime law?

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Churchill v. F/V Fjord,
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Conner v. Aerovox, Inc.,
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Gallagher v. The Yankee,
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Gamma-10 Plastics, Inc., v. American President Lines,
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Gertz v. Robert Welch, Inc.,
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Glynn v. Roy Al Boat Management Corp.,
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Gould v. Christianson,
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Guevara v. Maritime Overseas Corp.,
34 F.3d 1279 (5th Cir. 1994), *reversed in part on reh'g*, 59 F.3d 1496 (1995) 28

Illinois v. Milwaukee (City of Milwaukee I),
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In re Amtrack "Sunset Limited" Train Crash v. Warrior & Gulf Navigation Co., 121 F.3d 1421 (11th Cir. 1997) 29

In the Matter of P & E Boat Rentals, Inc.,
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International Paper Co. v. Ouellette,
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International Brotherhood of Elec. Workers v. Faust,
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Ira S. Bushey & Sons, Inc. v. United States,
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Kolstad v. American Dental Ass'n,
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Lake Shore & M. S. Ry. Co. v. Prentice,
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Lousiana ex rel. Guste v. M/V Testbank,
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Matter of Oil Spill by Amoco Cadiz,
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Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 24

Miles v. Apex Marine Corp.,
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Miller v. American President Lines,
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Milwaukee v. Illinois (City of Milwaukee II),
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Moragne v. U.S. Lines, Inc.,
398 U.S. 375 (1970) 4

Muratore v. The M/S Scotia Prince,
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Pacific Mut. Life Ins. Co. v. Haslip,
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Petition of M/V Sunshine II,
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Pope & Talbott, Inc. v. Hawn,
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Protectus Alpha Navigation Co. Ltd. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985) 16, 21

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Robins Dry Dock & Repair v. Flint,
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Southern Pac. Co. v. Jensen,
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Steamboat Co. v. Whilldin,
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The Sabine,
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Tug Ocean Prince, Inc. v. United States,
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U.S. Steel Corp. v. Fuhrman,
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United States v. Tex-Tow, Inc.,
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Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (2d Cir. 1993) 28

Yamaha Motor Corp. U.S.A. v. Calhoun, 516 U.S. 199, 215 (1996) 29, 32

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33 U.S.C. §§1321(o)(1) 24

46 U.S.C. § 30501 *et seq.* 9, 10

46 U.S.C. §§ 1300-1315 (2000) 9

46 U.S.C. app. §§ 190-196 (2000) 9

OTHER AUTHORITIES

DOBBS, DAN B., DOBBS LAW OF REMEDIES, vol. I (2d ed. 1993) 8

Force, Robert, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745 (1995) 29

LAYCOCK, DOUGLAS, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (3d ed. 2002) 33

MCCORMICK, CHARLES, HANDBOOK ON THE LAW OF DAMAGES (1935) 5

Nickerson, Colin, *For Ships, End of the Dotted (and Dashed) line*, BOSTON GLOBE, Jan. 31, 1999, at A1.. 11

RESTATEMENT (SECOND) OF TORTS § 909 .... passim

Robertson, David, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997)6, 29, 31

Schoenbaum, Thomas J., ADMIRALTY AND MARITIME LAW (Westgroup ed., 4th ed. 2004) 1

INTEREST OF *AMICUS CURIAE*[1]

Amicus is a law professor and an attorney who has spent much of his professional life in the practice and study of maritime law. He currently holds two posts: Professor of International Studies at International Christian University in Japan and Visiting Research Professor of Law at The George Washington University School of Law. He has previously taught at the law schools of the University of North Carolina, Tulane University, and the University of Georgia.

He is the author of many books and articles, including Thomas J. Schoenbaum, Admiralty and Maritime Law (Westgroup ed., 4th ed. 2004). This treatise and its previous editions are regularly cited in judicial opinions in maritime cases by federal and state courts, as well as occasionally by this Court.

Amicus has never before worked on or had any contact with the case at bar.[2] The only interest of amicus in this case is concern for justice and the proper and optimal development of the important field of admiralty and maritime law. Amicus regards this case as extremely important with respect to these concerns.

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[1] The parties have consented to this brief; no party has authored any part of this brief; and no one other than amicus has made a monetary contribution to fund this brief. I solicited several academic colleagues and asked them to join in this brief; however, while I received emails praising my work, they reported that conflicts of interest prevented them from doing so. Thus, I decided to file on my own.

[2] Amicus was a consultant for the State of Alaska on the issue of recovery of natural resource damages immediately after the oil spill occurred in 1989.

SUMMARY OF THE ARGUMENT

This brief will focus on the distinctly maritime law character of the issues involved. Four points are relevant in this regard:

1. No special maritime law rules regarding punitive damages are warranted or needed in maritime law cases. Punitive damages are a remedy of the common law that has a long history of indistinguishable application to maritime cases. This remedy serves the same purposes—punishment and deterrence—in maritime cases as in the common law. In oil spill cases such as the case at bar, punitive damages serve the societal purpose of deterring reckless conduct that endangers the marine environment.

2. In both the maritime law and the common law contexts some confusion presently exists with respect to vicarious liability for punitive damages. The Restatement (Second) rule on this topic is a useful analytical framework that may be employed by this Court to clear up this confusion because it retains the core idea that vicarious liability requires culpability but subjects the employer to liability in the case of an action by a managerial employee. There is no reason to formulate a special rule for vicarious liability limited to the conduct of masters of vessels.

3. Neither the Clean Water Act nor any rule of the general maritime law excludes the application of punitive damages in appropriate maritime cases. The Clean Water Act specifically preserves private tort actions, and punitive damages are available under the general maritime law.

4. No special doctrine of general maritime law presently regulates the size of an award of punitive damages. There is no principled way to impose a judicial limit on punitive damages applicable only to maritime law cases. The size of the award of punitive damages in maritime law cases is appropriately limited by the Due Process Clause of the U.S. Constitution. Non-constitutional restraints may be added by statute, but no statutory limit applies to the case at bar.

ARGUMENT

I. The General Maritime Law Contains No Special Rules for the Award of Punitive Damages that are Distinct from the Rules of the Common Law, and No Reason Exists for this Court to Create Such Rules.

The case at bar concerns the legal architecture to support an award of $2.5 billion in punitive damages assessed by a jury (and already greatly reduced by lower federal courts) in favor of tens of thousands of Alaska residents who suffered grievous disruption of their lives and livelihoods by the spill of some 11 million gallons of oil when the EXXON VALDEZ ran aground in 1989. Since all three of the legal questions that concern this Court are maritime in nature, an overarching and threshold question is whether it is appropriate or necessary to create a special rule (or rules) with respect to punitive damages that applies only to maritime cases.

This Court has advanced three reasons for the necessity of an exclusively maritime rule. First, when uniformity is a concern, there is need for a rule that applies only in the maritime context. The primary reason for the founding fathers' concern to "federalize" maritime law was to ensure the development of uniformity in American maritime law.

This Court has many times reiterated this concern. E.g. *Moragne v. U.S. Lines, Inc.*, 398 U.S. 375 (1970) (declaring an action for wrongful death for unseaworthiness under the general maritime law). See also *Southern Pac. Co. v. Jensen,* 244 U.S. 205 (1917). However, the case at bar does not present any uniformity issue since whatever rule this Court applies will be the uniformly applicable rule.

Second, a purely maritime law rule is appropriate for areas of law that are distinctively maritime. For example, in the law of salvage this Court has created a distinctly maritime body of legal rules. E.g., *The Sabine*, 101 U.S. 384 (1879); and *The Blackwall*, 77 U.S. 1 (1869). But punitive damages are not distinctively maritime; they arise in other contexts as well.

Third, a special maritime law rule is sometimes necessary to establish a general maritime law rule that is "free from inappropriate common law concepts." *Keramac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959) (common law distinctions between licensee and invitee in personal injury cases do not apply in admiralty); *Pope & Talbott, Inc. v. Hawn*, 346 U.S. 406 (1953) (common law rule that contributory negligence bars recovery is incompatible with admiralty). However, the legal doctrines involving the assessment of punitive damages arise in both maritime and non-maritime cases, and, as this Court stated in *Lake Shore & Michigan Southern Railway Co v. Prentice*, 147 U.S. 101, 107 (1893), "courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages." In keeping with this injunction, no distinctions have ever been drawn by lower federal courts between punitive damages in the maritime law context and cases arising on land.

Punitive damages have been awarded in a variety of contexts, both maritime and non-maritime, by American courts over the past almost 200 years. Indeed, punitive damages were a feature of the English common law. See CHARLES MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 275-279; 286-291 (1935). In the nineteenth century in England as well as in the United States, courts and juries did not sharply distinguish between punitive damages, which were commonly called "exemplary" or "vindictive" damages, and compensatory damages. What we would call today punitive damages was an allowance of additional compensatory damages in cases of outrageous conduct. MCCORMICK at 278. Some early maritime cases, in fact, distinguished between "vindictive" damages, involving conduct really outrageous, and "exemplary" damages, for conduct merely undesirable enough to warrant making an example of the penalty given. See *The Lively*, 15 F. Cas. 631 (C.C.D. Mass. 1812); *Ralston v. The States Rights*, 20 F. Cas. 201 (E.D. Pa. 1836); and *Steamboat Co. v. Whilldin*, 4 Har. 229 (Del. 1845). Apparently no case after 1900, however, has used the term "vindictive" damages, and the term "exemplary" was replaced by the current name of punitive damages. In the non-maritime 1851 case of *Day v. Woodworth*, 54 U.S. 363 (1851), this Court (in dicta, because the plaintiff had not claimed punitive damages) stated that "[i]t is a well-established principle of the common law, that in . . . actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant." *Id.* at 371. In the more recent case of *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 17 (1991), this Court again noted the common law origin of punitive damages.

The history of punitive damages from the beginning of the republic until 1990 shows no distinction at all between maritime and non-maritime cases. This was the conclusion of Professor David W. Robertson, who made an exhaustive study of the subject in *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997). His conclusion is amply borne out by the cases. Punitive damages were considered appropriate in maritime as well as non-maritime cases when the defendant's conduct amounts to gross negligence, actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct. Amicus will spare the Court going through all the cases, which are set out in detail by Professor Robertson, and confine his argument to salient examples. In *Chamberlain v. Chandler,* 5 F. Cas. 413 (C.C.D. Mass. 1823) Justice Story, who was sitting on circuit, awarded punitive damages in a maritime case against the master of a vessel, stating, "If [a master] is guilty of gross abuse and oppression, I hope it will never be found, that the courts of justice are slow in visiting him, in the shape of damages, with an appropriate punishment." *Id.* at 414. In *Gould v. Christianson*, 10 F. Cas. 857 (S.D.N.Y. 1836), the court gave an augmented award of damages to a seaman who was mistreated by his ship's captain. In *Gallagher v. The Yankee*, 9 F. Cas. 1091 (D.C. Cal. 1859), aff'd, 30 F. Cas. 781 (C.C. Cal. 1859) the court awarded punitive damages against a vessel master who transported the plaintiff against his will to the Sandwich Islands (now Hawaii). Finally, in *Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. 1981), the court awarded punitive damages under the general maritime law against a shipowner found guilty of willful and wanton misconduct.

Only after this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)—a case that did not involve punitive damages at all—did some commentators and courts begin to advocate a distinctive punitive damage regime for maritime law. Despite some differences among the lower courts engendered by *Miles*, a matter to be addressed in a later section of this brief, cases after *Miles* have generally upheld the imposition of punitive damages under the general maritime law. For example, in *Gamma-10 Plastics, Inc., v. American President Lines,* 32 F.3d 1244, 1256 (8th Cir. 1994), the court ruled that the district court had abused its discretion in denying the plaintiff's motion to amend its complaint to include a claim for punitive damages, stating that "[i]t is well-settled that punitive damages may be recovered under the general maritime law 'for conduct which manifests reckless disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference,'" citing *Churchill v. F/V Fjord,* 892 F.2d 763, 772 (9th Cir. 1988).

A further reason why no special punitive damage rule should apply in admiralty cases is that such a special rule would be impractical. Should this Court declare a rule limiting punitive damages under the general maritime law, the practical effect would be that in future maritime cases plaintiffs would invoke state law punitive damages which are available under the common law in most states. This would lead to further debate and possible conflicting court decisions concerning the question whether a general maritime law rule limiting punitive damages beyond what is required by the constitutional limits of Due Process preempts state common law.

II. Punitive Damages Are Available Under the General Maritime Law with Respect to the Conduct of a Ship's Master at Sea Under the Doctrine of Vicarious Liability.

The doctrine of vicarious liability for punitive damages is a major concern in the case at bar for the reason that differences in the circuits have arisen on this issue in the maritime context. However, differing views exist with respect to vicarious liability for punitive damages in the common law of the states as well. See DAN B. DOBBS, DOBBS LAW OF REMEDIES, vol. I, 495-97 (2d ed. 1993). Therefore, this Court's resolution of the vicarious liability issue will have repercussions beyond the general maritime law itself.

A. There is No Reason Why This Court Should Adopt a Special Maritime Vicarious Liability Rule for Masters of Ships.

A threshold question in the case at bar is whether this Court should fashion a special maritime version of the doctrine of vicarious liability for ship's masters at sea. Is the job of ship master so distinctive as to warrant a different approach than should be taken with respect to the myriad other occupations—from nuclear power plant operator to investment banker—regarding vicarious liability? The argument in favor of a special rule for ship masters is that when a ship is at sea the master is beyond the control of his principal; therefore it is unfair to visit full liability on the principal in such a case.

Congress has in fact accepted carefully targeted versions of this argument in two federal maritime statutes. First, the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (2000), exonerates errors in the navigation of a vessel with respect to the carrier's liability for lost or damaged goods. *Id.*, §§ 1304(2)(a), 1305(2)(a). However, this statute, passed in 1936, reflects an historic legislative compromise originally agreed between carriers and shippers of goods in 1890 with the passage of the Harter Act, 46 U.S.C. app. §§ 190-196 (2000), whereby carriers assume statutory responsibility for providing seaworthy vessels (the concept of seaworthiness includes a competent and functioning ship master) and the care of the cargo, in return for possible exoneration for matters such as navigation errors and perils of the sea. Moreover, COGSA is a narrow exemption that shifts the burden of proof of exoneration to the *carrier*. E.g., *Banana Services Inc. v. M/V Fleetwave,* 911 F.2d 519, 521 (11th Cir. 1990). COGSA, therefore has no application to the case at bar. There is no reason to carry over COGSA into the law of maritime torts.

A second statute that in some respects is forgiving of errors of ship masters is the 1851 Shipowners' Limitation of Liability Act, 46 U.S.C. § 30501 *et seq.*, which provides a special procedure in admiralty to allow the owner of a vessel to limit liability in certain circumstances to the value of the vessel after an accident. This Act was passed in order to promote investment in the shipping industry and is still in force today. The standard for limiting liability under the Limitation Act is that the shipowner must show that the fault causing the loss occurred without his "neglect, privity or knowledge." *Id.* Moreover, the shipowner has the entire burden to show that there was no neglect, privity or knowledge on his part. E.g., *Petition of M/V Sunshine II*, 808 F.2d 762 (11th Cir. 1987).

Modern cases interpreting this phrase now deny limitation for a master's navigational errors if the company did not exercise reasonable care in selecting or training the master. See, e.g. *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983) (*en banc*); *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978); and *Matter of Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992). In *Empresa Lineas Maritimas S.A. v. United States*, 730 F.2d 153 (4th Cir. 1984), the court denied limitation because the ship master's poor health, which contributed to the casualty, was known to the shipowner. Exxon's amici, Transportation Institute, et al., ignore these recent decisions, attributing a master's actions at sea to the shipowner for Limitation Act purposes. Br. for Amicus Curiae Transportation Inst., et al., at 16-17. Moreover, this Court has commented that "it has been thought that the scope of authority delegated by an individual owner to a subordinate may be so broad as to justify imputing privity." *Coryell v. Phipps*, 317 U.S. 406, 410 (1943). Indeed, in the case at bar Exxon took the decision not to petition the court for limitation of liability after the grounding of the EXXON VALDEZ, reportedly upon the advice of counsel that a limitation petition would have been futile. BIO App. 38a-43a.

Not only is there no statutory reason to craft a special vicarious liability rule for masters of ships, such a rule would be bad policy as well. First, modern technology permits instantaneous communication and constant tracking of a vessel at sea by shore personnel and even high corporate officials. The record in the case at bar shows that Captain Hazelwood conferred by phone with an Exxon official before trying to dislodge the vessel from Bligh Reef. Pet. App. 122a, 234a, n.13. No longer is the master of a vessel completely free of supervision and control. See Colin Nickerson, *For Ships, End of the Dotted (and Dashed) line*, BOSTON GLOBE, Jan. 31, 1999, at A1 ("[A]dvances in communications technology . . . have made email, fax, and crystal clear phone calls as commonplace on the bridge of a ship in the most remote sea as in a business office"). A ship now functions, in effect, as the branch office of the company. Second, a special rule for ship masters would inevitably give rise to close cases and borderline situations as well as appeals from other occupations to be given the benefit of such a rule. Thus, a special rule for ship masters would not be practical and may inspire a morass of future litigation (for example, is a foreman on a dry-docked vessel a "ship master"? What if reckless conduct, such as Captain Hazelwood's drinking, occurs shoreside but has consequences at sea?).

B. Under the General Maritime Law, the Court of Appeals Applied the Correct Rule for Vicarious Liability for Punitive Damages.

While no special rule should apply only to ship masters, this Court is called upon to resolve conflicts of authority that have developed in maritime cases. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), this Court ruled that vicarious liability for punitive damages "is not fundamentally unfair and does not in itself violate the Due Process Clause." *Id.* at 14.

Although this Court has already ruled that full *respondeat superior* vicarious liability does not violate due process, in the case at bar the Court will determine the optimum rule on this issue exercising its authority under the general maritime law. Three different versions of vicarious liability for punitive damages are applied by the states and, at this point, by the lower federal courts.

1. **The "majority rule."** The first rule—termed by courts and commentators to be the "majority rule"—is that a corporation or business entity should bear full vicarious liability for both compensatory and punitive damages. See *In the Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642, 650 (5th Cir. 1989). This rule has the advantage of being simple and easy to apply for both judges and juries. This Court was not troubled by the application of this rule by the Supreme Court of Alabama in the *Haslip* case, supra.

2. **The strict complicity rule**. A second much more restrictive rule derived from the early decisions of this Court is termed the "strict complicity" rule. This rule

states that "punitive damages are not recoverable against the owner of a vessel unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." *In the Matter of P&E Boat Rentals*, 872 F.2d at 650. In this case the Fifth Circuit relied greatly upon the Sixth Circuit's application of the strict complicity rule in *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969).

The strict complicity rule is ultimately derived, however, from the opinions of this Court in the case of *The Amiable Nancy*, 16 U.S. 546 (1818) and *Lake Shore & Michigan Southern Railway v. Prentice*, 147 U.S. 101 (1893). *The Amiable Nancy* involved an action for damages against the owners of an armed privateer whose crew had plundered and robbed a neutral vessel at sea. Justice Story, who delivered the opinion of the Court termed the case "gross and wanton outrage," and ruled that the honor of the country and the duty of the Court was to require "just compensation." 16 U.S. at 558. Justice Story, as an aside, also stated that "if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct." *Id.* However, this statement was made purely as a hypothetical since not only were the "original" wrongdoers not before the Court, the libellants had not prayed for exemplary or vindictive (punitive) damages. Thus, Justice Story in *The Amiable Nancy* was not announcing any rule of law; his statement was intended as an expression of the Court's own outrage against the actual perpetrators of the incident.

In the 1893 *Lake Shore* case this Court announced as a rule of "general jurisprudence" that "[a] principal [employer] . . . cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent [employee]," but that punitive damages might lie if the employer "participated in, approved, or ratified" the employee's conduct. 147 U.S. at 117. The Court in *Lake Shore* also stated, very importantly, that punitive damages might also lie if the employer knew that the employee was an "unsuitable person." *Id.* The example that the Court gave was "employing a drunken engineer or switchman," *id.* at 116, which is sufficient to affirm the judgment in this case under *Lake Shore's* express terms.

This latter point—that the employer knew that the employee was an unsuitable person—is explicitly part of the modern formulation of the strict complicity rule. In the *P&E Boat Rental* case, the Fifth Circuit stated that "[p]unitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him." 872 F.2d at 652. The court in *Fuhrman* also stated this rule, citing *Lake Shore* and *The Amiable Nancy*. 407 F.2d 1148.

3. The Restatement rule. The Ninth Circuit in the case at bar applied a third rule based upon the RESTATEMENT (SECOND) OF TORTS § 909,[3] which contains four separate grounds for awarding punitive damages against a principal/employer (paraphrasing slightly):

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[3] The same rule is contained in the RESTATEMENT (SECOND) OF AGENCY § 217C.

(a) if the principal or a managerial agent authorized the action of the employee;

(b) if the agent/employee was unfit and the principal/managing agent was reckless in employing or retaining him;

(c) if the wrongdoer himself was employed in a managerial capacity; or

(d) if the principal/managing agent ratified or approved the action.

It is evident that the formulation of three of these grounds, RESTATEMENT § 909(a), (b), and (d), are drawn directly from *Lake Shore* and its progeny that have announced the strict complicity rule. Only Restatement paragraph (c) can be said to be an extension of this rule.

In the case at bar the Ninth Circuit affirmed the jury's findings that both Captain Hazelwood and Exxon acted recklessly. Captain Hazelwood's reckless actions were leaving the bridge of the supertanker on the night of the accident and leaving an unqualified crew member in charge of the navigation of the vessel. (Pet. App. 63a, 87a.) Captain Hazelwood was also reckless in leaving port while inebriated (Pet. App. 63a-64a, 87a-88a), which rendered the EXXON VALDEZ unseaworthy under maritime law principles. Exxon's reckless conduct was that responsible officials of the company knowingly allowed a relapsed alcoholic to have charge of the supertanker EXXON VALDEZ. (Pet. App. 83a.) The Ninth Circuit in affirming the award of punitive damages in this case relied upon its earlier opinion in *Protectus Alpha Navigation Co. Ltd. v.*

North Pacific Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985).

Protectus Alpha involved a fire that broke out on a vessel docked at a grain facility. Fire fighters were immediately called and the fire was quickly brought under control. However, when the dock foreman arrived, without consulting the firefighters, he immediately ordered the vessel to be cast off from the dock, thereby dangerously stranding firefighters on board and causing the loss of the vessel. In assessing punitive damages against the employer for the action of the foreman, the Ninth Circuit stated that the Restatement formulation "reflects the reality of corporate America." *Id.* at 1386. However, the court minimized the value of Restatement formulations (a) and (d), stating that "[i]t seems obvious that no corporate executive or director would approve the egregious acts to which punitive damages would attach and, therefore, no recovery for more than compensatory damages could ever be had against a corporation" under this rule. Thus, the court, considering the "realities" of corporate America, rejected what amounts to the "strict complicity" approach in favor of a more modern and realistic approach that emphasizes paragraphs (b) and (c) of the Restatement rule. The court relied upon the finding that the dock foreman in the *Protectus Alpha* case was a managerial employee acting within the scope of his employment.

The case at bar differs from *Protectus Alpha* in that, while *Protectus Alpha* was based upon Restatement paragraph (c), the case at bar is based upon both paragraphs (b) and (c), in that corporate officials of Exxon as well as Captain Hazelwood were found to have acted recklessly. Nevertheless, the heart of the matter upon which this Court granted certiorari is Restatement paragraph (c), whether Captain Hazelwood should be considered a managerial employee with respect to Exxon Corporation. The strict complicity rule already includes Restatement paragraphs (a), (b), and (d). The really new question is the matter of Restatement (c) as applied in *Protectus Alpha* and in the case at bar.

It is respectfully submitted that Restatement paragraph (c) as applied in this case is the better rule of law not only in maritime cases, but as a general rule for vicarious liability for punitive damages. As the Ninth Circuit stated in *Protectus Alpha,* paragraph (c) of the Restatement represents a natural evolution of the strict complicity rule that corresponds to the realities of today's corporate America. This Court also has signaled that an extension of the *Lake Shore* formulation is needed. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (adopting the "any agent" rule for antitrust punitive damages), this Court stated (at 575, n. 14) that "[t]he Court may have departed from the trend of late 19th century decisions when it issued *Lake Shore* . . . , requiring the principal's participation, approval, or ratification." See also *Kolstad v. American Dental Ass'n,* 527 U.S. 526 (1999).

C. Restatement § 909(c) Should Be Interpreted to Render a Business Entity Vicariously Liable for Punitive Damages Assessed Because of the Actions of a Ship Master and Other Agents Employed in a Managerial Capacity.

The crux of this case as far as the vicarious liability issue is concerned is RESTATEMENT § 909(c). This section allows punitive damages to be awarded against a principal, "but only if . . . the agent was employed in a managerial capacity and was acting in the scope of employment."

To judge the appropriateness of this rule, we should consider the purpose of punitive damages as well as vicarious liability. Punitive damages are said to have two purposes: to punish and to deter, so that not only the defendant in the particular case but others will not commit the same faults. *International Brotherhood of Electrical Workers v. Faust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). See also PROSSER AND KEETON ON TORTS at 9 and 13. This purpose makes such damages available not for ordinary legal wrongs but only in extraordinary circumstances involving conduct that is intentional or manifests a reckless disregard for the rights of others. *Smith v. Wade*, 461 U.S. 30, 51 (1983).

The purpose of vicarious liability in tort is that since a business entity commonly acts only through its agents, it is only fair that a business bear the risk of liability for the wrongdoings of its agents toward innocent parties. The best expression of this purpose was stated by Judge Friendly in *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968):

> Vicarious liability . . . rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.

Construing these two purposes together, to impose vicarious liability for punitive damages on a principal, it is reasonable to distinguish between managerial and non-managerial employees or agents. Business enterprises typically employ personnel with a wide range of responsibilities, from the Chief Operating Officer to the most menial or part-time employee. Each employee will have a delegated job or responsibility. Obviously in the case of so-called managerial employees, the business has a greater responsibility in selecting and supervising the person. This greater duty should carry correspondingly greater legal responsibility.

While with respect to compensatory damages it is reasonable that a business entity is responsible for the legal wrongs of its agents acting in the scope of their employments, this may not seem fair in the case of punitive damages. While every business has a duty to select quality employees, for non-managerial employees the duty of careful selection is not as high as for managerial employees who carry heavy responsibility. Thus, contrary to the so-called "majority" rule, a business enterprise should be vicariously liable for punitive damages only for wrongs committed by *managerial* employees. This rule retains the "complicity" idea behind *Lake Shore* and its progeny, but updates this idea to require not "strict complicity" but rather simple "complicity." It is important to retain the complicity principle because of the purpose behind the imposition of punitive damages: the punishment and deterrence of reckless conduct. The complicity standard retains the idea of fault on the part of the principal. In the case of reckless conduct on the part of a *managerial* employee (as opposed to a menial or non-managerial employee) there is "complicity" (culpability, fault or guilt), so that it is proper for the business enterprise to be vicariously liable for punitive damages.

This was the interpretation of the RESTATEMENT § 909(c) rendered by the First Circuit in the case of *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995). The *Seafarer* case involved the malicious actions of a shipmaster, Niles, who destroyed the plaintiff's lobster traps and gear during May and June of 1992. The *Seafarer* was trawling for monkfish on the ocean floor, and the plaintiff's lobster traps posed an obstacle to this trawling operation. Although there was no evidence the shipowner, Doyle, authorized, ratified or participated in the wrongdoing, the court held that the shipowner was liable for punitive damages under the doctrine of vicarious liability because, as the court stated, "we conclude that strict adherence to the complicity approach would shield a principal, who, though not guilty of direct participation, authorization, or ratification in his agent's egregious conduct, nevertheless shares blame for the wrongdoing." 70 F.3d at 705. In imposing vicarious liability on the shipowner, however, the court stated that it is very important to retain "requiring some level of culpability." *Id.* The court found this culpability in the fact that the shipmaster was a managing employee.

The court upheld the district court's findings that Captain Niles had "complete managerial discretion over the means and methods of fishing." *Id.*

The First Circuit's ruling in the *Seafarer* case is consistent on its facts with the Ninth Circuit's holding in *Protectus Alpha* as well as with the case at bar. In *Protectus Alpha* the court, while not making explicit the idea that the Restatement's formulation should be interpreted to persons who are delegated managerial authority, ruled that the foreman/employee involved in the reckless actions in that case "clearly occupied a managerial position. He performed a supervisory role, managing several employees." 767 F.2d at 1386. In the case at bar as well, Captain Hazelwood clearly exercised managerial responsibilities for all aspects of the navigation of the EXXON VALDEZ and her crew. In the case at bar, Exxon in fact has admitted that Captain Hazelwood was exercising managerial responsibilities at the time of the accident. Pet. for Cert. 6.

Courts and juries can easily distinguish between employees who have a managerial position and those who do not. For example, in *Muratore v. The M/S Scotia Prince,* 845 F.2d 347 (1st Cir. 1988), the First Circuit considered the imposition of punitive damages against the defendant carrier for the intentional infliction of emotional distress by photographers upon the plaintiff, who was a passenger on a vessel. The court, applying the Restatement standard, denied punitive damages because the photographers did not occupy a managerial position.

Thus, RESTATEMENT § 909(c) is the proper formulation as long as it is clear that managerial employees are defined as those with discretionary responsibility for important business operations and decisions that may affect members of the general public. A second characteristic of managerial employees frequently is that they have authority over other business personnel. This interpretation of the Restatement ensures that the remedial purposes of punitive damages will be fulfilled and that punitive damages will not be imposed unreasonably upon a business enterprise. Such a ruling would make it clear that every business enterprise must exercise special vigilance and care in selecting and in retaining its managerial employees. The Restatement approach makes clear that the term "managerial agent" is not restricted to top corporate officials. Rather, the Restatement specifies a functional approach to the question of who is "managerial" that is more realistic and does not depend on artificial job labels.

While the question of who is a "managerial agent" will be dependent upon particular circumstances, the job of ship master of a large vessel such as an oil tanker is one that virtually always will qualify for this designation. Ship masters such as Captain Hazelwood have great responsibility not only for important business matters but also for public and environmental safety. The cases of the *Seafarer* and the case at bar are only the most recent instances when this has been recognized. The principle that a shipowner may be liable for punitive damages for the actions of a ship master was recognized long ago in the case of *Ralston v. The States Rights*, 20 F. Cas. 201, 209 (E.D. Pa. 1836). In that case, a Delaware River steamboat captain deliberately rammed his rival's boat. The court gave "exemplary damages," which it defined as "a high and exaggerated estimate of the wrong or injury" in the form of lost profits, which at that time was not proper in property damage cases. *Id.* at 210.

While the case at bar is a maritime case, the Restatement rule as interpreted by the *Seafarer* court is appropriate outside admiralty as well. The *Seafarer* court, after carefully examining authorities, noted that "most courts outside the maritime context do not follow [the strict complicity rule of] *Lake Shore*." 70 F.3d at 704. The court also stated that "we discern no reason, and the defendants point to none, why vicarious liability should be treated differently on sea than on land." *Id.*

In summary, the best rule for vicarious liability for punitive damages is the RESTATEMENT (SECOND) OF TORTS formulation in § 909(c) as interpreted by the First and Ninth Circuit Courts of Appeal. This approach occupies a middle ground between the "majority rule," on the one hand, and the strict culpability rule on the other. This rule also retains the culpability principle while updating the *Lake Shore* formulation.

III. Congress Has Not Foreclosed the Imposition of Punitive Damages in the Case at Bar.

This Court has granted certiorari to examine whether Congress may have precluded the imposition of punitive damages by statute. The question arises because at the time of the EXXON VALDEZ oil spill in 1989, the Federal Clean Water Act (CWA) provided a remedial scheme that imposed damages for clean-up of an oil spill, damages for natural resources as well as civil and criminal penalties against a violator. The question that arises from this statutory scheme is really twofold: does the CWA preempt private tort actions for property damage? And second, does the CWA preempt punitive damages?

To answer these questions the Court considers the regulatory framework of the CWA as was done in prior cases raising similar issues. *Illinois v. Milwaukee (City of Milwaukee I),* 406 U.S. 91 (1972); *Milwaukee v. Illinois (City of Milwaukee II)*, 451 U.S. 304 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1 (1981); and *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987). In the latter three cases, which were decided after comprehensive amendments were added to the CWA, the Court stated that the CWA provides a comprehensive regulatory scheme to combat water pollution including oil spills. E.g., *Int'l Paper,* 479 U.S. at 489. But as the Court stated, the CWA is a *regulatory* scheme designed to protect only public rights in water resources and to adopt and enforce standards for the nation's navigable waters. Damages to private property were not addressed under the CWA, and common law claims were explicitly saved by Congressional mandate pursuant to 33 U.S.C. §§1321(o)(1) and (2), which in 1989 provided as follows:

> (o) Obligation for damages unaffected; local authority not preempted . . . .
>
> (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel . . . to any person . . . under any

> provision of law for damages to any . . . publicly owned or privately owned property resulting form a discharge of oil or hazardous substance . . . .
>
> (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State . . . .

In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336 (1973) this Court explicitly stated that "the Federal [Water Pollution Control] Act does not preempt the states from establishing 'any requirement or liability' respecting oil spills." The general maritime law is closely analogous to state common law liability, and there is no statutory mandate of preemption.

This Court has never ruled that the CWA preempts private tort actions. In *City of Milwaukee II* this Court ruled that the CWA preempted the federal common law remedy of nuisance for interstate pollution, and this was followed by *International Paper*, which ruled that the CWA preempted state interstate nuisance law as well. The important policy behind these preemption rulings was the fact that common law nuisance law principles would interfere with the regulatory scheme of Congress in establishing a permit system for point source discharges, because common law nuisance law would permit courts to impose separate discharge standards and different compliance schedules from the U.S. Environmental

Protection Agency, creating a confusing dual system of administrative requirements. In *Sea Clammers* this Court ruled that the CWA (Federal Water Pollution Control Act) and the Marine Protection, Research and Sanctuaries Act cannot be interpreted to provide plaintiffs with an implied private cause of action under federal law. Although the plaintiffs had also sued on a maritime tort theory, this action had been dismissed by the lower court, and this Court did not address the matter. In *Conner v. Aerovox, Inc.,* 730 F.2d 835 (1st Cir. 1984), the court ruled that a maritime law *nuisance* action was preempted under the authority of this Court's opinions. Therefore, what this line of cases teaches is that the entire federal common law of nuisance, whether maritime or non-maritime, as well as state interstate nuisance law, is preempted by the Clean Water Act (Federal Water Pollution Act), and no implied federal cause of action can be derived from this Act. On the other hand, private rights of action for damages either under state law or the general maritime law are still available and are explicitly saved by the CWA.

The fact that the CWA unquestionably leaves untouched the underlying causes of action in the case at bar supports the conclusion that Congress did not intend to preempt any of the available private *remedies.*

The criminal and civil penalties provided in the Clean Water Act do not preempt any remedies provided in private tort actions under either state law or the general maritime law. Not only is there a complete absence of preemptive intent in the sections of the CWA dealing with criminal and civil penalties, but such provisions are common in regulatory statutes, and no previous case has held such remedies to have preemptive effect. Criminal penalties obviously are no substitute for the recovery of private tort damages, and the civil penalties provided in the Act have the character of quasi-criminal monetary fines intended to deter conduct detrimental to the public interest. The liability in such cases is strict; there are virtually no defenses to civil penalties under the Act. *United States v. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978) (no third party causation defense is available to the discharger). The fact that a violator of the CWA is subject to civil and criminal penalties is not intended to substitute for or to preempt punitive damages in a private action in maritime tort.

As the Ninth Circuit ruled in the case at bar, where the private law remedy clearly does not interfere with administrative judgments or conflict with the statutory scheme, there is no preemption. Pet. App. 77a.

The punitive damage remedy is also not preempted under the authority of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which involved the question whether the parent of a seaman killed in territorial waters could recover loss of society and lost future income damages for wrongful death under the general maritime law of unseaworthiness. This Court, relying primarily upon the remedial statute for seamen passed by Congress, the Jones Act, ruled that the general maritime law would not afford the plaintiff a greater remedy than had been provided seaman suing for negligence under the Jones Act.

The case at bar can be distinguished from *Miles* on several grounds. First, *Miles* was a general maritime law wrongful death action that was parallel to a *private* cause of action created by Congress under the Jones Act. In enacting the Clean Water Act, however, Congress did not create any *private* cause of action for damages in cases of oil spills. Second, *Miles* did not involve punitive damages. Third, in *Miles* the Court was concerned with alleviating an anomaly created by the private law remedies specified by Congress in the Death of the High Seas Act (DOHSA); but no such anomaly is present in the case at bar, because Congress has not passed any statute on maritime tort property damages, but has left this matter to the common law.

Nevertheless, some courts have engaged in an unwarranted extension of *Miles,* although *Miles* did not concern punitive damages and this Court did not address this matter. Several lower federal courts have used what they term the "analytical framework" of *Miles* to deny punitive damages in maritime law cases. For example, many courts now deny punitive damages in seamen's personal death and injury cases See, e.g. *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir. 1993) (no punitive damages under the Jones Act or for unseaworthiness); *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir. 1994), *reversed in part on reh'g*, 59 F.3d 1496 (1995) (no punitive damages for wrongful withholding of maintenance and cure). The Ninth Circuit has followed the precedent set by *Guevara*. See *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995). Some lower courts have also denied punitive damages generally in maritime wrongful death actions based on *Miles*.

Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (2d Cir. 1993); *In re Amtrack "Sunset Limited" Train Crash v. Warrior & Gulf Navigation Co.*, 121 F.3d 1421 (11th Cir. 1997). As a result, confusion and conflicts of authority are occurring in the lower federal courts on the question of the impact of *Miles* on punitive damages. Some courts hold that punitive damages are still available after *Miles* even for seamen. *Atl. Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007) (in disagreement with the Fifth and Ninth Circuits, punitive damages are available for wrongful denial of maintenance and cure). The confusion over punitive damages engendered by *Miles* is detailed by Professor Robertson in his article, *Punitive Damages in American Maritime Law*, supra. See also Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745 (1995).

To put an end to this confusion this Court should reiterate the limited parameter of *Miles*. The rationale of *Miles* is clearly stated in the Court's opinion: "[i]n this era an admiralty court . . . must be vigilant not to overstep the boundaries imposed by federal legislation." *Miles*, 498 U.S. at 27. This rationale was identical to that articulated by this Court in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (DOHSA by its terms limits recovery in wrongful death actions to pecuniary damages). This Court repeated this rationale in the *Yamaha* case: "when Congress has prescribed a comprehensive tort recovery regime..., there is no room for enlargement of the damages statutorily provided." *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 215 (1996). Therefore, *Miles* should be interpreted not to limit or to be concerned with punitive damages in the case at bar, which is not a personal injury claim and is not based upon federal statutory law. The concern of *Miles* was rather inconsistency with statutory law where specific and comprehensive remedies have been enacted by Congress. See also *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699-702 (1st Cir. 1995). The *Miles/Higginbotham* rule only applies when Congress has enacted a comprehensive statutory regime like the Jones Act or the Death on the High Seas Act that is directly on point and that specifically provides private tort victims with rights as well as remedies under federal law. In the case at bar, that is clearly not the case. The CWA does not create a federal right of recovery for plaintiffs in this case; the plaintiffs' substantive rights come solely from the general maritime law, a purely common law source. The Ninth Circuit therefore correctly rejected the argument based on *Miles* that was made by Exxon in the case at bar.

IV. The Size of the Award of Punitive Damages in the Case at Bar is Within the Limits Allowed by Federal Maritime Law.

In the case at bar Exxon challenged the size of the punitive damage award on due process grounds, and in response the Ninth Circuit reduced the award by fifty percent, from $5 billion to $2.5 billion, in order to comply scrupulously with the constitutional standards set out in the decisions of this Court. Since this Court has not granted review on the due process issue, the size of the award can be duly taken to satisfy the constitutional standards of the Due Process Clause.

Thus, the issue in the case at bar is whether this Court should single out *maritime* plaintiffs and the general maritime law to be treated differently with respect to punitive damages than the entire universe of tort law plaintiffs. In other words, should the Court in the exercise of its authority over the general maritime law announce that maritime plaintiffs shall be subject to more stringent limits on punitive damages than are required generally under the Due Process Clause?

Such a limitation for maritime plaintiffs would be unjust and unwarranted because no principled application of such a limit for a particular class of plaintiffs is possible. No distinctive doctrine or characteristic of maritime law requires a limit on the size of an award of punitive damages beyond that required by the Due Process Clause.

First, the long history of the application of punitive damages as a common law doctrine shows no distinction between maritime and non-maritime cases with respect to both the process of imposing punitive damages and the amounts involved. The cases demonstrating this point are collected in Part I of this brief and even more fully in the exhaustive article of David Robertson, *Punitive Damages in American Maritime* Law, 28 J. MAR. L. & COM. 73 (1997). The history of the imposition of punitive damages shows that this doctrine did not originate in maritime law but was simply applied as a common law doctrine that has been part of maritime law since earliest times.

Second, the traditional maritime law emphasis on uniformity is completely fulfilled by the adoption of the common law rule that bases vicarious liability for punitive damages upon the fault of a managerial agent. There is no need for a special cap on punitive damages that applies only in maritime cases. Moreover, uniformity is not a concern in the case at bar because punitive damages concerns only remedy, not substantive rights; this Court has expressly ruled that uniformity of remedies is not essential in maritime law cases. *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (maritime law remedies may be supplemented by state law remedies for wrongful death). Moreover, the due process limits that were employed to limit the award in the case at bar and that apply to all maritime cases satisfy any lingering uniformity concern. There is no need for a special cap on punitive damages that applies only to maritime law cases.

Third, Congress has not seen fit to limit punitive damages for oil spills or in maritime cases. The civil and criminal penalties under the Clean Water Act are intended to punish and deter harm to public resources, not to substitute for private tort damages. The punitive damages award in this case is also well within the limits of the civil and criminal penalties for which Exxon could have been liable, which exceeded $3 billion. Pet. App. 173a-175a. This Court may also take note that the oil spill that is the subject of the case at bar moved Congress to pass the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761, which greatly increased the financial penalties for dischargers of oil into navigable waters. Many states, including Alaska, did the same in response to this concern.

Fourth, an artificial limit on punitive damages imposed by this Court under the general maritime law would be impractical and ultimately futile since injured parties would then likely avoid maritime law and seek punitive damages instead in the common law courts, where punitive damages will remain available under more generous terms.

Fifth, there is no basis in the cases imposing punitive damages of any size differences or, indeed, any special maritime law rules. In the *Lake Shore* opinion this Court stated that "courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages." 147 U.S. at 107. The general maritime law generally embraces the doctrinal principles of the common law, and no court has ruled that punitive damages run counter to any essential characteristic of maritime law. See *CEH v. F/V Seafarer*, 70 F.3d at 704-705.

Punitive damages serve identical purposes in both maritime and non-maritime cases: punishment and deterrence of reckless conduct. In the case at bar these purposes are particularly important and relevant. Compensatory damages in the case of oil spill virtually always under-compensate and have little deterrence value. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 728 (3d ed. 2002). There are two reasons for this: first, the rule of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), generally applies in oil spill cases so that there is no recovery for pure economic losses sustained without associated property damage. See, e.g., *Lousiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*); and second, the environmental damages of an oil spill are frequently of a magnitude that compensation by any measure is inadequate. Punitive damages in the case at bar are particularly needed to serve the purpose of deterring reckless conduct that endangers the marine environment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

◆

AMICI CURIAE BRIEF OF SHIP MASTERS AND EXPERT MARINERS CAPTAINS MITCHELL STOLLER, JOSEPH AHLSTROM, ROGER JOHNSON, JOHN SCOTT MERRILL, AND TOM TROSVIG IN SUPPORT OF RESPONDENTS

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In the City of Carlisle, 39 F. 807 (D. Or. 1889) 26

Norwich Co. v. Wright, 80 U.S. 104 (1871) 27

The Amiable Nancy, 16 U.S. 546 (1818) .... *passim*

OTHER AUTHORITIES

GEORGE COGGESHALL, HISTORY OF THE AMERICAN PRIVATEERS, AND LETTERS-OF-MARQUE (1956) 20, 21

DAVID M. COONEY, CHRONOLOGY OF THE U.S. NAVY 1775-1965 (1965) 18

DON I. DALGEISH, AN INTRODUCTION TO SATELLITE COMMUNICATIONS (1989) 13

STOJCE DIMOV ILCEV, GLOBAL MOBILE SATELLITE COMMUNICATIONS FOR MARITIME, LAND AND AERONAUTICAL APPLICATIONS (2005) 13

EUROPEAN MARITIME SAFETY AGENCY, EMSA ACTION PLAN FOR HNS POLLUTION PREPAREDNESS AND RESPONSE (2007) 8

JEROME R. GARITEE, THE REPUBLIC'S PRIVATE NAVY: THE AMERICAN PRIVATEERING BUSINESS AS PRACTICED BY BALTIMORE DURING THE WAR OF 1812 (1977) 19

TABLE OF AUTHORITIES – Continued

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Charles Jarod Ingersoll, History of the Second War Between the United States and Britain (1852) 22

International Marine Organization, IMO and Dangerous Goods at Sea (1996) 8

Richard Posner, Tort Law: Cases and Economic Analysis (1982) 24

William L. Prosser, The Law of Torts (4th ed. 1971) 26

Joseph Alfred Scoville, The Old Merchants of New York (1864) 20

Reuben E. Stivers, Privateers and Volunteers: The Men and Women of Our Reserve Naval Forces, 1766 to 1866 (1975) 20

Gomer Williams, History of the Liverpool Privateers and Letters of Marque (1897) 20

Restatement (Second) of Torts (1979) 27

S. Rep. No. 101-94 (1990), *reprinted in* 1990 U.S.C.C.A.N. 749 8

N.P. Kyrtatos, *Ocean-going Ship Support Using Multimedia Teleconferencing Via Satellite*, 5 Electronics & Communication Engineering Journal 198 (1993) 9

Edgar Gold, *Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom*, 14 J. Mar. L. & Com. 1 (1983) 16

Page

Mark E. King, Note, *In re Complaint of Armatur, S.A.: The Limitation of Liability Act and Maritime Environmental Disasters*, 21 ENVTL. L. 405 (1991) 25

Sandra Speares, *Inmarsat 20 Successful Years: A Revolution in Marine Communications*, LLOYD'S LIST, Nov. 17, 1999, at 17 ....13, 16

Captain Shawn P. Walsh, *Training with Exxon*, QUARTERMASTER PROFESSIONAL BULLETIN (1995), http://www.quartermaster.army.mil/oqmg/Professional_Bulletin/1995/Autumn/walsh.html 15

Exxon Valdez Oil Spill Trustee Council, *Where the Oil Went*, http://www.evostc.state.ak.us/History/PWSmap.cfm..4

International Marine Organization, *Long range identification and tracking (LRIT)*, http://www.imo.org/Safety/mainframe.asp?topic_id=905 ....12, 13

National Space-Based Positioning, Navigation, and Timing Coordination Office, *Marine Applications of GPS*, http://www.gps.gov/applications/marine/index.html 10, 12

Richard E. Thorne, *Biological Monitoring in Prince William Sound*, http://www.pwssc.gen.ak.us/hydroacoustics/biologicalmonitoring.shtml...8

U.S. Coast Guard Navigation Center, *AIS Overview*, http://www.navcen.uscg.gov/enav/ais/default.htm 10

TABLE OF AUTHORITIES – Continued

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U.S. Coast Guard Navigation Center, *How AIS Works*, http://www.navcen.uscg.gov/enav/ais/how_AIS_works.htm 11

U.S. Coast Guard Navigation Center, *What AIS Broadcasts*, http://www.navcen.uscg.gov/enav/ais/what_AIS_broadcasts.htm 11

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Captains Mitchell Stoller, Joseph Ahlstrom, Roger Johnson, John Scott Merrill, and Tom Trosvig have extensive experience in the maritime industry. As former ship masters and expert mariners, *amici* have a strong interest in ensuring that the rules applied in this case are consistent with the realities of the modern shipping industry.

Captain Mitchell Stoller graduated as valedictorian from the California Maritime Academy. Captain Stoller worked for Exxon Shipping Company between 1975 and 1988, first as a third mate from 1975 to 1977, then as a second mate from 1977 to 1979, then as a first mate from 1979 to 1984, and finally as a master from 1984 to 1988, where he became a pilot in Los Angeles Harbor. While employed by Exxon, Captain Stoller worked with and for Joseph Hazelwood – the captain of the EXXON VALDEZ when the spill occurred – and was master on several vessels that made the same run as the EXXON VALDEZ between Valdez, Alaska, through Prince William Sound to various ports in Washington, Oregon, and California. Captain Stoller twice received awards from Exxon for safe vessel operation.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and their letters of consent have been filed with this Court.

During his more than thirty-five-year maritime career, Captain Stoller has served as an expert and consultant for more than four hundred law firms nationwide, has been retained on over one thousand seven hundred cases, and has testified in over sixty-five trials. He has earned an Unlimited Master's License and First Class Pilot's License for, among other areas, Prince William Sound. Captain Stoller has also written safety manuals on oil spill prevention for major oil and shipping companies, and has served as an advisor to Congress, the U.S. Coast Guard, and federal, state, and local organizations on the prevention of oil spills, collisions, allisions, and groundings.

Captain Joseph Ahlstom is Professor of Marine Transportation at the State University of New York, Maritime College. He is a well-known expert in the area of marine communications and has developed several courses in the field. Captain Ahlstom's experience as a Master and Chief Officer spans more than fifteen years. He is currently a United States Coast Guard licensed Master Mariner and is a Captain in the United States Navy Reserve.

Captain Roger Johnson is a retired Master of large ocean-going vessels carrying hazardous commodities, including 200,000-barrel asphalt tankers and 30,000-ton sulphur tankers. He worked for, among others, Sargeant Marine and Duval Sulphur. Captain Johnson's merchant officer's license is Master Unlimited Oceans. For twenty years, he was a member of the Masters, Mates and Pilots Officers union. He spent the twenty years before that as a member of the National Maritime Union sailing as a deck hand, and working his way up to third mate, second mate, chief mate, and eventually master.

Captain John Scott Merrill has been employed by the Alaska Marine Highway System for eleven years, and is currently the Master of M/V TUSTUMENA, an ocean class vehicle and passenger ferry operated by the Alaska Marine Highway System. He has an Ocean Masters License, unlimited tonnage, with an endorsement as a First Class Pilot, for Alaskan waters including Prince William Sound. During Captain Merrill's twenty-three years of service with the United States Coast Guard, he commanded buoy tenders and cutters, commanded Loran communications stations, and was a staff officer in the Marine Environmental Protection Branch. Between 1984 and 1988, he was the Coast Guard's Alaska Aids to Navigation Branch Chief, and was responsible for management of Alaska's navigable waterways including Prince William Sound. In that role, he was responsible for all of Alaska's seven Loran C electronics navigation stations.

Captain Tom Trosvig is a retired officer of the United States Coast Guard. While in the Coast Guard, Captain Trosvig served as (1) a marine inspector, (2) the first commissioned supervisor of the USCG Marine Safety Detachment in Kodiak, Alaska, (3) an operations officer/navigator aboard the USCGC CONFIDENCE, which patrolled the North Pacific and Bering Sea, (4) the Operations/Administrative Officer of the USCG Support Center in Kodiak, Alaska, and (5) the Commanding Officer of the Bering Sea patrol vessel, USCGC YOCONA. He maintains a merchant marine license for Master, Steam and Motor Vessels of 2000 Gross Tons Upon Oceans. Currently, Mr. Trosvig serves as the Security, Safety, and Hazardous Materials Officer for an Alaskan shipping terminal.

◆

STATEMENT

On March 24, 1989, the EXXON VALDEZ supertanker "ran aground on Bligh Reef in Prince William Sound, Alaska." Pet. App. 60a. Over eleven million gallons of oil flowed into the Sound, eventually spreading over 11,000 square miles. Pet. App. 64a; Exxon Valdez Oil Spill Trustee Council, *Where the Oil Went*, http://www.evostc.state.ak.us/History/PWSmap.cfm; *see* Pet. App. 123a. This tragedy was the direct result of the recklessness of Petitioners Exxon Shipping Company and Exxon Mobil Corporation (collectively "Exxon") because for many years, Exxon allowed an employee who had longstanding problems with alcohol to command the EXXON VALDEZ supertanker. Pet. App. 63a-64a; JA 212 (Exxon stipulated to its liability for Hazelwood's acts that led to the spill).

By 1985, Exxon was well-aware that its employee, Joseph Hazelwood, had a substance abuse problem that needed treatment and monitoring. That year Captain Hazelwood had attended a twenty-eight-day residential rehabilitation program. Pet. App. 63a. By the spring of 1986, however, Exxon knew that Captain Hazelwood was drinking again. Pet. App. 121a. It nevertheless left the captain in command of its supertankers, including the EXXON VALDEZ. Pet. App. 121a.

On March 23, 1989, Captain Hazelwood was in command of the EXXON VALDEZ when it left Valdez, Alaska, loaded with fifty-three million gallons of crude oil. *See* Pet. App. 120a-122a. Before leaving Valdez, however, the captain "drank at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars." Pet. App. 64a. Shortly after setting out, "Captain Hazelwood assumed command of the vessel from a harbor pilot and made arrangements to divert the vessel from the normal shipping lanes in order to avoid considerable ice which had calved off Columbia Glacier." Pet. App. 120a. The diversion from the standard shipping lanes meant that the tanker was headed directly toward Bligh Reef. Pet. App. 120a. When it was time to make the critical turn to avoid the reef, Captain Hazelwood was not on the bridge. Pet. App. 120a. He left the Third Mate, who was, "more probably than not, overworked and excessively tired at the time in question," Pet. App. 120a, to make the maneuver, even though Captain Hazelwood, not the Third Mate, was the only one aboard licensed to navigate that portion of the Sound. Pet. App. 63a. As shown at trial, "captains simply do not leave the bridge during maneuvers such as this one and that there is no good reason for the captain to go to his cabin to do paperwork at such a time." Pet. App. 63a.

Not surprisingly, shortly after the spill, many claims were filed against Exxon. Pet. App. 124a. The civil cases claiming economic and punitive damages "were ultimately (but with a few exceptions) consolidated into this case." Pet. App. 125a. The District Court certified several classes for compensatory damages and a single mandatory punitive damages class, which consisted of 32,677 members. Pet. App. 67a; 123a. The Court of Appeals concluded that the total compensable economic harm caused by Exxon to these plaintiffs was over $500 million. Pet. App. 38a. That court also reduced the total punitive damages award to $2.5 billion. Pet. App. 42a.

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SUMMARY OF ARGUMENT

Today's maritime industry and the circumstances under which the EXXON VALDEZ spill occurred bear little resemblance to those of the early 1800s when *The Amiable Nancy*, 16 U.S. 546 (1818), was decided. First, as is obvious, modern commercial maritime business has little in common with the activities of bygone privateers. In addition, modern communications and navigational technologies has revolutionized the ship-to-shore relationship between the captain and the owner. Finally, the cargo transported by ships today is much more dangerous than in the 1800s. The transport of those substances requires heightened coordination between vessel and shore, which necessitates a very different relationship between shipowner and captain than that of the early 1800s.

Nevertheless, as *The Amiable Nancy* teaches, maritime law should accurately reflect the maritime conditions of the time. Given the current nature of the industry, punitive damages are sometimes necessary to punish and deter intentional or reckless discharges of oil and other hazardous substances into the marine environment. For that reason, and because the punitive damages awarded in this case are appropriate and reasonable, this Court should affirm the judgment of the Court of Appeals.

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ARGUMENT

I. EXXON'S ARGUMENTS DO NOT COMPORT WITH THE REALITIES OF THE SHIPPING INDUSTRY

A. Modern Maritime Cargo Can Be Very Harmful to the Marine Environment

Thirty-five years ago, this Court recognized in *Askew v. American Waterways*, 411 U.S. 325 (1973), that "not only is more oil being moved by sea each year, but the tankers are much larger." *Id.* at 335. The trend to larger ships has continued unabated since that time. Some container vessels (scheduled to be constructed) will have a capacity of 16,000 20-foot equivalent containers (TEUs), which represents an increase in capacity of thirty-two times the number of TEUs carried on most vessels at the time of this Court's decision in *Askew*. In addition, more than half of all cargo transported by sea today is harmful to the environment. INTERNATIONAL MARINE ORGANIZATION, IMO AND DANGEROUS GOODS AT SEA 1 (1996).

The impacts from toxic marine spills go far beyond the concerns of safety of ships' crews and passengers. Such spills can have devastating consequences for the environment and for resource-based businesses such as the commercial fishing industry. *See* Br. of Natural and Social Scientists as *Amicus Curiae* in Support of Respondents. In this case, for instance, over 300,000 sea birds were reported dead in the months following the EXXON VALDEZ disaster. S. REP. NO. 101-94, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 749, 750. But the direct lethal effect on marine organisms is only the beginning. Spills of dangerous cargos can also damage marine ecosystems by causing critical changes in the environment. *See* EUROPEAN MARITIME SAFETY AGENCY, EMSA ACTION PLAN FOR HNS POLLUTION PREPAREDNESS AND RESPONSE 44 (2007). In this case, the EXXON VALDEZ spill has caused long-term damage to the Prince William Sound Pacific herring fishery, a once tremendously valuable resource. *See* Richard E. Thorne, *Biological Monitoring in Prince William Sound*, http://www.pwssc.gen.ak.us/hydroacoustics/biologicalmonitoring.shtml.

B. Modern Technologies Allow for Contact Between Ship and Shore at Anytime

Ship-to-shore communications today are also much different than in the 1800s. A shipowner and a vessel's master can be in contact anytime. If there is a serious technical problem on the ship, experts at the shipping company and other locations use modern communication facilities for remote inspection, problem diagnosis, advice, cooperative decision-making and supervision of the repair procedure. *See* N.P. Kyrtatos, *Ocean-going Ship Support Using Multimedia Teleconferencing Via Satellite*, 5 ELECTRONICS & COMMUNICATION ENGINEERING JOURNAL 198-208 (1993). Even supplies, refueling, and weather alerts are handled ashore by the shipping company. *Id.*

Several other technologies are critical to modern maritime communications and contact between ship and shore.

1. Navigational Technology

The Global Positioning System ("GPS") allows a ship to identify its location with absolute precision, conveying this position to the company office via worldwide cellular phone technology or by satellite communications known as Inmarsat, discussed in more detail below. This allows guidance and direction from the office ashore to be provided to the ship on a regular basis rather than only during times of crisis as in the past. *Id.*

GPS information is embedded in the Automatic Identification System ("AIS"). AIS is endorsed by the International Maritime Organization ("IMO") and is used for vessel traffic control around busy seaways. National Space-Based Positioning, Navigation, and Timing Coordination Office, *Marine Applications of GPS*, http://www.gps.gov/applications/marine/index.html. AIS functions by "us[ing] a transponder system that operates in the VHF maritime band and is capable of communicating ship to ship as well as ship to shore, transmitting information relating to ship identification, geographic location, vessel type, and cargo information – all on a real-time, wholly automated basis." *Id.*

More specifically, AIS provides the officer in charge of the navigational watch with a radar display that includes a mark for every significant ship within radio range, each with a velocity vector indicating speed and heading:

> Each ship 'mark' can reflect the actual size of the ship and its position with GPS or differential GPS accuracy. By clicking on a ship mark, the officer can learn the ship name, course, speed, classification, call sign, registration number, and other information. Maneuvering information, closest point of approach, time to closest point of approach, and other navigation information are also available.

U.S. Coast Guard Navigation Center, *AIS Overview*, http://www.navcen.uscg.gov/enav/ais/default.htm; *see* *also* U.S. Coast Guard Navigation Center, *How AIS Works*, http://www.navcen.uscg.gov/enav/ais/how_AIS_works.htm (providing more detailed explanation of technology).

While underway, shipboard AIS units broadcast the following information every two to ten seconds and every three minutes while at anchor: (i) the unit's maritime mobile identity ("MMSI"), a unique identifier for each ship radio unit, assigned by the International Telecommunications Union; (ii) the navigation status of the ship (e.g., underway using engine, at anchor, not under command); (iii) rate of turn; (iv) speed over ground; (v) position accuracy; (vi) longitude and latitude; (vii) course over ground, (viii) true heading; and (ix) time stamp. U.S. Coast Guard Navigation Center, *What AIS Broadcasts*, http://www.navcen.uscg.gov/enav/ais/what_AIS_broadcasts.htm. In addition, the AIS unit broadcasts the following information every six minutes: (i) MMSI number (ii) Ship's IMO number; (iii) Ship's radio call sign; (iv) Name of ship (up to 20 characters); (v) Type of ship and cargo; (vi) Dimensions of ship (in meters); (vii) Location on ship where the reference point for position reports is located; (viii) Type of position fixing device utilized by ship; (ix) Draft of ship (in meters); (x) Destination of ship (at master's discretion); and (xi) Estimated time of arrival (ETA) at destination.

AIS is not only vital for navigation, but is increasingly used to bolster the security of ports and waterways by providing governments with greater situational awareness of commercial vessels and their cargo: "Because the ship's GPS position is embedded in [the] transmissions, all essential information about vessel movements and contents can be uploaded automatically to electronic charts. The safety and security of vessels using this system is significantly enhanced." National Space-Based Positioning, Navigation, and Timing Coordination Office, *Marine Applications of GPS,* http://www.gps.gov/applications/marine/index.html.

As new developments continue to occur, it is clear that we now sail in an age when the control of shoreside owners over vessels at sea will become even more comprehensive. Long Range Identification and Tracking ("LRIT") is a system spearheaded by the United States Coast Guard after September 11, 2001, to track the approximately 50,000 large ships around the world. The LRIT information that ships will be required to transmit include "the ship's identity, location and date and time of the position." IMO, *Long range identification and tracking (LRIT),* http://www.imo.org/Safety/mainframe.asp?topic_id=905. An important difference between LRIT and AIS – in addition to the disparity in range – is the availability of information. AIS is a broadcast system available to all; "data derived through LRIT will be available only to the recipients who are entitled to receive such information and safeguards concerning the confidentiality of those data have been built into the regulatory provisions." *Id.* The LRIT system will be operational with respect to the transmission of LRIT information by ships from December 30, 2008. *Id.*

2. Communications Technology

In 1989, ships had instantaneous and continuous communications with the company office ashore available through satellites. This form of communication is known as Inmarsat, which is short for International Marine Satellite Organization. *See* Sandra Speares, *Inmarsat 20 Successful Years: A Revolution in Marine Communications*, LLOYD'S LIST, Nov. 17, 1999, at 17. There are four Inmarsat satellites that circle the world at the equator and provide instant communication with personnel with public phone access similar to landline phones at home or cell phones. DON I. DALGEISH, AN INTRODUCTION TO SATELLITE COMMUNICATIONS 239 (1989). It was common practice for mariners of that time to use the satellite phone to speak immediately with the company, agent, or charterers. *Id.*

The Inmarsat phone can be used for voice and telex communications. STOJCE DIMOV ILCEV, GLOBAL MOBILE SATELLITE COMMUNICATIONS FOR MARITIME, LAND AND AERONAUTICAL APPLICATIONS 32 (2005). Based on the experience of these *amici*, however, it is clear that the widespread use of worldwide cellular phones has replaced the Inmarsat system for voice communication. In fact, the use of worldwide cellular phones, shore-based communication networks, satellites and ship-board equipment has radically changed the operating practices of the marine industry. The use of advanced telecommunications, such as high data-rate land networks and satellite links, allows the transmission of digitized moving video, voice and computer data, to support applications such as multimedia conferencing and computer interworking. All of these technologies can be used for the remote support of a ship's master and crews from land-based agencies.

3. Exxon's Use of Modern Communications Technology

To appreciate the import of modern communications in today's maritime industry one need only look at the spill at issue here. On March 24, 1989 when the EXXON VALDEZ ran aground on Bligh Reef the vessel immediately contacted Valdez traffic stating "we . . . should be on your radar." PX92A (Resps.' DVD). Captain Hazelwood received a call on the ship's satellite phone from Exxon executives in San Francisco shortly after the ship's grounding. JA 223-24, 354-55, 872-75. Using that same phone, they discussed his near-disastrous plan to dislodge the EXXON VALDEZ from Bligh Reef. *Id.*

In response to an inquiry from the United States Senate following the grounding of the EXXON VALDEZ, Exxon detailed the communication system on board the ship:

> Is the EXXON VALDEZ equipped to maintain communications with Exxon Headquarters during its shipping operations?
>
> Yes, the EXXON VALDEZ is equipped with a number of ship-to-shore communications to enable the vessel to communicate with any shore location. These systems include Marsat [Inmarsat] voice and telex systems, single sideband radio, VHF Marine radio, HF Radio, cellular telephone, SITOR telex, and facsimile.

SJA249sa.

As of 1995, one of Exxon's employees explained that Exxon had moved from hard copy telexes to electronic mail: "According to *Lamp*, an Exxon publication, 'Exxon ships are tied into a satellite network so they can receive and initiate instantaneous telecommunications, including voice, data and facsimile, just as if they were in a modern office building instead of thousands of miles from civilization.'" Captain Shawn P. Walsh, *Training with Exxon*, QUARTERMASTER PROFESSIONAL BULLETIN (1995), http://www.quartermaster.army.mil/oqmg/Professional_Bulletin/1995/Autumn/walsh.html. He explained further that Exxon had such extensive access to information about its ships that if one was delayed, "shipping specialists [could] immediately approve or disapprove a vessel for movement of petroleum product anywhere in the world." *Id.*

C. The Ship Master's Modern Role Is Akin to Plant Manager or Division CEO

The vessel has become a fully integrated part of the corporate commercial network, and its master the manager of the floating corporate office. Master and vessel are part of the fully integrated corporate network, and the master is a corporate manager responsible for the safety of the ship, cargo, and crew. The marine communication and navigational technologies discussed above have changed the relationship between shipowners and captains, which allows for an increasingly coordinated approach to decision making between ships and shore-side management. *See* Sandra Speares, *Inmarsat 20 Successful Years: A Revolution in Marine Communications*, LLOYD'S LIST, Nov. 17, 1999, at 17.

Well before 1989, oil carriers and many shipping companies recognized this new reality. *See* Edgar Gold, *Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom*, 14 J. MAR. L. & COM. 1, 13 (1983) ("The master is expected to be a key member of a total 'management team' and would disregard instructions at his own professional risk."). In essence, the master is viewed as the corporate manager of a seagoing staff, constantly coordinating with his or her shore-side counterparts. In Exxon's parlance, the master is the "management representative on board the ship." JA 898. Decisions once handled by the master such as course and speed are decided ashore or in conjunction with the shore. Even supplies, refueling, repairs and technological problems are handled remotely from the shore or are managed with the assistance of integrated computer communications.

D. The Availability of Insurance to Insulate Shipowners from Liability

Exxon has not raised the issue of its capacity to pay punitive damages at the level assessed in this case. Nor has Exxon claimed that pollution liability losses are not capable of being insured. In fact, the capacity of the insurance market is much larger today than it was historically. If a vessel operator such as Exxon is capable of insuring its exposure for compensatory losses, punitive damages become even more necessary from a societal standpoint. If all losses are insurable, there is no longer any element of deterrence and the cost of the risk becomes merely a cost of "doing business."

One of the parties supporting Exxon in this litigation, the American Institute of Marine Underwriters, acknowledged in its brief supporting Exxon at the certiorari stage that punitive damages are even sometimes insurable. *See* Br. of Am. Inst. of Marine Underwriters at 1 n.2, 2 n.3. Regardless of whether punitive damages might be covered by insurance, with the growth of insurance capacity for vessels, there is no longer any serious threat that the vicarious liability of a single reckless corporate shipowner for punitive damages will destroy the marine insurance industry.

II. IMPOSING PUNITIVE DAMAGES FOR THE RECKLESS ACTS OF A SHIP CAPTAIN PROPERLY REFLECTS MODERN MARITIME REALITIES

Exxon's argument against the award of punitive damages in this case relies heavily on *The Amiable Nancy*, 16 U.S. 546 (1818). What Exxon misses, however, is that that case reflected the conditions and customs of the maritime industry at that time – particularly the activities of privateers – not today's world.

A. *The Amiable Nancy*'s Background and Holding

The Amiable Nancy was decided in the context of the War of 1812. When the U.S. declared war on Britain, it had only seventeen seaworthy ships, with four hundred forty-seven guns and five thousand men. DAVID M. COONEY, CHRONOLOGY OF THE U.S. NAVY 1775-1965 (1965). As a result, it was necessary for the United States to encourage "privateers" in order to ensure national security.

A privateer was a quasi-sovereign, privately financed, owned, outfitted, crewed, and operated armed vessel. They were relatively small vessels compared to naval warships, and typically lightly-armed. Nevertheless, they had sufficient power to take on more lightly armed or unarmed cargo ships, which were their primary targets. By virtue of Letters of Marque & Reprisal issued by Congress pursuant to Article I, Section 8 of the United States Constitution, privateers were allowed to commit maritime torts and to attack the vessels of a declared national enemy for profit.

Although in today's era of professional navies privateers are a historical anachronism, for centuries they were dispatched from most maritime nations at one time or other. In fact, Elizabethan England was "almost totally dependent upon the private initiative and individual enterprise of its privateering establishment." JEROME R. GARITEE, THE REPUBLIC'S PRIVATE NAVY: THE AMERICAN PRIVATEERING BUSINESS AS PRACTICED BY BALTIMORE DURING THE WAR OF 1812, at 5 (1977). For example, Sir Walter Raleigh, a privateer himself, was rescued in his failed attempt at the colonization of Virginia in 1585 by fellow privateer Sir Francis Drake.

In hindsight, the sheer magnitude of such activity was remarkable. Britain's American colonies commissioned one hundred thirteen privateers during King George's War of 1744-1748, and four hundred to five hundred during the Seven Years' War of 1756-1763. *Id.* at 7-8. During the American Revolution, both sides freely employed privateers. Despite having a large public navy, the British commissioned at least seven hundred such vessels, ninety-four of which were from Liverpool alone. During the American Civil War, secessionist states sent about eight hundred privateers to sea in search of prizes.

The activities of a privateer were viewed as vital to the national interest. Accordingly, it was necessary to insulate those owners who took the risk of committing their vessels to the national service from various consequences relating to the conduct of war. REUBEN E. STIVERS, PRIVATEERS AND VOLUNTEERS: THE MEN AND WOMEN OF OUR RESERVE NAVAL FORCES, 1766 TO 1866 at 29 (1975). As former President Thomas Jefferson explained in 1813:

> [E]very possible encouragement should be given to privateering in time of war with a commercial nation. . . . Our national ships are too few in number . . . [but] by licensing private armed vessels, the whole naval force of the nation is truly brought to bear on the foe.

GEORGE COGGESHALL, HISTORY OF THE AMERICAN PRIVATEERS, AND LETTERS-OF-MARQUE xliv (1956); *see also* GOMER WILLIAMS, HISTORY OF THE LIVERPOOL PRIVATEERS AND LETTERS OF MARQUE 459 (1897).

The Amiable Nancy arose from the activities of the privateer SCOURGE. Peter H. Schenck, the co-owner of the SCOURGE, was already a national hero at the time of the events in question. He had given the nearly bankrupt federal government $10,000 and had transported supplies to New York during the British blockade of that city. COGGESHALL, HISTORY, at 221; JOSEPH ALFRED SCOVILLE, THE OLD MERCHANTS OF NEW YORK 91 (1864).

When the SCOURGE set sail for the north coast of England and Norway to aid the war effort, its owners would not see the vessel again for more than a year.

Nor would they be able to communicate, guide, or even know its whereabouts. Moreover, they would have no ability to make changes in crew, including its captain. COGGESHALL, HISTORY, at 219-23. For example, while in Dronheim, Norway, the ship's master, Captain Nicoll, decided to remain in Norway. *Id.* at 223. He was replaced on March 10, 1814, by Captain J. R. Perry. *Id.* It was not possible to convey the change in command to the owners of the SCOURGE, nor was the owners' approval deemed necessary even if he could have reached them. It was understood that the choice of competent captain and crew was a matter for experienced seamen, not for New York merchants.

The SCOURGE became one of the most successful privateers of the war. *Id.* In the summer and late fall of 1813, it captured and looted dozens of ships, in total amounting to 4,505 tons and sixty guns. *Id.* at 223. A 19th century historian expressed the hope that the ship's "acts and deeds in [its] country's service will ever be appreciated, while bravery and patriotism are held in high regard by civilized nations." *Id.* at 219. After more than a year away from the United States, with only tales of their good fortune reaching home, the SCOURGE sailed into the harbor at Chatham, Cape Cod, in May 1814, along with several captured ships and four hundred twenty prisoners taken along the route home. *Id.* at 225.

On November 4, 1814, armed crewmen of the SCOURGE, led by a Lieutenant Dickenson, boarded THE AMIABLE NANCY. Doing exactly what they had done for a year and a half, the men looted the ship. The mistake, however was that THE AMIABLE NANCY was neutral. *The Amiable Nancy*, 16 U.S. at 551.

The owners of THE AMIABLE NANCY sued the owners of the SCOURGE – but not any of the men who looted their ship[2] – seeking only compensatory damages. *Id.* at 558. The Court upheld portions of the compensatory damages award against the owners of the SCOURGE. It also explained in dicta that punitive damages might have been warranted if they had been sought against Lieutenant Dickenson and the original wrongdoers. The Court then went out of its way to explain that punitive damages would not have been appropriate against the national heroes Schenck and Brett, owners of the SCOURGE, given the nature of privateering:

---

[2] Because the SCOURGE operated in a quasi-sovereign capacity, the crew of the SCOURGE was subject to naval military law for its looting of THE AMIABLE NANCY. After the incident, and "[j]ust before the war ended, a court-martial of naval officers . . . on the 10th of February, 1815, adjudged Jeremy S. Dickenson, first Lieutenant of [the SCOURGE], to imprisonment for . . . mutinous and seditious conduct. At the same time, the same court sentenced the boatswain and three seamen of the Scourge to be flogged . . . for pillaging [the AMIABLE NANCY] and maltreating persons aboard the vessel." CHARLES JAROD INGERSOLL, HISTORY OF THE SECOND WAR BETWEEN THE UNITED STATES AND BRITAIN 37 (1852). In addition, the Lieutenant and the three crew members were forced to forfeit their share of the captures made by the SCOURGE. *Id.* Unlike Exxon's stipulation that Captain Hazelwood was at fault for the EXXON VALDEZ spill, however, it was determined that the Captain of the SCOURGE had no part in the misdeeds of the looting seamen. *Id.*

> But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can *scarcely ever* be able to secure to themselves an adequate indemnity in cases of loss. . . . While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government, by burthening [sic] the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders.

Id. at 558-59.

This passage on punitive damages was widely understood at the time to reflect "peculiar relations subsisting between the owners and the officers and crew of a privateer, and on reasons of public policy connected with the employment of privateers in our public wars." *Hopkins v. Atlantic & St. Lawrence R.R.*, 36 N.H. 9, 20 (1857). It was clear that it was not intended to have any application outside of that context.

B. Application of *The Amiable Nancy* to This Case

Like *The Amiable Nancy*, the rule governing this case should reflect the conditions and norms of the incident at issue. But the particulars of *The Amiable Nancy* have little bearing on this case because the circumstances surrounding *The Amiable Nancy* are simply too different from those surrounding the EXXON VALDEZ spill.

First, the cargo transported by ship at the time of *The Amiable Nancy* was relatively harmless. IMO, DANGEROUS GOODS, at 1-3 (1996). It was not until sixty years ago that there was sufficient transport of dangerous goods to justify comprehensive regulation. *Id.* at 1.

Now, given the potential for environmental harm posed by dangerous cargo spills, care must be taken to reduce the risk of such spills. As the district court said in this case: "This is not someone hauling dry cargo, the spilling of which would have minimal impact on the fisheries and other uses of Prince William Sound." Pet. App. 155a.

Shipowners are in the best position to insure that the risks associated with the transport of dangerous cargo are minimized and fully internalized. It is clear from an economic standpoint that a high cost of harm, even when coupled with a relatively low probability of occurrence, serves to promote high avoidance costs. *See* RICHARD POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 1-9 (1982). But if the shipowner does not have to account for the high cost of harm, then the shipowner is less likely to engage in optimal efforts to prevent such disasters. *See id.*; Mark E. King, Note, *In re Complaint of Armatur, S.A.: The Limitation of Liability Act and Maritime Environmental Disasters*, 21 ENVTL. L. 405, 422 (1991). In other words, the way to get shipowners to pay attention to their responsibilities is to hold them accountable for the high costs of harm caused by their activities.

Second, at the time of *The Amiable Nancy*, once a vessel sailed over the horizon, all contact between the ship and owners ashore ceased. Ships today, however, are no longer the autonomous, isolated entities that they once were. As detailed above, modern ships have available instantaneous and continuous communications with the company office and agents ashore, the Coast Guard, port officials, and other ships.

Third, modern commercial transport of oil is unlike privateering. Privateers were permitted to engage in many activities that were prohibited, including committing acts that would normally amount to maritime torts. Exxon, on the other hand, is engaged in a commercial business that has no similar claim to immunity from tort liability. Moreover, its transport of oil should not include the "irregularities and improper conduct" that were expected in privateering. *The Amiable Nancy*, 16 U.S. at 559.

Finally, ship captains today pilot ships that are enormous compared to those in existence at the time of *The Amiable Nancy*. Modern container ships will soon carry up to 16,000 20-foot containers. In addition to piloting these enormous ships, captains may manage as many as several hundred crew members. In order to run all of the operations on these ships, captains must maintain contact with the shore. As a result, captains of today are much like plant managers of a land-based operation.

Like the selection of plant managers, shipowners will exercise optimal care over the selection of their ship masters if they know that they may be exposed to vicarious punitive damages by reason of the conduct of such onboard managers.[3] Indeed, punitive damages serve the purposes "of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." WILLIAM L. PROSSER, THE LAW OF TORTS § 2, at 9 (4th ed. 1971). Punitive damage awards can also serve to capture some of the externalities associated with harms that are not captured by compensatory damage awards and for which shipowners would not otherwise be held accountable.

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[3] Even early maritime cases recognized that vicarious liability sends the right message to shipowner-employers, encouraging maritime employers to be careful about who they hire. *See, e.g.*, *In the City of Carlisle*, 39 F. 807, 817 (D. Or. 1889) (stating "if owners do not wish to be mulct [sic] in damages for such misconduct, they should be careful to select men worthy to command their vessels"). The justification for the availability of vicarious punitive damages is even stronger today than in the past given the acknowledged potential for extreme environmental harm from dangerous cargos.

Because the vast majority of jurisdictions permit vicarious punitive damages to be awarded based on the actions of an employee who "was employed in a managerial capacity and was acting in the scope of employment," RESTATEMENT (SECOND) OF TORTS § 909 (1979), punitive damages should be available in the same circumstances under maritime law. Maritime law ought to reflect the reality that the modern shipping industry bears many business similarities to land-based operations. *Cf. Norwich Co. v. Wright*, 80 U.S. 104, 122 (1871) (reasoning that shipping industry was analogous to any other industry that used corporate entities).

The punitive damages award here – as revised by the lower court – accurately reflects the relationship between shipowners and masters in the modern shipping industry. Moreover, it accurately reflects the reprehensibility of Exxon's conduct in knowingly allowing a man with a serious substance abuse problem to continue in his managerial capacity, eventually leading to the EXXON VALDEZ catastrophe.

◆

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Petitioners,

v.

Grant Baker et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF SOCIOLOGISTS, PSYCHOLOGISTS, AND LAW AND ECONOMICS SCHOLARS IN SUPPORT OF RESPONDENTS.

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ERA Aviation, Inc. v. Lindfors, 17 P.3d 40 (Alaska 2000) 24

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Forsyth v. City of Dallas, Tex., 91 F.3d 769 (5th Cir. 1996), *cert. denied*, 522 U.S. 816 (1997) 25

Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996) 20

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) .... passim

Sloane v. Equifax Info. Servs., LLC, No. 06-2044, 2007 U.S. App. LEXIS 29805 (4th Cir. Dec. 27, 2007) 24

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 3, 25

Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974) 23

Other Authorities

A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) 21

Alan Zarembo, *Funding Studies to Suit Need*,

L.A. Times, Dec. 3. 2003, at A1 14

Brent K. Marshall et al., *Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms*, 26 Law & Pol'y 289 (2004) 9, 10, 16, 18

Catalina M. Arata et al., *Coping With Techological Disaster: An Application of the Conservation of Resources Model to the* Exxon Valdez *Oil Spill*, 13 J. Traumatic Stress 23 (2000) .... passim

Charles H. Peterson et al., *Long-Term Ecosystem Response to the Exxon Valdez Oil Spill*, Science, Dec. 19, 2003, at 2082 12

Charles Siebert, *After the Spill*, Men's Journal, Apr. 1999 .... 5, 11

Daniel Sharp et al., Alaska *Dep't of Fish and Game: Prince William Sound Management Area 1999 Annual Finfish Management Report* (1999) 7

David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363 (1994) 21

Duane A. Gill, *Technological Disaster, Resource Loss and Long-Term Social Change in a Subarctic Community* (2007) 17, 18

Exxon Valdez Oil Spill Restoration Plan, *Update on Injured Resources and Services 2006* (Nov. 2006), *available at* www.evostc.state.ak.us/Publications/injuredresources.cfm (visited Jan. 19, 2008) 7

Impact Assessment, Inc., *Exxon Valdez Oil Spill, Cleanup and Litigation: A Collection of Social Impacts Information and Analysis*, *available at* http://www.mms.gov/alaska/reports/2001rpts/2001_058/volume3.pdf (visited Jan. 29, 2008) 15

J. Steven Picou & Cecelia G. Martin, *Long-Term*

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J. Steven Picou & Duane A. Gill, *The Exxon Valdez Oil Spill and Chronic Psychological Stress*, 18 Am. Fisheries Soc'y Symposium 879 (1996) .... passim

J. Steven Picou et al., *Disaster, Litigation, and the Corrosive Community*, 82 Social Forces 1493 (2004) .... passim

J. Steven Picou et al., *Disruption and Stress in an Alaskan Fishing Community: Initial and Continuing Impacts of the Exxon Valdez Oil Spill*, 6 Indus. Crisis Q. 235 (1992) .... passim

Joanna Endter-Wada et al., Social Indicators Study of Alaskan Coastal Villages*: IV. Postspill Key Informant Summaries: Schedule C Communities, Part I (Cordova, Tatitlek, Valdez) and Part 2 (Kenai, Tyonek, Seldovia, Kodiak City, Karluk, Old Harbor, Chignik)* (1993), *available at* http://www.mms.gov/alaska/reports/1990rpts/92_0052.pdf (visited Jan. 28, 2008) 4, 14, 15

Journeyman Pictures, *USA – Alaska – Exxon Valdez*, *available at* www.journeyman.tv/?lid=9672 16

Mari Rodin et al., *Community Impacts Resulting from the Exxon Valdez Oil Spill*, 6 Indus. Crisis Q. 219 (1992) 14

Mark G. Carls et al., *Sensitivity of Fish Embryos to Weathered Crude Oil: Part I*, 18 Envtl. Toxicology and Chemistry 481, 481 (1999) 12

Rachel D'Oro, *Exxon Valdez Oil Won't Vanish Soon*, Associated Press, Feb. 1, 2007 13

Richard E. Thorne & Gary L. Thomas, *Herring and the "Exxon Valdez" Oil Spill: An Investigation into*

Historical Data Conflicts, 65 ICES J. Marine Sci. 44 (2007) 6

Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. Cal. L. Rev. 79 (1982) 19

Ron A. Heintz et al., *Sensitivity of Fish Embryos to Weathered Crude Oil: Part II*, 18 Envtl. Toxicology and Chemistry 494 (1999) 12

Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3 (1990) 19, 21, 22

William R. Freudenburg & Timothy R. Jones, *Attitudes and Stress in the Presence of Technological Risk: A Test of the Supreme Court Hypothesis*, 69 Soc. Forces 1143 (1991) 8

INTEREST OF AMICI CURIAE[1]

Amici are scholars in the fields of sociology, psychology, and law and economics. *Amici* – several of of whom have conducted extensive empirical research in the Prince William Sound for over a decade – have a professional interest in ensuring that the Court is fully informed regarding the full impact of the Exxon Valdez oil spill on the neighboring communities and on respondents in particular, as well as the appropriateness of an award of punitive damages in light of the extensive but uncompensated harms resulting from the spill.[2]

SUMMARY OF THE ARGUMENT

In this case, a jury awarded respondents compensatory damages that included compensation for the economic harm suffered by commercial fishermen as a result of the Exxon Valdez oil spill. However, maritime law precluded respondents from recovering compensatory damages for some other economic harms that they suffered, such as losses in the value of fishing permits and fishing vessels, lost tax revenues, and damage to area tourism. Maritime law also precluded respondents from recovering any compensatory damages for their non-economic harms. Empirical research conducted over a seventeen-year period by teams of sociologists and psychologists specializing in disaster research reveals that these non-economic harms were – and continue to be – profound. These impacts include high rates of anxiety, depression, and post-traumatic stress disorder among area residents exposed to the spill, and in particular among commercial fishermen.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

[2] More detailed information regarding each of the *amici* is provided in the appendix to this brief.

It is common ground among legal scholars and economists that inefficient behavior will not be deterred unless actors are forced to internalize all of the costs associated with their activities. Although adequate deterrence may generally be achieved through an award of compensatory damages, an award of punitive damages may be necessary to achieve complete deterrence in cases in which compensatory damages fail to fully account for the costs of a tortfeasor's actions.

The case before the Court is precisely the kind of case in which an award of punitive damages is not only appropriate but also necessary to achieve adequate deterrence. Specifically, as a result of the restrictive conception of damages under maritime law, compensatory damages were available for only a subset of the actual economic harms inflicted by the spill, and for none of the non-economic harms. When this uncompensated harm is considered, it becomes clear that an award of punitive damages is not only appropriate but essential in this case to ensure that Exxon and others similarly situated are adequately deterred.

ARGUMENT

I. The Respondents in This Case Suffered Substantial Uncompensated Harms.

This Court has repeatedly indicated that in reviewing an award of punitive damages, courts should consider the totality of the harm to the plaintiffs. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-26 (2003). During the second phase of the trial in this case, the jury awarded $287 million in compensatory damages for economic harm to commercial fishermen in the major fisheries. Pet. App. 160a. Other settlements and payments increased the level of total compensated harm to just over $500 million. Pet. App. 38a. However, maritime law prohibited the plaintiffs from recovering compensatory damages for a variety of other economic and non-economic harms, *see infra* at 23, including "emotional distress damages, price diminishment in fisheries that were not oiled, diminished value of limited entry fishing permits or fishing vessels absent a sale of the permit or vessel, . . . [and] diminution of market value owing to fear or stigma." *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166, 167 n.3 (9th Cir. 1997).

These uncompensated harms generally fall into three categories: (1) economic harm arising from the spill for which compensation was precluded by *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); (2) economic harm arising from the spill for which plaintiffs cannot recover under maritime law because the extent of the harm was unknown at the time of trial in 1994; and (3) non-economic harm arising from the spill.

1. The first category of uncompensated harm is that of damages for economic harms for which compensation was precluded by *Robins Dry Dock*. *See* J.A. 118-48, 1368-81, 1384-90. This category includes, for example, the damages suffered by commercial fishermen who plied fisheries that were not oiled, but whose catches were devalued by the stigma associated with fish from Alaskan waters, *see* J.A. 1155-56. It also includes the damages suffered by area municipalities and myriad area residents who were not commercial fishermen, but whose livelihoods depended on fishing, such as those who repaired boats, manufactured fishing nets, and supplied other goods and services to commercial fishermen: the decrease in commercial fishing that resulted from the spill reduced demand for the latter's services and products and created millions of dollars in uncompensated damages. J.A. 132-40.

This category also includes the harms caused by the spill to the tourist industry, as concerns about the spill's effects discouraged other tourists from traveling to the region. Joanna Endter-Wada et al., *Social Indicators Study of Alaskan Coastal Villages: IV. Postspill Key Informant Summaries: Schedule C Communities, Part I (Cordova, Tatitlek, Valdez) and Part 2 (Kenai, Tyonek, Seldovia, Kodiak City, Karluk, Old Harbor, Chignik)*, at 66-67 (1993), *available at* http://www.mms.gov/alaska/reports/1990rpts/92_0052.pdf (visited Jan. 28, 2008). And local governments lost substantial tax revenues as a result of the fisheries' closure – for example, over twelve million dollars in income and revenues were lost with the closure of the shrimp, sablefish, and herring fisheries. *Id.* at 150.

Among the most significant losses were the losses in value of fishing permits, which are limited in number and are "traded on the open market, their price determined strictly by demand." Charles Siebert, *After the Spill*, Men's Journal, Apr. 1999. In light of the contamination of the fishing grounds resulting from the spill and the uncertainty about its recovery, the fishing permits plummeted in value: when this case went to trial, per-permit losses reached as high as $100,000 for Prince William Sound herring permits, *see* J.A. 1161, and nearly $200,000 for Prince William Sound salmon permits, *see id.* 1162; *see also* J.A. 130 ("The court . . . does not doubt that the going price for limited entry permits and Alaskan fishing vessels dropped significantly when the full impact of the *Exxon Valdez* grounding was realized."). Prices for the fishing permits have continued to fall in recent years, reaching per-permit losses as high as $330,000 in 2004. *See* J. Steven Picou & Cecelia G. Martin, *Long-Term Community Impacts of the* Exxon Valdez *Oil Spill: Patterns of Social Disruption and Psychological Stress Seventeen Years After the Disaster* 14 (2007) [hereinafter Picou & Martin, *Long-Term Community Impacts*] (final report submitted to National Science Foundation). This decline in the value of fishing permits was especially catastrophic in Cordova, where the town's fishermen hold forty-four percent of all herring permits and fifty-five percent of all salmon fishery permits in the region. J. Steven Picou & Duane A. Gill, *The Exxon Valdez Oil Spill and Chronic Psychological Stress*, 18 Am. Fisheries Soc'y

Symposium 879, 884 (1996) [hereinafter Picou & Gill, *Chronic Psychological Stress*].

The value of fishing vessels designed for use in the oiled waters similarly plunged as a result of the spill. CD7501, Oesting Dec., Exhs. 4-7 (expert reports submitted in district court). That value, which at bottom hinges on predictions regarding the availability of fish and the price of fish, dropped $50,000 – from $350,000 to $300,000 – for a seine vessel used in Prince William Sound, while the value of commercial fishing vessels for use in Cook Inlet declined from $72,000 to $52,000. *Id.*

2. A second category of harm is that of damages for economic harms that were uncompensated because the extent of the harms were unknown at the time of trial in 1994. *See generally* Br. *Amici Curiae* of Natural and Social Scientists in Support of Respondents. One example is the harm to the Prince William Sound herring fishery, an important resource for subsistence and commercial harvests that collapsed in 1993. Given the four years that apparently elapsed between the spill and the fishery collapse, initial research dismissed any suggestion of a link between the two. Subsequent research has demonstrated, however, that "the herring population decline most likely began immediately after the [spill] rather than 4 years later." Richard E. Thorne & Gary L. Thomas, *Herring and the "Exxon Valdez" Oil Spill: An Investigation into Historical Data Conflicts*, 65 ICES J. Marine Sci. 44 (2007); as of November 2006, the herring fishery had been closed for eleven of the seventeen years since the spill and was still not regarded as being fully recovered, *see* Exxon Valdez

Oil Spill Restoration Plan, *Update on Injured Resources and Services 2006*, at 35 (Nov. 2006), *available at* www.evostc.state.ak.us/Publications/injuredresources.cfm (visited Jan. 19, 2008).[3] Significantly, the Exxon Valdez Oil Spill Trustee Council in 2006 described the commercial fishing generally as being "in the process of recovering from the effects of the oil spill," but it warned that "full recovery has not been achieved." *Id.* at 36 (emphasis omitted).

3. A third and substantial category of uncompensated harm is that of non-economic harm arising from the spill, including in particular damages for emotional distress relating to the spill, which disrupted family and community life and caused psychological stress and uncertainty regarding future well-being. Empirical research has consistently demonstrated that disasters, especially those caused by humans, can have long-lasting and deleterious effects on the mental health of the affected communities. This research has been repeatedly borne out in the communities in the Prince William Sound area, which were effectively shattered by the spill and its subsequent effect on the natural resources that

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[3] During the five years that preceded the spill, the total value of the Prince William Sound herring harvest ranged from five to twelve million dollars per year. Between 1993 and 1999, the herring fishery was closed for three seasons, and the annual value of the herring harvest during the remaining open seasons ranged from approximately $187,000 to $2.8 million dollars. Daniel Sharp et al., Alaska *Dep't of Fish and Game: Prince William Sound Management Area 1999 Annual Finfish Management Report* App. H.13 (1999).

form an integral part of those communities' livelihood and identity.

When disasters strike, they wreak havoc not only through their physical devastation of the affected communities, but also by creating disruption and stress, J. Steven Picou et al., *Disruption and Stress in an Alaskan Fishing Community: Initial and Continuing Impacts of the Exxon Valdez Oil Spill*, 6 Indus. Crisis Q. 235, 239 (1992) [hereinafter Picou et al., *Disruption and Stress*], that result in "significant impacts on mental health functioning." Catalina M. Arata et al., *Coping With Techological Disaster: An Application of the Conservation of Resources Model to the* Exxon Valdez *Oil Spill*, 13 J. Traumatic Stress 23, 23 (2000). These mental health effects can, and frequently do, include depression, anxiety, post-traumatic stress disorder, problems in relationships, and an upswing in visits to mental health and medical facilities. *Id.*

In the case of natural disasters, such as hurricanes, forest fires, earthquakes, and floods, these mental health effects generally subside within two years. Arata et al., *supra*, at 24. By contrast, technological disasters – that is, disasters that occur because of breakdowns by humans – consistently have social, cultural, and psychological effects that are both more severe and longer-lasting. *See, e.g.*, William R. Freudenburg & Timothy R. Jones, *Attitudes and Stress in the Presence of Technological Risk: A Test of the Supreme Court Hypothesis*, 69 Soc. Forces 1143, 1154-59 (1991); Picou & Gill, *Chronic Psychological Stress*, *supra*, at 879-80; Picou et al., *Disruption and Stress*, *supra*, at 239; Arata et al., *supra*, at 24; Brent K.

Marshall et al., *Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms*, 26 Law & Pol'y 289, 291-92 (2004); J. Steven Picou et al., *Disaster, Litigation, and the Corrosive Community*, 82 Social Forces 1493, 1495 (2004) [hereinafter Picou et al., *Disaster, Litigation*]. For example, research following the nuclear accident at Three Mile Island in 1979 found that although they were not exposed to radiation, members of the surrounding community experienced psychological stress for as long as six years. *See* Picou & Gill, *Disruption and Stress*, *supra*, at 238.

Technological disasters also frequently have "debilitating consequences" at the community level, Marshall et al., *supra*, at 292; Picou et al., *Disaster, Litigation*, *supra*, at 1496-98, as the chronic psychological stress experienced by individuals as a result of the disaster collectively undermines the community's social structure, Marshall et al., *supra*, at 292. These effects are particularly acute when technological disasters strike renewable resource communities – communities within a defined area whose residents' "primary cultural, social, and economic existences are based on the harvest and use of renewable natural resources." In such cases, technological disasters can create a domino effect: they are likely to result in contamination of the environment and natural resources, Picou et al., *Disaster, Litigation*, *supra*, at, 1496, which then disrupts subsistence or commercial harvests of those natural resources, Picou et al., *Disruption and Stress*, *supra*, at 239, which in turn creates perceptions of "uncertainty, ambiguity and continuing disruption [that] generate patterns of long-term community stress," *id.* And even after initial stress levels subside for the community as a whole, some groups may continue to experience chronically elevated stress levels based on their special relationship to the disaster – for example, because of a physical proximity to the contamination or "a unique relationship to the resources that have been contaminated, i.e., subsistence and/or commercial harvests." *Id.*

Finally, the litigation that frequently follows a technological disaster itself tends to exacerbate, rather than assuage, the stress created by the disaster. The combination of the disaster and the subsequent disaster-related litigation constitutes a "double blow" for victims, who must first "endure the initial trauma of experiencing real or perceived toxic contamination from the disaster-event," Marshall et al., *supra*, at 293, and then must navigate an "adversarial legal process" that serves as such "a source of chronic social disruption and psychological stress" as to effectively become a "'secondary disaster' that continues over time, preventing timely disaster recovery." *Id.*

Non-economic harm caused by the Exxon Valdez spill must be understood in terms of the unique social character of community life in coastal Alaska. Unlike most small, rural communities in the lower forty-eight states, community life in the Prince William Sound area has a cultural, social, and economic base that is directly derived from seasonally available renewable natural resources. Picou et al., *Disruption and Stress*, *supra*, at 241-42; Picou & Gill, *Chronic Psychological Stress*, *supra*, at 881-82.

The Prince William Sound community of Cordova, for example, is the primary renewable resource community in the area. Its economy has long been heavily dependent on commercial fishing: nearly half of the community's labor force works either as fishermen or in jobs relating to fish processing, *see* Picou & Gill, *Chronic Psychological Stress*, *supra*, at 884, while still others work in other occupations that depend on commercial fishing, such as net mending and repairing boats and their electronics, *id.*; Siebert, *supra*; *see also* 3 U.S. Dep't of Interior, Final Envtl. Impact Statement, Proposed Trans-Alaska Pipeline 370 (1972), *reprinted in* J.A. 1442 (noting, nearly four decades ago, that "[t]he economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities").

In addition to their commercial fishing activities, many Cordovans engage in a variety of subsistence activities – such as "[h]arvesting, receiving and giving away fish, moose, deer, berries, etc." – that "provide[] the basis for maintaining social relationships," Picou et al., *Disruption and Stress*, *supra*, at 241, and "are a part of how individuals define themselves and their quality of life," Arata et al., *supra*, at 26.

With over eleven million gallons of oil released into Prince William Sound, the Exxon Valdez oil spill was the most devastating in North American history, Picou et al., *Disaster, Litigation*, *supra*, at 1499. The inadequate response of Exxon and the government only exacerbated the problem, and the spill ultimately resulted in an oil slick that covered over 3000 square miles and affected over 1200 miles of shoreline. Picou et al., *Disruption and Stress*, *supra*, at 240.

The ecological effect was immediate and devastating, resulting in the widespread deaths of area birds and marine animals, Picou et al., *Disruption and Stress*, *supra*, at 240-41, as well as the closing of primary fishing areas. Picou & Gill, *Chronic Psychological Stress*, *supra*, at 884. These ecological effects have persisted to this day. In one of the most tangible examples of these effects, oil was found over a decade after the spill "in surprising amounts and in toxic forms" in Prince William Sound, Charles H. Peterson et al., *Long-Term Ecosystem Response to the Exxon Valdez Oil Spill*, Science, Dec. 19, 2003, at 2082; Picou et al., *Disaster, Litigation*, *supra*, at 1501. The continued presence of the oil has "had long-term impacts" on the area's natural resources, Peterson et al., *supra*, at 2082; Picou et al., *Disaster, Litigation*, *supra*, at 1499, such as "severe declines in herring and pink salmon fisheries [that] appear to be related to chronic contamination of spawning areas in Prince William Sound," *id.* at 1501; *see also* Mark G. Carls et al., *Sensitivity of Fish Embryos to Weathered Crude Oil: Part I*, 18 Envtl. Toxicology and Chemistry 481, 481 (1999); Ron A. Heintz et al., *Sensitivity of Fish Embryos to Weathered Crude Oil: Part II*, 18 Envtl. Toxicology and Chemistry 494, 494-95, 500 (1999). Indeed, by 2006, only a few species had recovered. Picou & Martin, *Long-Term Community Impacts*, *supra*, at 1 (only eight of twenty-two species had recovered). Moreover, the quantity and toxicity of oil still present in the Sound long after the spill suggests that the negative consequences for the Prince William Sound ecology and fisheries may persist well into the future. *See id.* at 2; *see also* Rachel D'Oro, *Exxon Valdez Oil Won't Vanish Soon*, Associated Press, Feb. 1, 2007 (reporting on recent study indicating that oil from spill "could persist for decades below the surface of some beaches," thereby creating "a chronic source of low-level contamination").

Although the communities in the Prince William Sound area were not directly oiled, the spill nonetheless resulted in serious disruption, conflict, and fragmentation for area residents. This cultural, social, and psychological damage from the spill has been empirically documented by social science research for over seventeen years.[4] As two *amici* have explained, the spill "threatened the essential economic, social, and cultural viability of [renewable resource communities] in the impact region." Picou & Gill, *Chronic Psychological Stress*, *supra*, at 882.

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[4] Although petitioners have dismissed the empirical research on which the district court relied, *see, e.g.*, Pet. App. 151a, as "articles by plaintiffs' retained experts" and assert that, given the opportunity, they "would have shown that their conclusions were methodologically and statistically absurd," BIO to Cross-Pet. 7 n.2 (No. 07-276), *amici* note that (1) the majority of the articles were written by independent researchers unaffiliated with respondents; (2) Exxon did not object to these studies when they were presented to the district court; and (3) much of the research on the social and psychological damage inflicted by the spill has been published in numerous peer-reviewed journals in the disciplines of sociology, psychology, and anthropology, including *Social Forces*, the *Journal of Traumatic Stress*, the *American Journal of Psychiatry*, and *Law and Policy*. Other research has been published in book chapters and social science reports prepared for the National Science Foundation, the Minerals Management Service, the Prince William Sound Regional Citizens' Advisory Council, and the Alaska Conference of Mayors. *Amici* further note that although *amicus* Dr. J. Steven Picou was indeed retained as an expert by respondents in the district court, none of the research on which he relied (or on which this brief relies) was funded by respondents. In contrast with the independence of the social science research on which *amici* rely, Exxon's subvention of – and later reliance on – legal and social

During the months immediately following the spill, the small fishing communities throughout Prince William Sound were overwhelmed and substantially disrupted. Immediate impacts on the communities included rapid increases in local populations as a result of the clean-up efforts, increased demands for childcare, increased health care demands, and an increase in crime rates.[5] *See, e.g.*, Mari Rodin et al., *Community Impacts Resulting from the Exxon Valdez Oil Spill*, 6 Indus. Crisis Q. 219, 223-26 (1992). The spill also placed severe strains generally on community resources, and the strains were subsequently exacerbated by the decreased tax revenues from the closing of fisheries. *See* Endter-Wada et al., *supra*, at 366-68, 384-87, 389-93.

And even to the extent that some businesses and commercial fishermen may have initially benefited economically from participating in the clean-up, the money that flowed to those businesses and residents created social conflicts in the form of divisions between those who had participated in the clean-up and those who had not. The divisions were both economic and moral in nature, as some members of the community

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science research favorable to it has been well-documented. *See, e.g.*, Alan Zarembo, *Funding Studies to Suit Need*, L.A. Times, Dec. 3. 2003, at A1.

[5] In Valdez, for example, arrests increased 124 percent, while the town experienced a 166-percent increase in accidents and a 71-percent increase in assaults. *See* Rodin et al., *supra*, at 225.

regarded the clean-up workers with disdain because they had accepted money from Exxon. Impact Assessment, Inc., *Exxon Valdez Oil Spill, Cleanup and Litigation: A Collection of Social Impacts Information and Analysis*, at 1.4 & 1.5 (2001), *available at* http://www.mms.gov/alaska/reports/2001rpts/2001_058/volume3.pdf (visited Jan. 29, 2008).

Empirical research conducted during the seventeen years following the spill consistently found that area residents experienced increased mental stress and spill-related disruptions to daily and family life. These problems manifested themselves in a variety of ways, including reports of chronic feelings of helplessness, betrayal, and anger. The spill's mental health effects extended even to the region's children, whose parents were sometimes absent for weeks at a time while working on the clean-up. *See* Endter-Wada et al., *supra*, at 366-68. Most importantly, the empirical research revealed high rates of anxiety, depression, and post-traumatic stress disorder among area residents exposed to the spill. *See, e.g.*, L.A. Palinkas et al., *Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill*, 150 Am. J. of Psychiatry 1517-23 (1993), *cited in* Arata et al., *supra*, at 26 (survey conducted one year after the spill found that twenty percent of the individuals affected by the spill could be categorized as having a generalized anxiety disorder, nearly seventeen percent could be categorized as clinically depressed, and nine percent had post-traumatic stress disorder).[6]

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[6] Such a relationship is directly reflected in the comments of at least one Cordova resident, who in 1993 explained that there was "a tremendous amount of bitterness" in the town after the spill

The mental health effects of the spill were particularly acute for commercial fishermen and the other area residents whose livelihoods were directly linked to commercial fishing and the fishing grounds that were contaminated by the spill. The contamination of the fishing grounds not only resulted in an "immediate threat to the fisheries," but also "generated uncertainty regarding the long-term recovery of the resources" – uncertainty that, in turn, helped to generate chronic stress. Picou & Gill, *Chronic Psychological Stress*, *supra*, at 882; *see also* Pet. App. 123a ("[C]ommercial fishermen not only suffered economic losses but also the emotional distress that comes from having one's means of making a living destroyed."). For example, in one survey of commercial fishermen from Cordova conducted six years after the spill, twenty-three percent of men and thirteen percent of women were categorized as having "clinically significant levels of anxiety," while thirty-nine percent of men and twenty percent of women had "clinically significant levels of depressive symptoms." In the same survey, thirty-four percent of men and forty percent of women reported a "high number of PTSD-related symptoms." Arata et al., *supra*, at 31.[7] The significance of these stress

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and specifically compared the mental health effects of the spill to "the stress shock that a lot of combat troops felt. It's just this slow attrition of people's emotions. It didn't happen all at once, but we're all wound up tight." *See* Journeyman Pictures, *USA – Alaska – Exxon Valdez*, *available at* www.journeyman.tv/?lid=9672.

[7] *See also* Picou & Gill, *Chronic Psychological Stress*, *supra*, at 888 (survey conducted in 1991 and 1992 revealed high stress levels among commercial fishermen); Marshall et al., *supra*, at 295-96 (survey finding increased stress levels from 1992 until

levels becomes even clearer when viewed in context: the average stress levels for commercial fishermen surveyed between 1989 and 2006 were comparable to those of children grieving the loss of a parent six months after the parent's death. Duane A. Gill, *Technological Disaster, Resource Loss and Long-Term Social Change in a Subarctic Community* 2, 44 (2007). Even in 2006, seventeen years after the spill, one study determined that depression "continues to be a serious mental health issue" for commercial fishermen from Cordova, while more than a third reported fragmented personal relationships. *Id.* at iv.

The stress experienced by commercial fishermen reverberated at the community level as well, as the social problems created by that stress further weakened the already fragile social structure in affected communities, *see* Picou et al., *Disaster, Litigation*, *supra*, at 1501. Moreover, the disruption that the spill caused for fishermen and those in fishing-related occupations "amplified and exacerbated basic distinctions between fishing and nonfishing occupations in Cordova's social structure." *Id.* at 1513. This fragmentation of the community in turn led to the development of a "corrosive community," which seriously impeded community recovery. Arata et al., *supra*, at 37.

Some negative mental health effects – those attributable to litigation regarding the spill – have continued to impede recovery from the spill, Marshall

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1995 and attributing high stress levels to, among other things, "loss of resources from the spill, including herring and salmon fisheries [and] concerns about the contamination of Prince William Sound").

et al., *supra*, at 295-96; Picou et al., *Disaster, Litigation*, *supra*, at 1514-15. Some of the litigation-related stress "resulted from time spent with lawyers, trying to understand complex litigation issues, and recurrent unpleasant memories of the spill." *Id.* at 1514. Other stress arose from the adversarial process and delay tactics to which litigants were exposed, which are stressful both in and of themselves and also because they delay resolution of the litigants' damages claims, thereby causing the litigants economic stress. Marshall et al., *supra*, at 294-96; Picou et al., *Disaster, Litigation*, *supra*, at 1514.

Indeed, negative mental health effects attributable to the spill have been documented as recently as last year. Two recent reports to the National Science Foundation provide both qualitative and quantitative empirical evidence that significant levels of spill-related psychological stress, depression, hostility, and loss of trust in the judicial process characterize residents of Cordova seventeen years after the spill. *See* Gill, *supra*, at iii-vi; Picou & Martin, *Long-Term Community Impacts*, *supra*. This documentation of the chronic social and psychological damages produced by the Exxon Valdez spill is unparalleled in the disaster research literature.

II. A Punitive Damages Award Is Appropriate in This Case to Ensure Adequate Deterrence.

In its brief on the merits, petitioner posits that "there is no role left for punitive damages" in a case, such as this one, in which respondents have purportedly already received "full compensation . . .

for their (purely economic) losses" and Exxon has been required to pay other clean-up costs, fines, and expenses. Pet. Br. 48-49. A punitive damages award would serve no deterrent effect, petitioner reasons, because the combined effect of these payments would be "enough to deter anyone from anything." *Id.* 49. Nor, petitioner asserts, does the punitive damages award in this case serve as an appropriate punishment in light of the statutory penalties already prescribed by Congress in the Clean Water Act. *Id.*

Although this Court's jurisprudence makes clear that review of a punitive damages award is not limited to whether such an award will deter future wrongdoing, *see, e.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 439-40 (2001), Exxon's assertion that punitive damages are not necessary in this case to achieve adequate deterrence nonetheless falls short under even a strict law-and-economics analysis, as only an award of punitive damages will ensure that Exxon bears the full cost of its conduct.

There is widespread agreement among legal scholars and economists that, generally, "inefficient behavior can be deterred by forcing actors to accurately take account of all the costs of their activities."[8] Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3, 7-8 (1990); *cf. BMW of North America, Inc. v. Gore*, 517 U.S. 559, 592-93 (1996) (Breyer, J., concurring) ("Some economists, for example, have argued for a standard that would deter illegal activity causing solely economic harm through the use of punitive damages that, as a whole, would take from a wrongdoer the total cost of the harm caused."). In some cases, adequate deterrence can be achieved through an award of purely compensatory damages, which – as this Court explained in *Cooper Industries* – "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," 532 U.S. at 432 (citing Restatement (Second) of Torts § 903).

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[8] To the extent that a defendant may gain illicit benefits from its behavior, these costs must also include the value of these benefits. *See* Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. Cal. L. Rev. 79, 79-80 (1982).

However, as Judge Calabresi and others have explained, in some categories of cases, an award of compensatory damages, standing alone, will "result in systematic underassessment of costs, and hence in systematic underdeterrence"; in these cases, an award of "[p]unitive damages can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm." *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir.) (Calabresi, J., concurring), *cert. denied*, 531 U.S. 993 (2000); *see also, e.g., Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996) (Posner, J.) (noting that "punitive damages are necessary . . . to make sure that tortious conduct is not underdeterred, as it might be if compensatory damages fell short of the actual injury inflicted by the tort").[9] One such category of cases, as

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[9] Indeed, even Professors Polinsky and Shavell, in work *supported by petitioner*, concede that "[i]n practice, . . . parties may escape having to pay for some of the harm" that they cause, and that the damages should be increased in such cases "to make up . . . for the chance of not having to pay for the full harm." Moreover, they acknowledge, "[t]he most likely circumstance in which the

Galligan notes, is those in which a legal rule limits the available damage awards, such as those that permit "recovery of economic losses if the plaintiff suffered some accompanying damage to person or property," but "prohibit[] the recovery of negligently inflicted economic losses absent personal injury or property damage." *See* Galligan, *supra*, at 11, 44-46 (citing *Robins Dry Dock* rule as example of such a rule). *Cf.* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 377-79 (1994). In this and other categories of cases that fail to fully account for the costs to society in compensatory damages, Galligan posits, deterrence can be achieved by imposing an award that would "ideally equal total accident costs less compensatories

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full harm would not be assessed against the defendant arises when a particular component of harm (say, some type of nonpecuniary loss) is excluded from compensatory damages." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 896 (1998). However, they dismiss this scenario, arguing unconvincingly that although the failure to include these harms as part of compensatory damages "does undesirably dilute deterrence," "remedies for missing components of harm would be best pursued through revision of the rules used to calculate compensatory damages" because of the difficulties purportedly involved in estimating those harms. *Id.* at 939. They offer no reason, however, why the resulting underdeterrence is appropriate in cases, such as this one, in which the uncompensated harms have been catalogued at length, *see* Part I, *supra*. Nor does the article advert, in its discussion of this case, to the substantial uncompensated harms caused by the spill. Instead, the article posits only that "no punitive damages are needed, or appropriate, in the circumstances of this case because the injurer could not have escaped liability for compensatory damages." Polinsky & Shavell, *supra*, at 903-04.

plus the 'value' of other applicable fines or penalties." Galligan, *supra*, at 12-13.

The use of punitive damages will generally ensure adequate deterrence when compensatory damages do not fully account for all of the costs resulting from the defendant's activity, Judge Calabresi explains, because a rational actor will act when – based on a cost-benefit analysis – it determines that the benefits of doing so outweigh the costs.[10] *Ciraolo*, 216 F.3d at 243. "Such an analysis cannot be even roughly accurate unless approximately all the costs of the activity are borne by the actor," and it will "necessarily be distorted" if he will receive the benefits of the activity without being responsible for the costs. *Id.*[11]

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[10] Judge Calabresi notes, however, that in some cases – such as those in which "the 'benefit' resulting from the defendant's conduct is socially illicit" – "allowing a separate award of punitive damages could represent a societal judgment that, for certain conduct, a cost-benefit analysis is inappropriate." 216 F.3d at 246 n.8 (Calabresi, J., concurring).

[11] Similarly, although *amicus* Washington Legal Foundation posits that "[i]t defies reason to suggest that accident costs of $3.4 billion would not induce Exxon (or any similarly situated company) to implement corrective measures," Br. *Amicus Curiae* of Washington Legal Foundation 18, that assertion rests – among other things – on the assumption that a business such as Exxon is a purely rational actor. Such an assumption is belied by Exxon's actions in this case, Pet. App. 170a, as demonstrated by the fact that it did not take the economically sensible action of replacing Captain Hazelwood with a sober captain "with relatively small expense, when compared with the risk." Pet. App. 233a. That the costs of taking the economically rational action were tiny when compared with the enormous risk suggests that the illicit benefits of maintaining an alcoholic culture and protecting a colleague

As this Court has acknowledged, "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001). Although compensatory damages are more broadly available now in many areas of the law, they continue to be more narrowly available under maritime law, which – as relevant here – prohibits plaintiffs from recovering for economic and emotional injuries unless those injuries are accompanied by physical harm. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). Courts have carved out a very limited exception to this general maritime prohibition, allowing commercial fishermen to recover economic damages even in the absence of physical harm. *See Union Oil v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *see also* J.A. 122 (district court reiterating that when "pure economic loss is at issue – not connected with any injury to one's body or property, and especially where that economic loss occurs in a marine setting – the reach of legal liability is quite limited except as to commercial fishermen").

When the extensive but nonetheless uncompensated harms arising from the spill – as catalogued above – are considered, it becomes clear that a sizeable award of punitive damages is not only appropriate but indeed necessary to provide adequate deterrence, as the compensatory damages awarded in

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trumped rational economic considerations, *see supra* note 10 (citing *Ciraolo*, 216 F.3d at 246 n.8 (Calabresi, J., concurring)).

this case do not fully account for the injuries actually inflicted by the spill and thus do not require Exxon to bear all of the costs of its actions.

First, class members suffered substantial damages in the form of uncompensated economic harm due to the district court's *Robins Dry Dock* rulings.

Second, and even more significantly, the compensatory damages awarded in this case do not include any compensation for the devastating social and psychological impact on the spill on area residents and the broader Prince William Sound communities, *see supra* at 15-18. Although no attempt has been made to assess the magnitude of these damages to date, even a relatively modest award of fifty to one hundred thousand dollars per plaintiff would not be inconsistent with other awards for emotional distress, both in Alaska and elsewhere around the country. *See, e.g.*, *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1243, 1249-50 (9th Cir.) (emotional distress award of $100,000 for bad faith denial of insurance benefits), *cert. denied*, 525 U.S. 930 (1998); *ERA Aviation, Inc. v. Lindfors*, 17 P.3d 40, 42 (Alaska 2000) ($50,000 emotional distress award for gender discrimination and retaliatory discharge); *Sloane v. Equifax Info. Servs., LLC*, No. 06-2044, 2007 U.S. App. LEXIS 29805 (4th Cir. Dec. 27, 2007) (award of $150,000 for emotional distress arising from repeated violations, over two-year span, of Fair Credit Reporting Act); *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769, 774 (5th Cir. 1996) (in Section 1983 retaliation case, upholding emotional distress award of $100,000 to plaintiff who "testified that she suffered depression, weight loss, intestinal troubles, and marital problems, that she had been sent home from work because of her depression, and that she had to consult a psychologist" and award of $75,000 to plaintiff who testified "that he suffered depression, sleeplessness, and marital problems"), *cert. denied*, 522 U.S. 816 (1997); *EEOC v. Convergys Customer Mgmt. Group, Inc.*, 491 F.3d 790, 797 (8th Cir. 2007) (upholding $100,000 emotional distress award for termination in violation of Americans With Disabilities Act and noting that "[t]he record evidence shows that [the employee] suffered significant emotional injuries as a result of his wrongful termination," including "severe depression and anxiety," which in turn caused him to become "isolated, ashamed, and gain[] a significant amount of weight"). Collectively, such awards on a per-plaintiff basis in this case would amount to between 1.6 and 3.2 billion dollars.

Moreover, a larger award would likely be appropriate for the subset of plaintiffs – such as commercial fishermen and others in towns such as Cordova whose livelihoods and identities are closely linked to the availability of natural resources – who were hardest hit by the spill and its aftermath. In *State Farm*, for example, the plaintiffs were awarded compensatory damages of $500,000 for their emotional distress over the course of eighteen months regarding whether their insurance claim would be covered. *See* 538 U.S. at 419, 425. Here, by contrast, a large percentage of commercial fishermen experienced mental health effects from the spill that included anxiety, depression, and symptoms of post-traumatic stress disorder as many as six years after the spill. Even if the emotional distress claims of these plaintiffs are valued at the same level as the plaintiffs in *State*

Farm, the uncompensated harms stemming from the spill would increase even more, in all likelihood to the point at which they would in fact dwarf the punitive damages award of $2.5 billion in this case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 29, 2008

APPENDIX

LIST OF *AMICI CURIAE*

J. Steven Picou is Professor of Sociology and Chair of the Department of Sociology, Anthropology and Social Work at the University of South Alabama (Mobile). Dr. Picou's research interests include disasters, environmental sociology and applied sociology. He has published over 75 peer-reviewed articles, book chapters and four books in these and other areas of research. Dr. Picou's research has been supported by many agencies and foundations, including the National Science Foundation, U.S. Department of Education, U.S. Department of Labor, The Rockefeller Foundation and Alabama Department of Environmental Management. In 2001 he was the recipient of the American Sociological Association (Environment and Technology Section) "Distinguished Contribution Award" for his development and implementation of intervention programs to reduce the negative community impacts of the Exxon Valdez oil spill. Currently, he is directing research on long-term community recovery in Mississippi and Louisiana from Hurricane Katrina.

Catalina M. Arata is currently a psychologist in private practice. She previously served as an Associate Professor at the University of South Alabama. She has spent eighteen years conducting research on post-traumatic stress disorder and trauma, including research regarding the psychological effects of the Exxon Valdez oil spill, resulting in over twenty publications.

Lee Clarke is an Associate Professor of Sociology at Rutgers University, where he has also served as the

Co-Director of the Center for Social Research and Instruction. He has written extensively about risk communication, panic, civil defense, evacuation, community response to disaster, and organizational failure, and he frequently consults with corporations, government agencies, and research foundations. His most recent book, *Worst Cases: Terror & Catastrophe in the Popular Imagination*, was nominated for a Pulitzer Prize.

Michael R. Edelstein has worked in the field of environmental psychology for over three decades. He is a Professor in the Environmental Studies program at Ramapo College of New Jersey. Dr. Edelstein was one of the early researchers to study the psycho-social impacts of human-caused disaster, particularly those involving toxic exposure or environmental hazards. His work, *Contaminated Communities*, now in its second edition (Westview Press, 2004), a book of theory about the psycho-social impacts of such disaster, is considered to be a classic in the field. Dr. Edelstein served as a research consultant to Impact Assessment, Inc. and the "oiled mayors'" study of the Exxon Valdez disaster.

Duane Gill is Associate Director for Research on Society and Environment and Research Professor at the Social Science Research Center (SSRC) and Professor of Sociology in the Department of Sociology, Anthropology and Social Work at Mississippi State University. He also serves as Coordinator of the Societal Risk Unit within the SSRC, where he pursues research interests in the sociology of disasters, environmental sociology, and community. Dr. Gill is part of a research team that has been investigating human impacts of the 1989 Exxon Valdez Oil Spill in Alaska through a series of longitudinal studies funded by the National Science Foundation, the Earthwatch Center for Field Studies, and the Prince William Sound Regional Citizens' Advisory Council. Dr. Gill also collaborated on several studies of impacts of Hurricane Katrina. These include a needs assessment of Mississippi State University students and a survey of displaced students from three New Orleans universities. In addition, he organized and led a Katrina Summit that brought together several nationally and regionally recognized disaster scholars to discuss research needs and approaches to the disaster.

Robert Gramling is an environmental sociologist, a professor of sociology, and the director of the Center for Socioeconomic Research at the University of Louisiana at Lafayette. He is the author of two books and numerous journal articles. His research has focused on rural communities and natural resource development. He has served on National Research Council committees and scientific committees for state and federal agencies, including National Marine Fisheries Service, Northwest Power Planning Commission, and the states of Alaska and Louisiana. His research has been funded by a number of agencies, including the Environmental Protection Agency, Department of Interior, Department of Health and Human Services, and the Louisiana Department of natural resources.

Steve Kroll-Smith is professor of sociology at the University of North Carolina, Greensboro and Editor of Sociological Inquiry. His latest book (with Valerie Gunter) is *Volatile Places, A Sociology of Communities and Environmental Controversies* (2007). Steve has written and edited four additional books on communities, people and environmental troubles. His work on human-made hazards was recognized by the American Sociological Association's Distinguished Contribution Award for research on environments and technologies. He is currently working on two projects related to Hurricane Katrina: (1) a comparative study of the 1906 San Francisco earthquake and fire and the 2005 flooding of New Orleans and (2) a comparative neighborhood study of post-flood recovery in New Orleans.

Brent K. Marshall is an independent scholar employed by the University of Central Florida. His teaching and research interests include the following areas: disasters, environmental justice, and natural resource management. He has published thirteen articles in peer-reviewed journals in the last five years and has received extramural funding from a diverse set of sources that includes the United States Environmental Protection Agency, Heart of Florida United Way, Rockefeller Foundation, and Southwest Florida Water Management District. He is a research team member of the Task Force on Hurricane Katrina and Rebuilding the Gulf Coast, organized by the Social Science Research Council and American Sociological Association.

Kathleen Tierney is a professor in the Department of Sociology and the Institute of

Behavioral Science at the University of Colorado at Boulder. She also serves as director of the Natural Hazards Center, which since 1976 has served as the nation's clearinghouse for knowledge on the societal dimensions of hazards, disasters, and risk. An internationally recognized expert on the disasters and their impacts, Professor Tierney has written dozens of articles, book chapters, and research reports on the short- and long-term effects of disasters on individuals, households, businesses, and communities. She is senior author of the book *Facing the Unexpected: Disaster Preparedness and Response in the United States* (2001), which is considered to be one of the most authoritative sources of information on the human dimensions of disasters.

Steve Calandrillo is Professor of Law and Washington Law School Foundation Scholar at the University of Washington, where he teaches (inter alia) contract law and law and economics.

Thomas Galligan has worked in higher education since 1986 as a professor, dean, and college president. He was the Dale Bennett Professor of Law at the Paul M. Hebert Law Center at Louisiana State University, where he taught from 1986-1998. From 1998 until 2006, he served as Dean of the University of Tennessee College of Law from 1998-2006. He has extensively taught, written, and spoken about torts, punitive damages, and admiralty. His work has been cited and relied upon by the U.S. Supreme Court, lower federal courts, state courts, the Restatement of Torts, and commentators.

Ugo Mattei is the Alfred and Hanna Fromm Chair in International and Comparative Law at the University of California Hastings College of the Law, where he teaches (inter alia) law and economics. He is a member of the Editorial Board of the *International Review of Law and Economics* and the *New Palgrave: A Dictionary of Economics and Law*.

Richard O. Zerbe, Jr., is the Associate Dean and the Daniel J. Evans Distinguished Professor of Public Affairs and an Adjunct Professor of Law at University of Washington. He teaches environmental ethics, microeconomics, government regulation, law and economics, and benefit-cost analysis. He has worked on the executive board of the Western Economic Association, and with the American Bar Foundation, was a founding board member of the American Law and Economics Association, and serves as editor of the *Research in Law and Economics* journal.

AMICUS
CURIAE
BRIEF

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In The
Supreme Court of the United States

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EXXON SHIPPING COMPANY, et al.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF *AMICUS CURIAE* PRINCE WILLIAM SOUND REGIONAL CITIZENS' ADVISORY COUNCIL AND COOK INLET REGIONAL CITIZENS' ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

◆

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City of Carlisle, 39 F. 807 (D. Or. 1889) 20

Lake Shore & M. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893) 20

United States v. Locke, 529 U.S. 89 (2000) 11, 14

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46 C.F.R. § 4.06 (former) 24

OTHER AUTHORITIES

Exxon Valdez Oil Spill Restoration Plan, Update on Injured Resources and Services 2006 (Exxon Valdez Oil Spill Trustee Council, November 2006) (*EVOS 2006 Update*) 15, 18, 19

TABLE OF AUTHORITIES – Continued

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Fine and Probation: Attempt was Made to Cover Incident Up, ANCHORAGE D.N., October 24, 2007 (*Fine and Probation*) 25

Gill, D., *Technological Disaster, Resource Loss and Long-Term Social Change in a Subartic Community:* Exxon Valdez *Oil Spill Social Impacts on Alaska Natives and Commercial Fishermen in Cordova, Alaska – 2001-2006* (Miss. State U. Soc. Sci. Res. Center 2007) 17

Hemmingsson, T., *et al., Alcoholism in Social Classes and Occupations in Sweden* 26 Int'l J. Epidem. (Int'l Epidem. Ass'n 1997) 22

Hitz, D., *Drunken Sailors and Others,* 34 Quart. J. Stud. Alc. 496 (1973) 22

Mandell, W., *et al., Alcoholism and Occupations: A Review and Analysis of 104 Occupations* 16 Alcohol. Clin. Exp. Res. 734-746 (July/Aug. 1992) 22

Moore, W.H., *et al., Improving the Management of Human and Organization Errors (HOE) in Tanker Operations,* Ship Structures Symposium at 2 (November 16-17, 1993) 26, 27

NRC, *Double-Hull Tanker Legislation: An Assessment of the Oil Pollution Act of 1990* (Nat'l Acad. Press 1998) 21

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Prosser, W., *The Law of Torts* § 2 at 9 (4th ed. 1971) 20

Ritz-Timme, S., *et al.*, *What shall we do with the drunken sailor? Effects of alcohol on the performance of ship operators,* 156 Forensic Sci. Int'l 16-22 (2006) 22, 23

Robertson, D., *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 163 (1997) 19, 20

Rose, H.K. and M.M. Glatt, *A Study of Alcoholism As An Occupational Hazard of Merchant Seamen* 107 J. Mental Sci. (Brit. J. Psych. January 1961) 22

Short, Jeffrey W., *et al.*, *Slightly Weathered* Exxon Valdez *Oil Persists in Gulf of Alaska Beach Sediments after 16 Years*, 41 Environ. Sci. Tech. 1245 (2007) 17

The Human Factor: Why Another Exxon Valdez *Could Happen*, Seattle P.I., March 23, 2005 (*The Human Factor*) 24, 25, 26, 28

BRIEF OF *AMICUS CURIAE* PRINCE WILLIAM SOUND REGIONAL CITIZENS' ADVISORY COUNCIL AND COOK INLET REGIONAL CITIZENS' ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Prince William Sound Regional Citizens' Advisory Council (PWSRCAC) and the Cook Inlet Regional Citizens' Advisory Council (CIRCAC) respectfully submit this brief as *amicus curiae* in support of Respondents.[1]

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

PWSRCAC is an independent non-profit corporation organized under the laws of the State of Alaska and incorporated on December 26, 1989. It was created in the months following the *Exxon Valdez* oil spill, after representatives of Prince William Sound commercial fishing interests approached Alyeska Pipeline Service Company (Alyeska) and persuaded it of the need for citizen oversight of the Valdez oil terminal and the tanker operations within Prince

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[1] Petitioners and respondents each have filed a blanket consent with the Clerk. Pursuant to S. Ct. R. 37.6, PWSRCAC and CIRCAC state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

William Sound. Alyeska is the operator of the Trans-Alaska Pipeline as well as the Marine Terminal located in Valdez, Alaska (Marine Terminal), from which North Slope crude oil is loaded onto tankers for transport mostly to refineries outside of Alaska. It is a corporation primarily owned by several major oil companies producing and shipping oil from Alaska's North Slope, in the following percentages: BP Pipelines (Alaska) Inc., 46.93%; ConocoPhillips Transportation Alaska, Inc., 28.29%; ExxonMobil Pipeline Co., 20.34%; Unocal Pipeline Co., 1.36%; and Koch Alaska Pipeline Co. LLC, 3.08%. PWSRCAC is dedicated to the mission of citizens promoting the environmentally safe operation of the Marine Terminal in Valdez and the oil tankers that use it. Initially, PWSRCAC was comprised of representatives from the municipalities that were affected by the oil spill, as well as representatives from environmental, Alaska Native, and commercial fishing organizations. Today, PWSRCAC is made up of 18 member organizations, including representatives from communities, aquaculture, commercial fishing, environmental, Alaska Native, recreation, and tourism groups.[2] They include communities and

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[2] PWSRCAC's current membership consists of two classes – voting members and ex-officio, non-voting members. Its voting members are representatives nominated by the following organizations and municipal governments: The Alaska State Chamber of Commerce, Alaska Wilderness Recreation and Tourism Association, Chugach Alaska Corporation, City of Cordova, City of Homer, City of Kodiak, City of Seldovia, City of Seward, City of Valdez, City of Whittier, Community of Chenega, Community of Tatitlek, Cordova District Fishermen United, Kenai

(Continued on following page)

interest groups in a region stretching from the Sound itself to Kodiak Island to the lower Cook Inlet – all areas that were touched by oil from the *Exxon Valdez* spill.

On February 8, 1990, PWSRCAC and Alyeska entered into a contract, which will remain in effect as long as oil continues to flow through the Trans-Alaska Pipeline. Under the contract, Alyeska annually funds PWSRCAC to carry out certain contractual responsibilities for the benefit of Alyeska and the public. The contractual obligations include monitoring oil tanker operations in Prince William Sound, providing local and regional input into the design of mitigation measures for oil spills, reviewing oil spill response and prevention plans and the capabilities of the terminal and tankers to comply with those plans, undertaking studies relating to spill prevention and

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Peninsula Borough, Kodiak Island Borough, Kodiak Village Mayors Association, Prince William Sound Aquaculture Corporation, and the Oil Spill Region Environmental Coalition. The following organizations have designated an individual to act as an ex-officio, non-voting member of PWSRCAC: The United States Environmental Protection Agency (EPA), the United States Coast Guard (USCG), the United States National Oceanic and Atmospheric Administration (NOAA), the United States Department of the Interior, the United States Forest Service (USFS), the Bureau of Land Management (BLM), the Alaska Department of Environmental Conservation (ADEC), the Alaska Department of Fish and Game, the Alaska Department of Natural Resources (DNR), the Alaska Division of Homeland Security and Emergency Management (HSEM), the Department of Military and Veterans Affairs and the Oil Spill Recovery Institute. *See* the Oil Pollution Act of 1990 § 5002(d)(2).

mitigation of environmental impacts of terminal and tanker operations, and increasing public awareness of the actual and potential environmental impacts of terminal and tanker operations.

Congress later mandated the existence of PWSRCAC and CIRCAC (collectively the RCACs). Immediately after the catastrophic oil spill in March 1989, Congress began work on legislation aimed at preventing such spills from occurring again. The result was the Oil Pollution Act of 1990 (OPA 90).[3] Section 5002 of OPA 90 requires the establishment of Oil Terminal and Oil Tanker Oversight and Monitoring Demonstration Programs for Prince William Sound and Cook Inlet. The programs were designed to provide a model for overcoming "mistrust and confrontation" by promoting partnership and cooperation among local citizens, industry and government and by providing citizen oversight of environmental compliance by oil terminals and tankers.[4] Significantly, Congress

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[3] Public Law 101-380 (August 18, 1990).

[4] CIRCAC supports and joins in this *amicus* brief to the Court. Like PWSRCAC, CIRCAC was established under Section 5002 of OPA 90 to provide citizen oversight for oil industry operations, but in the Cook Inlet region rather than the Prince William Sound area. CIRCAC meets its mission to "represent the citizens of Cook Inlet in promoting environmentally safe marine transportation and oil facility operations in Cook Inlet" through its 13-member Board of Directors appointed by boroughs, cities and municipalities in the Cook Inlet region, as well as Alaska Native, commercial fishing, aquaculture, Alaska State Chamber of Commerce, recreational, and environmental interest groups. OPA 90 also requires CIRCAC to establish committees to

(Continued on following page)

identified complacency on the part of the oil industry and government regulators as one of the contributing factors of the *Exxon Valdez* oil spill. OPA 90 § 5002(2)(B).

Section 5002(d) of OPA allows an alternative, pre-existing organization to fulfill the requirement for a citizens' council if the President annually certifies that the citizens' advisory committee "fosters the general goals and purposes of this section" and is broadly representative of the communities and interests in its geographic area. Each year since the enactment of OPA 90, PWSRCAC has been certified as the citizens' oversight and monitoring program for the Sound.

Funding of the regional citizens' advisory councils under Section 5002(o) is provided by the oil companies whose activities impact each region. Thus, Alyeska must fund PWSRCAC annually as long as the Trans-Alaska Pipeline is operational, and the owners or operators of terminal facilities, offshore

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accomplish its mandates, which provides additional opportunities for citizen involvement by allowing public members to participate on each of the main working committees: the Environmental Monitoring Committee and the Prevention, Response, Operations, and Safety Committee. The following organizations have designated an individual to act as an ex-officio, non-voting member of CIRCAC: EPA, USCG, USFS, NOAA, BLM, ADEC, DNR, and HSEM. *See* OPA 90 § 5002(d)(2).

facilities, or crude oil tankers operating in Cook Inlet must fund CIRCAC each year.[5]

Although it works closely with and is primarily funded by Alyeska, PWSRCAC is an independent advisory group. PWSRCAC's contract with Alyeska is explicit: "Alyeska shall have no right . . . to any degree of control over the formation or operation of the [PWSRCAC]." PWSRCAC 2006-07 Annual Report (Annual Report), App. 8.

Since its formation in 1989, PWSRCAC has been a leader in the area of tanker monitoring and oil spill prevention. PWSRCAC closely monitors the operations of the Marine Terminal as well as the operations of tankers while in transit through Prince William Sound and while berthed at the Terminal. PWSRCAC reviews and comments on the oil spill contingency plans prepared by both Alyeska, as the operator of the Marine Terminal, and the tankers that transit Prince William Sound. Jointly with the industry it has conducted major studies relating to tanker operations in Prince William Sound.

More recently, the PWSRCAC has been involved in a variety of projects, ranging from participating in oil spill response drills, commenting on draft permits from regulatory agencies, participating in oil spill prevention and response plans, and studying the problem of non-indigenous species that result from tanker transportation of oil. *See* Annual Report, App. 12, 13-14, 16-17 and 25-27. One of PWSRCAC's specific responsibilities is to increase public awareness of issues relating to the Marine Terminal and oil tanker operation. *See id.*, App. 19-20. Accordingly, PWSRCAC has financed a variety of studies, including a guidebook explaining how communities can deal with "technological disasters," and an oral history of the *Exxon Valdez* oil spill. PWSRCAC, *Then and Now – Changes in Oil Transportation Since the* Exxon Valdez *Spill* (1989-1999) (*Then and Now*), App. 67-68.

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[5] Current charter funding members are ConocoPhillips, Cook Inlet Pipeline Co., Forest Oil Corp., Marathon Oil Co., Tesoro Alaska Petroleum, Chevron Corp., and XTO Energy.

In the last several years, PWSRCAC has taken an active role in urging the oil companies that own and/or operate the oil tankers to continue to maintain and use the fleet of tugs that escort the tankers through Prince William Sound. *Id.*, App. 46-49. PWSRCAC also has successfully advocated for the installation of upgrades to the ballast water treatment facility at the Alyeska terminal to eliminate hazardous air pollution. *Id.*, App. 69-71. PWSRCAC has been described as an "anti-complacency" organization, and as a "corporate conscience" financed by the oil industry.[6] Through PWSRCAC the people with the most to lose from oil pollution have been given a voice in decisions that potentially put their livelihoods at risk.

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[6] *See, e.g.*, PWSRCAC website, http://www.pwsrcac.org/faq.html at 3.

In sum, the RCACs are "the third leg of a tripod supporting safer oil transportation, the other two being industry and government." *Then and Now*, App. 73. "Industry must balance the need for environmental protection against the pressure for profits, while government agencies are . . . subject to political pressure to promote economic development and minimize the regulatory burden on industry." *Id.*, App. 74. In contrast, the RCACs are "unique in having no mission except promoting safety and informing the public about it. . . ." *Id.*, App. 73.

The RCACs believe that punitive damages are appropriate – in fact, necessary – in maritime cases, such as this one. Punitive damages serve a vital purpose in deterring reckless acts that profoundly affect not only the environment, but also the social well-being and livelihood of the many people who use, enjoy and rely upon areas such as Prince William Sound, Cook Inlet and the Kodiak Archipelago. Because of their unique position as citizens' advisory and monitoring organizations, the RCACs bring to this discussion the outlook of the residents of Alaska who have seen first hand the tragic consequences of a calamitous oil spill. The RCACs believe that the world of shipping has changed dramatically, especially within the last 50 years. They further believe that while citizen oversight councils such as themselves provide an important safeguard against the complacency that led to the *Exxon Valdez* oil spill, punitive damages also are an essential deterrent against the reckless conduct that could cause another such disaster.

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SUMMARY OF ARGUMENT

Nearly 19 years after the *Exxon Valdez* oil spill, its effects on Prince William Sound, Lower Cook Inlet, and the Kodiak Archipelago still are being felt. The oil spill did immeasurable damage to the region, its resources, and its inhabitants. The oil spill damaged the very social and economic fabric of the region, affecting people's lives, their livelihood, recreational opportunities and subsistence. Although punitive damages cannot repair the socio-economic fabric of the region, they can help to protect it from future spills by deterring the conduct that led to the oil spill.

In this brief, PWSRCAC and CIRCAC present their view that punitive damages are essential here as a means of deterring Exxon and other oil companies, by letting them know that the complacency and reckless behavior that led to the grounding of the *Exxon Valdez* and the most devastating oil spill in North America will not be tolerated. PWSRCAC and CIRCAC have a unique voice in this litigation, in part because they were born out of the *Exxon Valdez* oil spill itself and in part because they speak for the enduring interests of Prince William Sound, Cook Inlet, the Kodiak Archipelago and their inhabitants. Despite advances in vessel monitoring, marine safety and communications, and spill prevention, several recent incidents suggest that without the threat of punitive damages, the conduct that led to the *Exxon Valdez* oil spill and its result could occur again. The RCACs believe that punitive damages are necessary to deter Exxon and others from engaging in the conduct that led to the *Exxon Valdez* oil spill and could lead to future oil spills.

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ARGUMENT

I. Punitive Damages Are Necessary And Appropriate here to Ensure that the Corporate Complacency and Recklessness that Resulted in the *Exxon Valdez* Oil Spill Do Not Recur.

Two unforgettable disasters have occurred in Alaska since it became a state in 1959. The first one was the 1964 earthquake, the largest recorded quake in the history of North America, larger even than the infamous San Francisco earthquake of 1906.[7] The earthquake struck without warning at 5:36 p.m. on Good Friday, March 27, 1964 – it was inescapable and unavoidable. The earthquake left its indelible mark on many areas in the State, including several communities, such as Valdez, which were devastated by the ensuing tsunami.

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[7] According to the U.S. Geological Survey, the 1964 Earthquake had a magnitude of 9.2. *See* USGS website, http://earthquake.usgs.gov/regional/states/events/1964_03_28.php.

The second one also struck, coincidentally, on Good Friday, March 24, 1989. The *Exxon Valdez* oil spill was not a natural disaster at all, but an all-too-human one, a disaster that devastated the natural resources of Prince William Sound, Lower Cook Inlet and the Kodiak Archipelago. To this day, the *Exxon Valdez* is the most disastrous oil spill to have occurred in North America. This Court has recognized it as "[t]he most notorious oil spill in recent times," which "released more than 11 million gallons of crude oil and . . . caused public officials intense concern over the threat of a spill." *United States v. Locke*, 529 U.S. 89, 96 (2000).[8] In contrast to the earthquake, the oil spill was entirely avoidable and preventable. Whereas the earthquake was an Act of God, the spill was entirely an act of man. A misadventure of alcohol, exhaustion, and personal and corporate recklessness, the oil spill affected, and continues to affect, the lives and livelihood of thousands of persons with ties to Prince William Sound, Lower Cook Inlet, and the Kodiak Archipelago.

PWSRCAC and CIRCAC have been tasked with, among other things, assuring that a catastrophe such as the *Exxon Valdez* spill does not happen again. In furtherance of this goal, the RCACs believe that it is critical that oil companies are held accountable for egregious conduct, which has the potential for such long-lasting, far-reaching and catastrophic consequences.

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[8] For the path that the spilled oil took, *see Then and Now*, App. 40.

A. A Catastrophic Spill Such as the *Exxon Valdez* Oil Spill Continues to Affect and Harm the Region and Its Resources Long After the Spill Has Occurred.

Nearly 19 years after the oil spill, the continuing harm to the socio-economic fabric of Prince William Sound, Lower Cook Inlet and the Kodiak Archipelago is well documented. Punitive damages are appropriate to help prevent against future catastrophic spills, the effects of which would likely be immeasurable.

What is the area comprising Prince William Sound, Lower Cook Inlet, and the Kodiak Archipelago? To its inhabitants it is a place of remarkable beauty and abundance. To commercial fishermen and women, it is the source of their livelihood. To Alaska Natives, its resources provide them with a rich subsistence lifestyle. To visitors and recreational users, it is a place of unparalleled majesty and abundant wildlife. To the large corporations that move the oil, it is primarily a body of water, a thing to be traversed to bring the bounty of the North Slope oil fields to market. To too many people, Prince William Sound is known principally as the place where the *Exxon Valdez* grounded on Bligh Reef and spilled its oil.

Located in Southcentral Alaska, Prince William Sound is bounded to the north, east and west by the Chugach Mountains, the second highest range of coastal mountains in the world (after the Andes).[9] The Sound was formed by millions of years of glacial activity, which has left it marked with deep fjords, bays, and passageways along its more than 3,000 miles of shoreline. *Id.* The Sound is home to more than 20 towering tidewater glaciers and countless smaller glaciers, many of which descend from its several ice fields, including Bagley Icefield, the largest subpolar icefield in North America. *Id.*

Prince William Sound's inhabitants are scattered throughout an area larger than Massachusetts, Connecticut and Rhode Island combined. *Id.* Most of its inhabitants reside in the towns of Valdez, Cordova, and Whittier, and in the two Native villages of Chenega and Tatitlek. *Id.* No roads connect these communities, and only Valdez and Whittier can be reached by car – Whittier by the same one-lane tunnels used by locomotives. Many of its inhabitants derive their livelihood from the fish, natural resources, and recreational opportunities that are found in abundance throughout the Sound.

In the 1970's, one of the Sound's communities, Valdez, became the southern terminus of the Trans-Alaska Pipeline. Tankers began transporting the oil being pumped from Prudhoe Bay across the Sound, taking the oil to markets in California and other ports in the western United States. These tankers are cavernous modern ships capable of transporting enormous quantities of oil across the open seas. This Court has recognized this development in oil transportation:

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[9] Prince William Sound Natural History, http://www.alaska.net/~awss/pws.html (Alaskan Wilderness Sailing and Kayaking).

> The bulk of oil transported on water is found in tankers, vessels which consist of a group of tanks contained in a ship-shaped hull, propelled by an isolated machinery plant at the stern. The Court described the increase in size . . . of these ships close to three decades ago in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 335, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973), noting that the average vessel size increased from 16,000 tons during World War II to 76,000 tons in 1966. . . . By December 1973, 366 tankers in the world tanker fleet were in excess of 175,000 tons. . . .

United States v. Locke, 529 U.S. at 96 (citation omitted). As the *Locke* Court concluded, "[t]he size of these vessels, the frequency of tanker operations, and the vast amount of oil transported by vessels with but one or two layers of metal between the cargo and the water present serious risks. . . ." *Id. See also Askew v. American Waterways*, 411 U.S. at 324-25 (oil spillage was "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent[,]" a concern heightened by "the risk of ever-increasing damage by reason of the size of modern tankers[,]" among other things).

The vast amounts of oil being transported by these vessels can result in catastrophic oil spills like the *Exxon Valdez*.

Although we must be prepared to respond to any spills that occur, prevention of future spills is critical. "History shows that oil, once spilled on the sea, is never fully contained and recovered." *Then and Now*, App. 44. Despite "improvements in containment and cleanup technology," it is virtually impossible to "recover all the oil from a major spill. . . ." *Id.* Further, bad weather "can defeat even a good plan." *Id.* In other words, a spill that never occurs is one that never requires cleaning up, has no impact on the lives and livelihoods of the inhabitants of the area, and leaves the area as pristine as before. The *Exxon Valdez* spill itself illustrates this. Even now its effects are still found – and felt – throughout Prince William Sound, Lower Cook Inlet, and the Kodiak Archipelago, not only on the area's beaches and natural resources, but also on its socio-economic fabric. *See Exxon Valdez Oil Spill Restoration Plan, Update on Injured Resources and Services 2006* (Exxon Valdez Oil Spill Trustee Council, November 2006) (*EVOS 2006 Update*), *infra.* Prevention, therefore, must be "the first line of defense," *Then and Now*, App. 44, the foundation on which spill response is built.[10]

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[10] Since prevention efforts cannot guarantee that no spills will occur, however, "the industry, regulatory agencies and the public must [also] be prepared to respond to spills that do occur." *Then and Now*, App. 56.

More than 17 years after the oil spill, Prince William Sound is still recovering from its effects. *EVOS 2006 Update* at 6. In addition to the damages to the environment, which are not at issue here, the spill did incalculable, unquantifiable damage to the socio-economic fabric of life in and around Prince William Sound and Lower Cook Inlet. *See, e.g.*, Pet. App. 150-151a, 166a-167a, and SJA386sa-572sa. The effects of the *Exxon Valdez* oil spill were not "purely economic. The social fabric of Prince William Sound and Lower Cook Inlet was torn apart," as the district court aptly noted. JA150a. Community impacts included "'a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress.'" JA150a-151a, *quoting* J. Steven Picou, *et al.*, *Community Recovery from the* Exxon Valdez *Oil Spill: Mitigating Chronic Social Impacts* at 6-7. The communities affected by the spill "'reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems, and occupation related problems.'" JA151a, *quoting* Duane A. Gill, *Environmental Disaster and Fishery Co-Management in a Natural Resources Community: Impact of the* Exxon Valdez *Oil Spill, in Folk Management in the World's Fisheries*, 227 (Dyer & McGoodwin, eds., 1994). Several studies found that "a high percentage of affected fishermen suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder or a combination of all three." JA151a (citation omitted). The oil spill's disruption of "the lives and livelihood of thousands of claimants and their families" could not be "quantified." JA167a.

Oil from the *Exxon Valdez* spill continues to persist, and contaminate the Sound and its beaches. In fact, a recent study indicated that, "at some locations, remaining subsurface oil may persist for decades with little change." Jeffrey W. Short, *et al.*, *Slightly Weathered* Exxon Valdez *Oil Persists in Gulf of Alaska Beach Sediments after 16 Years*, 41 Environ. Sci. Tech. 1245 (2007). The same study determined that "physical dispersion rates" of the oil have slowed since 2001. *Id.* at 1248. The study concluded that "the remaining subsurface oil may persist with little change for decades, even in sediments that are not anoxic [oxygen-depleted]." *Id.* at 1249. Such persistence will, understandably, continue to pose problems for the Sound and its inhabitants:

> Such persistence can pose a contact hazard to intertidally foraging sea otters, sea ducks, and shorebirds . . . , create a chronic source of low-level contamination . . . , discourage subsistence in a region where use is heavy . . . , and degrade the wilderness character of protected lands.

Id. Like the lingering effects of the oil, "mental health problems" continued to "linger a decade" after the Spill, *Then and Now*, App. 67, and still linger today, *see* D. Gill, *Technological Disaster, Resource Loss and Long-Term Social Change in a Subartic Community:* Exxon Valdez *Oil Spill Social Impacts on Alaska Natives and Commercial Fishermen in Cordova,* *Alaska – 2001-2006* (Miss. State U. Soc. Sci. Res. Center 2007).[11]

As of November 2006, not one of the "Human Service" categories identified by the EVOS Trustee Council had recovered. *EVOS 2006 Update* at 34-38, and at 6, Table 1. The four categories that the Trustee Council identified were commercial fishing, subsistence, recreation and tourism and passive use. *Id.* Commercial fishing was injured "as a result of the spill's direct impacts to commercial fish species. . . ." *Id.* at 34. Oil from the spill also "disrupted subsistence activities" for the 2,200 people of 15 Alaskan Native communities and about "13,000 other subsistence permit holders in the area." *Id.* at 37. Recreation and tourism in areas affected by the spill "dramatically declined in 1989 in Prince William Sound, Cook Inlet and the Kenai Peninsula." *Id.* at 36. Finally, injuries to "passive use," the "service provided by natural resources to people that will likely not visit, contact or otherwise use the resource," are tied "to public perceptions of injured resources." *Id.* at 35.

Each of these categories of "Human Service" was "negatively indirectly impacted by the spill due to its connection with impacted natural resources." *Id.* at

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[11] Gill's final report was submitted to the National Science Foundation, Office of Polar Research, Washington, D.C. (NSF #0082405).

34-38, and at 6. Each is still struggling with the aftereffects of the spill, *id.*, aftershocks that are longer-lasting than those from the '64 quake. Although punitive damages cannot repair the socio-economic fabric of the region, or restore it to pre-oil spill days, punitive damages can help protect the region from future spills by deterring the conduct that led to the spill.

B. Punitive Damages as a Deterrent Are Vital to Protect Prince William Sound, Cook Inlet and the Kodiak Archipelago Against the Occurrence of Another Catastrophic Oil Spill such as the *Exxon Valdez.*

Punitive damages are an important tool to help deter future oil spills by punishing the conduct that causes them and the corporate climate in which they occur. It is vital today to continue to discourage the conduct and climate that led to the *Exxon Valdez* spill – the lack of vigilance, tolerance of serious errors, and corporate recklessness. If the award of punitive damages here prevents a single, serious oil spill, even one far less catastrophic than *Exxon Valdez*, their purpose will have been well served.

Punitive damages are meant "as a threat to discourage egregious misconduct." D. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 163 (1997) (hereafter "*Punitive Damages*"). When the "threat" operates properly, "such damages should not have to be actually awarded very often." *Id.* Further, punitive damages are "a well-settled part of American maritime law and have been since the early 1800s. . . ." *Id.* at 162. *See Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U.S. 101, 108 (1893) ([C]ourts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages . . . "). As a federal court observed more than a century ago, "[I]f owners do not wish to be mulct [sic] in damages for such misconduct, they should be careful to select men worthy to command their vessels." *City of Carlisle*, 39 F. 807, 817 (D. Or. 1889), *quoted in Punitive Damages*, 28 J. Mar. L. & Com. at 121. Similarly, this Court has observed that punitive damages are appropriate if an employer knew that its employee was "an unsuitable person," or if the employer "participated in, approved, or ratified" the employee's tort. *Lake Shore*, 147 U.S. at 117. *See also Punitive Damages*, 28 J. Mar. L. & Com. at 121-22.

Punitive damages also serve the three-fold goal of "'punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.'" *Punitive Damages*, 28 J. Mar. L. & Com. at 75, *quoting* W. Prosser, *The Law of Torts* § 2 at 9 (4th ed. 1971). Punitive damages are particularly important here to discourage and deter others from engaging in similar conduct in the future.

The checks in place today to prevent another catastrophic oil spill in Prince William Sound are better than they were at the time of the *Exxon Valdez* spill. They include, among other things, the requirement that by 2010 all tankers in the fleet transporting oil from

Valdez will be double hulled;[12] changes to and improvements in the tug escort system;[13] and improved oil spill contingency plans and oil spill drills.[14]

Furthermore, the checks also include the RCACs themselves. OPA 90 mandated PWSRCAC and CIRCAC as a means of giving the people most directly affected by the *Exxon Valdez* oil spill a voice in decisions relating to oil and its transportation in the region. As described in the Statement of Interest, *supra*, during the last 18 years, PWSRCAC has developed an expertise in oil spill prevention and spill response, as evidenced by its many public outreach programs, studies, and participation in national and international activities regarding these topics.

Regardless of the additional checks in place today and the RCACs' involvement, however, there is no "guarantee that the complacency [that resulted in the *Exxon Valdez* oil spill] will not set in again. . . ." *Then and Now*, App. 74. Simply stated, human factors never can be removed: "The U.S. Coast Guard estimates that nearly 85% of oil spills and marine accidents can be attributed to human factors – either individual errors or organizational failures." Nuka Research and Planning Group, LLC, "*Importance of Maintaining the Prince William Sound Escort System for Double-Hulled Tankers*" (December 3, 2004) (Nuka, *PWS Escort System*), App. 82-83.[15] Significantly, many of the same human factors that caused the *Exxon Valdez* oil spill remain today. We believe that unless the punitive damages award is affirmed, sending a clear message to the industry that such behavior will not be countenanced, the number of oil spills will increase again, and much of what we and others have accomplished over the last nearly 20 years will be lost.

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[12] Federal law calls for the phase out of all single-hulled oil tankers trading in U.S. ports by 2010, and the phase out of older double-bottomed vessels by 2015. 46 U.S.C. § 3703a. A 1998 study by the National Research Council (NRC) confirmed that advances in vessel technology, such as double hulls and redundant systems, however, do not erase the need for additional prevention measures. Nuka, *PWS Escort System*, App. 84, *citing* NRC, *Double-Hull Tanker Legislation: An Assessment of the Oil Pollution Act of 1990* (Nat'l Acad. Press 1998).

[13] *Then and Now*, App. 46-49.

[14] *Then and Now*, App. 57-61.

Numerous studies document the prevalence of alcohol abuse among seamen.[16] Unquestionably, alcohol consumption affects performance. A 2004 study found the effects of alcohol on the performance of ship operators to be "striking." S. Ritz-Timme, *et al.*, *What shall we do with the drunken sailor? Effects of alcohol*

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[15] The Nuka *PWS Escort System* report was citing *USCG 1998. Safety: We are the enemy. Safety Alert,* http://www.uscg.mil/hq/g-m/moa/docs/sa0998.htm. *See* App. 82-83.

[16] *See, e.g.*, T. Hemmingsson *et al.*, *Alcoholism in Social Classes and Occupations in Sweden* 26 Int'l J. Epidem. (Int'l Epidem. Ass'n 1997); W. Mandell *et al.*, *Alcoholism and Occupations: A Review and Analysis of 104 Occupations* 16 Alcohol. Clin. Exp. Res. 734-746 (July/Aug. 1992); D. Hitz, *Drunken Sailors and Others,* 34 Quart. J. Stud. Alc. 496 (1973); H.K. Rose and M.M. Glatt, *A Study of Alcoholism As An Occupational Hazard of Merchant Seamen* 107 J. Mental Sci. (Brit. J. Psych. January 1961).

on the performance of ship operators, 156 Forensic Sci. Int'l 16-22 (2006). According to the study, "[t]he complex categories [of performance] were most affected, namely the analysis of situations, foresight, concentration, navigation, risk disposition and accurateness . . . " *Id.* at 20-21. Further, the authors noted that even among the captains who compensated for their alcohol impairment by concentrating almost exclusively on the primary task, performance would be "seriously impaired in case of an emergency or other circumstances of increased workload." *Id.* at 21.[17]

Sadly, the problem of "drunk driving" among ship operators that led to the grounding of the *Exxon Valdez* continues today. On August 4, 2007, a Polish sea captain with a blood alcohol level two and a half times the limit first crashed his ship into an unmanned gas platform in the North Sea, then behaved bizarrely during the rescue and finally, began to drink vodka while the crew boarded a life raft. "What shall we do with the drunken sailor? Clap him in irons and jail him for a year."[18] Closer to home, in March 2005, the Seattle Post-Intelligencer briefly reported on a lawsuit that had been filed by a galley worker who had worked aboard the *Polar California*, one of ConocoPhillips' tankers which transports Alaskan oil out of Valdez to the West Coast of the United States and Hawaii. The lawsuit, which settled out of court, alleged that ConocoPhillips had constructively terminated the galley worker in retaliation for her reporting alcohol use by the tanker's captain and crew. The newspaper article further reported that Port Angeles, Washington, which sits along the Strait of Juan de Fuca, had become a popular "watering hole" among tanker crews and had become "a de facto hole in the system meant to keep alcohol away from these dangerous ships." *The Human Factor: Why Another* Exxon Valdez *Could Happen*, SEATTLE P.I., March 23, 2005 (*The Human Factor*).

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[17] The facts in this case are proof enough of the deleterious effects of alcohol on the performance of a ship's operator. *See, e.g.*, Plaintiff's Brief at 5-8.

[18] Ebsco Publishing, http://web.ebscohost.com/ehost/detail?vid=15&hid=21&sid=240b4742-dc5f-4388-9a6a-6. . . .

Most recently, the seriousness and prevalence of alcohol consumption among mariners is evidenced by the 2006 change in the U.S. Coast Guard's requirements for alcohol testing after serious marine incidents (SMI). Before June 20, 2006, the Coast Guard required marine employers to try to have each person employed on the vessel in commercial service who was directly involved in an SMI chemically tested for evidence of drug and alcohol use. *See* former 46 C.F.R. § 4.06. The regulations did not specify a time requirement following the SMI for collecting specimens or completing the tests to determine the use of alcohol or dangerous drugs. Now, however, Coast Guard regulations require alcohol testing to be conducted within two hours of an SMI and require most commercial vessels to have alcohol-testing devices on board. 46 C.F.R. § 4.06-3 (2006), published in 70 Fed.

Reg. 75954 (2005). In addition, the rule adds a 32-hour time limit for the collection of specimens for drug testing following a serious marine incident. In sum, the 2006 Coast Guard rule change shows that "drunk driving" continues to be a problem among ship operators.

Likewise, crew fatigue, which was identified as one factor in the *Exxon Valdez* oil spill, *see* Pet. App. 254a-255a, occurs today, notwithstanding the federal law limiting work hours on tankers. OPA 90 § 4114, *amending* 46 U.S.C. § 8104(n). A March 2006 newspaper story investigated an unreported oil spill by the *Polar Discovery* in January 2004. *The Human Factor*, SEATTLE P.I. *supra*. The *Polar Discovery* is one of ConocoPhillips' double-hulled supertankers in the Valdez fleet. Waste oil from the engine room flowed for a half hour through a valve carelessly left open onto the deck of the tanker and into the scupper holes that drain to the ocean. The *Polar Discovery*'s captain failed to report the spill. Worse yet, he falsified records to cover it up. *Fine and Probation: Attempt was Made to Cover Incident Up*, ANCHORAGE D.N., October 24, 2007 (*Fine and Probation*). More than four months after the spill, a whistleblower finally reported it to the Coast Guard.[19] According to one

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[19] In October 2007, ConocoPhillips pleaded guilty to a criminal pollution violation for failing to report the spill and falsifying records to cover it up. *Fine and Probation*, ANCHORAGE D.N., *supra*. ConocoPhillips agreed to pay a fine and penalties totaling $2.5 million and was placed on probation for three years. As part of the plea agreement, U.S. prosecutors agreed

(Continued on following page)

newspaper account, the spill occurred through a series of human errors due to having a tired and overworked crew and a cost-cutting corporate culture that ignored reported misconduct and retaliated against whistleblowers. *The Human Factor*, SEATTLE P.I. *supra*. Clearly, despite improvements since 1989, the conditions and corporate climate that led to the *Exxon Valdez* oil spill still persist today.

Organizational complacency and inertia, like alcohol consumption and crew fatigue, continue to affect oil spill prevention and response efforts. There are three primary "players" in high-consequence marine accidents: humans, physical elements (such as the weather) and organizations. W.H. Moore, *et al.*, *Improving the Management of Human and Organization Errors (HOE) in Tanker Operations*, Ship Structures Symposium at 2 (November 16-17, 1993). Organizational pathologies[20] often are "over-riding influences" in such accidents, and are the most difficult to correct:

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not to seek criminal prosecution against the company for alleged violations aboard two other tankers, the *Polar Alaskan* and the *Polar Endeavour*. *Id.*

[20] The organizational pathologies identified were: "corporate 'cultures' focused on production at the expense of quality, ineffective and stifled communications, ineffective commitment and resources provided to achieve quality, excessive time and profit pressures, conflicting corporate objectives, and counter-quality and integrity incentives." Moore, *Improving the Management of HOE in Tanker Operations* at 2.

> [h]uman and organization errors . . . account for the vast majority of unanticipated significant problems associated with the design, construction, and *operation of ships*. Approximately 80% of the problems are due to [human and organization errors], and approximately 80% of these can be traced to operations.

Id. (emphasis added).

The RCACs believe that the oil companies' complacency is due in no small part to the inherent tension between their profit-making imperative and legally-mandated oil spill prevention and response measures, which often require spending money to implement. Safety is sacrificed for the bottom line. The following example illustrates this point. Federal law now requires laden single-hulled tankers to be escorted by two tugs as they transit Prince William Sound. 33 C.F.R. § 168.40(a). Currently, double-hulled tankers laden with oil also are escorted through the Sound by two tugs. However, the law requiring the two-tug escort for the laden single-hulled tankers may become moot when the single-hulled tankers are phased out, perhaps as soon as the end of 2008. Thereafter, the use of double tug escorts will depend on voluntary compliance by the oil companies. Annual Report, App. 9. In the absence of a law requiring the use of double tug escorts, it is possible, if not probable, that the oil companies will try to cut back on the use of tug escorts in Prince William Sound, as they have in other port areas.[21] Though the escort tugs unquestionably have contributed to the overall safety of tanker traffic in Prince William Sound, it should come as no surprise that the oil companies would prefer to eliminate this expense. The tension between safety and cost is intrinsic, and unavoidable.

In light of the RCACs' nearly 20 years of experience in the aftermath of the *Exxon Valdez* oil spill, and, particularly, their substantial experience dealing with the oil industry, they are convinced that, despite the many safeguards in place today against another oil spill, the elements of human error – indeed recklessness – and the corporate profit-making imperative remain substantially the same. The RCACs believe that one important reason Prince William Sound, Cook Inlet and the Kodiak Archipelago have been spared large oil spills in the last 18 years is that the oil companies and their employees are wary of the threat of financially-significant sanctions that may be assessed as punitive damages. Moreover, the threat of punitive damages encourages the oil companies to continue making the right choices, choosing safety and self-policing over the bottom line. In short,

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[21] Tug escorts already have been eliminated for the new double-hulled tankers in San Francisco Bay. *The Human Factor*, SEATTLE P.I. at 5. Further, in 2004, at the behest of the oil companies, Washington state commissioned a study that concluded with a recommendation to eliminate tug escorts for the tankers there. *Id.*

PWSRCAC and CIRCAC urge the Court to retain punitive damages as one effective means of deterring individual and corporate recklessness.

◆

CONCLUSION

PWSRCAC and CIRCAC therefore respectfully request the Court to affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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January 29, 2008

Letter from the President and the Executive Director

[All Pictures Omitted In Printing]

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Note: This report covers the period from July 2006 through June 2007.

Our council has had a productive year. Our relations with the oil industry are on perhaps the best footing we've seen in a decade. Some old issues have been satisfactorily resolved, and, on balance, the new ones seem less contentious.

And we're happy to note that interest in citizen oversight continues around the world.

Here are some highlights of the past year:

- We started an oral history of the Exxon Valdez oil spill, featuring interviews with people directly involved in the spill and its aftermath. We expect to publish their memories in book form by March 2009, the 20th anniversary of the spill.

- We remain active on the threat that non-indigenous species from tanker ballast water pose to Alaska's maritime environment, especially its commercial, sport, and subsistence resources. With Congressional interest in this issue growing, we are pressing federal lawmakers to make sure any legislation on the subject requires ballast-water exchange, which is the best practice presently available for deterring invasions by non-indigenous species. In February 2007, we organized a successful film festival with a major focus on invasive species as part of the Alaska Forum on the Environment in Anchorage. We also initiated an annual science night to communicate our research efforts to our constituents and other researchers in our region.

- Our last two annual reports noted our continuing concerns over the future of the escort tugs that accompany loaded oil tankers through Prince William Sound. Those concerns were partly resolved over the past year when the tanker companies agreed to maintain the present fleet of ten tugs, at least for now. However, another question remains: what will happen to the tug fleet as federal escort requirements end with the transition to double-hull tankers? As discussed elsewhere in this report, the council in May 2007 called for continuing and strengthening the double-escort requirement.

- We produced "Where Do I Go From Here," a half-hour film aimed primarily at high-school students. It focuses on jobs in the marine sciences and seafaring. We hope it will help students find careers that let them work in their home communities.

- In fall 2006, as Congress investigated a partial shutdown of the Prudhoe Bay oilfield caused by pipeline corrosion, we were invited to provide information on how citizen oversight might work on Alaska's North Slope. We developed a whitepaper on the subject that was added to the Congressional record by Sen. Lisa Murkowski.

In May 2007, the council's executive director traveled at the invitation of the U.S. State Department to Finland and Estonia to discuss citizen involvement in oil spill prevention and response. Interest was intense; the executive director gave four major speeches and approximately 15 news interviews.

- This year saw an agreement that we believe will solve a long-running problem at Alyeska Pipeline Service Co.'s tanker terminal in Valdez: hazardous air pollution from the facility that cleans oily residue from tanker ballast water. After lengthy discussions among ourselves, Alyeska, and its oil-company owners, the owners committed to upgrades that should eliminate virtually all of this pollution by the end of 2008. In response, we published newspaper advertisements in

Valdez and Anchorage commending the owners for their commitment, and we pledged to continue working with them to see the upgrades completed.

- We settled a dispute with Alyeska over the council's right to investigate the profitability of oil companies operating on Alaska's North Slope. Alyeska dropped its claim that the council may not use Alyeska contract funds for such investigations, and paid half our legal expenses.

- Over a period of years, we participated with Alyeska and the Alaska Department of Environmental Conservation in a remarkably cooperative workgroup process to develop an updated oil spill contingency plan for the tanker terminal. The process was such a model of effective interaction among citizens, industry, and regulators that we nominated Alyeska and the environmental conservation department for recognition from the Pacific States/British Columbia Oil Spill Task Force.

We saw the other side of this coin in a highly unsatisfactory contingency-planning process conducted by the companies that operate oil tankers. Their plan was prepared in private, without citizen participation, and was so deficient when first submitted that it was summarily rejected by the state. The tanker companies returned to the drawing board, set up a highly compressed workgroup process, and invited us to participate. The revised contingency plan for oil tankers was approved by the state for public comment, and we hope the final version will be comparable in quality to Alyeska's terminal plan.

- In spring 2006, the council received whistleblower allegations of unsafe welds on some storage tanks at the Valdez tanker terminal. The council began an investigation that, while still in progress, has satisfactorily resolved all but two of 23 issues raised during the inquiry. Those two issues are now being investigated jointly by Alyeska and the council.

The federal Oil Pollution Act of 1990 called on citizens, industry and regulators to work as partners to prevent a return to the complacency that led up to the Exxon Valdez oil spill. We believe the accomplishments of the past year prove that process is working, and we commit to continue it in the coming year.

Mission and Responsibilities

Citizens Promoting Environmentally Safe Operation of the Alyeska Terminal and Associated Tankers

The Prince William Sound Regional Citizens' Advisory Council is an independent non-profit corporation guided by its mission: promoting environmentally safe operation of the Alyeska terminal in Valdez and the oil tankers that use it.

The council's 18 member organizations are communities in the region affected by the 1989 Exxon Valdez oil spill, as well as Alaska Native, aquaculture, commercial fishing, environmental, recreation, and tourism groups.

Consistent with its mission, the council's structure and responsibilities stem from two documents. The first is a contract with Alyeska, which operates the trans-Alaska pipeline as well as the Valdez terminal. Most of the council's operating funds come from this contract.

The second guiding document, enacted after the council was created, is the Oil Pollution Act, which required citizen oversight councils for Prince William Sound and Cook Inlet. Their purpose is to promote partnership and cooperation among local citizens, industry and government, to build trust, and to provide citizen oversight of environmental compliance by oil terminals and tankers.

The Act allows an alternative, pre-existing organization to fulfill the requirement for citizen oversight and our council has done so for Prince William Sound since 1991. Each year, the U.S. Coast Guard certifies that the council fosters the general goals and purposes of the Oil Pollution Act and is broadly representative of the communities and interests as envisioned in the Act.

The council's contract with Alyeska pre-dates the Oil Pollution Act, but the similarities in the powers and duties given the council in the two documents are not coincidental. Many people involved in the establishment of the council also promoted citizen involvement requirements in the federal law.

In accordance with the provisions of the two documents, the council performs a variety of functions aimed at reducing pollution from crude oil transportation through Prince William Sound and the Gulf of Alaska:

- Monitor, review and comment on oil spill response and prevention plans prepared by Alyeska and by operators of oil tankers.

- Monitor, review and comment on the environmental protection capabilities of Alyeska and the tanker operators, as well as on the environmental, social and economic impacts of their activities.

- Review and make recommendations on government policies, permits, and regulations relating to the oil terminal and tankers.

As part of these undertakings, the council regularly retains experts in various fields to conduct independent research and technical analysis on issues related to oil transportation safety.

The Alyeska contract also calls for the council to increase public awareness of the company's oil spill response, spill prevention and environmental protection capabilities, as well as the actual and potential environmental impacts of terminal and tanker operations.

The contract states that the council may work on other related issues not specifically identified when the contract was written.

The council was initially funded at $2 million a year. The funding is renegotiated every three years; current Alyeska funding is approximately $3 million a year. The council's total annual budget is about $3.7 million.

Although the council works closely with and is funded chiefly by Alyeska, the council is an independent advisory group. The contract is explicit: "Alyeska shall have no right . . . to have any degree of control over the formation or operation of the corporation."

Oil Spill Prevention

To ensure a maximum level of safety, the council reviews all aspects of the oil transportation system in Prince William Sound. These include operations of oil tankers and the Valdez Marine terminal, oil spills and other incidents, and the adequacy and maintenance of the Coast Guard's Vessel Traffic Service.

TANKER SAFETY

Escort System

The heart of the system for preventing oil spills in Prince William Sound is the fleet of rescue and response tugs that accompany loaded tankers out into the Gulf of Alaska. Thanks to years of study and analysis, and considerable investment by the shipping industry, this system is widely considered the best in the world. This fleet, operated by Alyeska's Ship Escort Response Vessel System, includes five state-of-the-art 10,000-horsepower tugs that have proved their capabilities in actual incidents, as well as in sea trials observed and reviewed by the council.

Federal law now requires that loaded single-hull oil tankers be escorted by two tugs in Prince William Sound, and current practice is for double-hull tankers to have double escorts as well. However, it's unclear what will happen as the tanker fleet completes the transition to double-hull vessels, which is expected to happen by the end of 2008, and the federal requirement becomes moot. After that, the use of double escorts will hinge on voluntary compliance and on state-level requirements, and the council is concerned that the tanker companies may propose to reduce the escort and response system.

As a result, the council in May 2007 adopted a new position on the escort system. It calls for preserving the double-escort requirement, and for strengthening the system with a new requirement regarding the tug kept on station at Hinchinbrook Entrance, where tankers pass from the Sound into the Gulf of Alaska and where they face some of the most extreme sea and weather conditions. That tug would be required to be one of Alyeska's high-performance Prevention/Response Tugs, also known as PRTs, rather than a conventional tug as is allowed now during maintenance rotations.

Automatic Identification System

In an effort to increase the security and safety of large vessels in U.S. ports, the United States Coast Guard recently required the use of Automatic Identification Systems, or AIS, on all such ships. This system reports the ship's position and navigational status to the Coast Guard and to all AIS-equipped vessels and ground stations nearby.

The council uses an AIS in its Valdez office to compile a data archive describing with great accuracy virtually all tug and tanker traffic in Prince William Sound since early 2006, when our system began operating. Besides providing historical data, we believe, the AIS will increase our ability to monitor the response in real time if a serious oil spill should occur in the Sound.

Iceberg Detection and Avoidance

Icebergs have proved to be one of the greatest hazards to tanker navigation in Prince William Sound. In 1989, the Exxon Valdez left the tanker traffic lanes to avoid icebergs, leading to the worst oil spill in North American history. In 1994, the tanker Overseas Ohio collided with an iceberg while coming into Port Valdez and sustained significant damage to its hull.

Fortunately, the Ohio was empty and no spill resulted.

Council-sponsored research has determined that ice from Columbia Glacier will continue flowing into the tanker lanes for the foreseeable future. After investigating several ice detection and reporting technologies, the council, along with several partners, launched a major project to use radar to reduce the navigational risk posed by ice.

A VHF (very high frequency) radar system was installed on Reef Island, near Bligh Reef, scene of the Exxon Valdez disaster. This system began operation in 2002 and continues to operate successfully today. It is linked to Alyeska's escort system facility and to the Coast Guard's Vessel Traffic Service, both in Valdez, enabling oil shippers, coastal pilots, escorts, and the Coast Guard to make informed decisions about shipping schedules and other ice avoidance measures.

Oil Spill Preparedness & Response

The council has devoted significant resources to preventing oil spills, but the risk cannot be eliminated entirely. We must be prepared to respond quickly and effectively in case prevention measures fail. Two council programs address this need: Oil Spill Prevention and Response Planning, and Oil Spill Prevention and Response Operations.

OIL SPILL PREVENTION AND RESPONSE PLANNING

State and federal laws require the operators of oil tankers, the Valdez Marine Terminal, and the trans-Alaska pipeline to prepare detailed plans showing how they will respond to oil spills should prevention measures fail. The council devotes much time and attention to oversight of these all-important plans.

In many cases, the council participates with government and industry on the working groups that develop these plans, known as contingency plans. The council also conducts independent reviews and submits comments and recommendations.

The council promotes compliance, enforcement, and funding for state and federal regulations and oversight, and also supports the Alaska Coastal Management Program. Along with local communities, the council encourages the incorporation of local knowledge of sensitive areas into contingency planning.

During the past year, the council reviewed applications for new contingency plans for oil tankers and for the Valdez terminal.

Valdez Marine Terminal Contingency Plan

As discussed at the beginning of this report, the council participated from the earliest stages in developing an updated oil spill contingency plan for Alyeska's tanker terminal in Valdez. For several years, a workgroup has met regularly to improve the plan.

The council participated in this workgroup with the state-federal Joint Pipeline Office, the Coast Guard, Alyeska, and the Alaska Department of Environmental Conservation.

Issues tackled by this workgroup included training, storage tank status and inspections, and new contingency plan regulations adopted by the state of Alaska in December 2006. The plan is expected to be completed and approved by March 2008.

We consider this one of the most successful such processes we have seen. In recognition, we nominated Alyeska for the Pacific States/British Columbia Oil Spill Task Force 2007 Legacy Award and recommended the Alaska Department of Environmental Conservation for honorable mention. (As a member of the Task Force, it is not eligible for the Legacy Award).

Oil Tanker Contingency Plans

As also discussed earlier, a new oil spill contingency plan for tankers in Prince William Sound was submitted to the state of Alaska in February 2007. It had been prepared by the tanker industry in private, without citizen input, and was so deficient that the state declined to put it out for public review and comment. Instead, the tanker companies were directed to rework and re-submit it. At that point, the companies did invite citizen involvement, and the council subsequently participated in several workgroups in an effort to improve and clarify the plan.

Nine areas of concern were addressed, including escort tugs, non-mechanical response tactics such as dispersing or burning floating oil, and Geographic Response Strategies.

In our view, the handling of the oil tanker contingency plan – especially in contrast with the development of the updated plan for the Valdez oil terminal – is a strong illustration of the need for, and value of, transparency and citizen involvement in such processes, as envisioned in the Oil Pollution Act.

Geographic Response Strategies

These are oil spill response mini-plans specific to sensitive areas and resources, such as salmon streams and clamming beaches. The council has long worked to have them included in oil spill contingency plans for Prince William Sound and the Gulf of Alaska.

As this report went to press, a total of 238 Geographic Response Strategies had been completed and another 20 are expected to be completed in the coming year.

Weather and Sea Current Data Collection

Weather conditions and sea currents affect nearly every aspect of oil transportation safety. They can play a role, sometimes the determining role, in efforts to prevent or to clean up oil spills. Consequently, the council promotes constant improvements in the system for collecting weather and current information for Prince William Sound.

We are partners with the Cordova-based Oil Spill Recovery Institute in a project to install weather stations in the Sound, many of which incorporate web cameras in addition to data-gathering equipment. Fifteen of the stations are now set up or scheduled to be installed in the near future. Web camera images from many of them are available at http://ak.aoos.org/pws/web_cams.php on the Internet.

The council is working to deploy gauges to collect data on wave height and frequency in Valdez Arm, where very little such information is available at present.

ShoreZone Mapping

The council has been involved in ShoreZone mapping in Prince William Sound since 2004. ShoreZone mapping involves shooting aerial video of shorelines during the lowest tides of the year. Biologists and geologists aboard the aircraft provide commentary on the video sound tracks during the overflight. Their information is used to create detailed maps and databases of the shorelines that were videotaped; in addition, the video itself becomes part of the ShoreZone information bank.

The council's primary goal in ShoreZone mapping is to have this detailed information available for use in oil spill response planning (including the preparation of Geographic Response Strategies) and in actual responses. However, the information has other uses as well, including education and research unrelated to oil spills.

To date, the council has funded or co-funded mapping of approximately 1,680 miles of shoreline in the Sound, including 745 miles in the past year. When work in the Sound funded by other organizations is completed in the coming year, there will be a continuous set of habitat mapping data stretching from Southeast Alaska to Kodiak.

ShoreZone mapping data – including aerial video imagery – is available to the public at www.CoastAlaska.net on the Internet.

OIL SPILL PREVENTION AND RESPONSE OPERATIONS

It takes more than volumes of carefully written and reviewed contingency plans to effectively respond to an oil spill or to an emergency that could cause one. It also takes equipment, trained people, and a management system to implement the plan. And it takes practice, practice, practice. The council's oil spill prevention and response operations program is tasked with monitoring the operational readiness of Alyeska's Ship Escort Response Vessel System and the tanker companies, and with making sure the council itself is prepared to respond to oil spills and other emergencies.

Council staff members, volunteers, and contractors monitor and report on spill response drills, exercises, and training throughout the region to provide citizens, regulators, and responders with information about the state of readiness and to make recommendations for improvement. Most of the monitoring work is done by council staffers, who present annual reports summarizing each year's activities, lessons learned, recommendations, and outstanding issues.

In the past year, two major multi-day drills were conducted in Valdez. Both of these – one by ExxonMobil's SeaRiver Maritime in September 2006 and another by BP in May 2007 – included over one hundred participants and focused on a process called "transition." This occurs when the oil company responsible for a spill takes over response management from the Ship Escort Response Vessel System, or SERVS, which manages the initial response.

Alyeska keeps a large fleet of fishing vessels under contract to help with the cleanup in the event of another big oil spill, and the council works to make sure the crews of these vessels have the training and resources they need to be effective.

In March 2007, the council hosted a Fishing Vessel Workshop in Anchorage. The purpose was to provide vessel owners in the program a forum to discuss training and other issues of concern. Officials of the Alaska Department of Environmental Conservation attended, as did a representative from SERVS.

The Response Gap

The council has long been concerned about the 'response gap' – the fact that loaded tankers are allowed to sail through Prince William Sound in weather so harsh that oil recovery would not be possible in the event of a spill.

To address this problem, the council hired a consulting firm to analyze the response gap and examine what could be done about it. The consultant concluded the gap may be 'open' – meaning oil recovery is not possible – as much as two-thirds of the time during the winter, and about one-sixth of the time even in summer. On a year-round basis, the consultant estimated, oil recovery in some areas of the Sound is impossible 38.5 percent of the time, or 140 days a year.

The consultant recommended that an effort be started to find ways to improve response capability so as to reduce the response gap. The consultant also recommended additional research into the problem, and the council has taken the first steps to implement those recommendations. The report, Response Gap Estimates for Two Operating Areas in Prince William Sound, is available at www.pwsrcac.org/docs/d0034200.pdf on the council's website.

Environmental Protection & Science

The Oil Pollution Act directs our council to review, monitor and comment on Alyeska's environmental protection capabilities, as well as the actual and potential environmental impacts of terminal and tanker operations. The Act also calls on us to develop recommendations on environmental policies and permits. The council carries out this work through two major programs: Terminal Operations and Environmental Monitoring. Under the leadership of the Scientific Advisory Committee and the Terminal Operations and Environmental Monitoring Committee, the council commissions scientific studies to determine actual or potential risks, to document levels of pollution and biological effects, and to better understand new technologies and the environmental costs or benefits that might be associated with their use.

TERMINAL OPERATIONS

Besides posing the risk of a major oil spill caused by earthquake or accident, Alyeska's Valdez tanker terminal produces ongoing pollution from routine operations, as allowed by its permits from regulatory agencies. The council oversees terminal operations in an effort to minimize the risk of spills, as well as to make sure that pollution is within regulatory limits and that those limits are set at the lowest feasible levels.

The council has monitored oil loadings at the terminal since January 2002. At that time, about 968,000 barrels of North Slope crude moved through the terminal and onto tankers every day. Since then, oil flow has dropped steadily, reaching an average of about 692,000 barrels a day by May of 2007. That's barely more than a third of what the trans-Alaska pipeline carried to Valdez at its peak of about 2 million barrels a day in the early 1990s.

However, the value of the oil moving through the terminal has gone up, not down, because crude oil prices have risen so sharply. In 2002, the oil moving through Valdez was worth about $8.4 billion; in 2006, the value was $15.8 billion.

Even at a shore facility like the oil terminal, Prince William Sound weather can cause problems. Unusually windy conditions during the winter of 2006-2007 sent waves breaking over the booms placed around tankers at the terminal to contain spills during loading. This required a shutdown of loading operations at a time when Alyeska had taken four of its 18 large oil storage tanks out of service. As a result, the 14 tanks still in service became so full that North Slope oil production and trans-Alaska pipeline operations were affected.

Situations like this are why the council pays such close attention to oil flow and tank levels at the terminal, and to the actions that Alyeska and regulators take to manage high inventory levels in the storage tanks. Alyeska has reported that it is seriously considering returning another tank to service, which would give a total of 15.

Air and Water Quality

The terminal is a major source of volatile organic compounds and other air pollutants, primarily because of hydrocarbon vapors released at the Ballast Water Treatment Facility. Some of these emissions are known carcinogens and may be affecting health or the quality of life in Valdez. The council is working to reduce concentrations of hazardous air pollutants in Valdez and at the terminal.

The vapors are released because some tankers arrive in Valdez with significant quantities of oily ballast water carried in cargo tanks to provide navigational stability during the trip north.

This water is cleaned at the ballast water facility, where concentrations of specified pollutants in the water are reduced to permitted levels of a few parts per million before it is discharged into Port Valdez. These discharges occur under a National Pollutant Discharge Elimination System permit issued by EPA and a separate permit issued by the Alaska Department of Environmental Conservation. The council reviews the permit applications during the renewal process, which last occurred in January 2005.

Until recently, the system included almost no effort to control the hydrocarbon vapors released during the three-stage treatment process. The council worked with Alyeska and, for the first time, the oil companies that own it to get a commitment from the owners to reduce these vapor emissions. The efforts were largely successful, as recognized by the council in a series of newspaper advertisements in late 2006.

Since then, the council has collaborated with Alyeska on development of vapor controls for the ballast water facility, and work is well under way on fixes for the first two stages of the three-stage process.

However, Alyeska has experienced considerable difficulty in finding a suitable replacement for the third stage. It consists of two large open-air pools where bacteria eat some of the hydrocarbons still in the ballast water while other hydrocarbons are given off as vapors. Alyeska has been active in prototyping and testing processes that offer promise for controlling these third-stage vapors.

Terminal Integrity Issues

Since 2006, the council has been investigating concerns raised by whistleblowers about faulty welds, incorrect welding procedures, and regulatory indifference during work that occurred in 2002 on four tanks that store crude oil, ballast water, or diesel fuel at the terminal. While it appears that some welding irregularities may have occurred, Alyeska maintains that all welds are safe. As this report goes to press, Alyeska and the council have joined forces to retain an independent tank welding expert to review the matter.

Earthquake Risks

Alyeska's Valdez tanker terminal was designed to withstand earthquakes as strong as the Good Friday earthquake that devastated Valdez and many other Alaska coastal areas in 1964.

However, the Good Friday earthquake is now believed to have been more severe than originally thought, so the council is concerned that the terminal might suffer serious or catastrophic damage in another such event.

The council retained experts to review seismic safety at the terminal. While their report is not final, one preliminary finding is that major earthquakes in the area may be more frequent than previously thought. It had been estimated that a Good Friday-scale earthquake could occur every 2,500 years, but the experts concluded from landslide evidence that another large earthquake occurred in the area only 1,000 years ago.

ENVIRONMENTAL MONITORING

Chemical Dispersants

Chemical dispersants are substances that, when applied to spilled oil, are claimed to do as their name suggests: they disperse it into the water column, rather than leaving it floating on top in a slick. The council promotes research and testing to increase knowledge about chemical dispersants and the environmental consequences of their use on oil spills in Alaska waters.

The council has voiced concerns about efficacy, toxicity, resurfacing, and other dispersant issues for years, urging regulatory agencies to take a conservative approach towards their use. Because outstanding questions have not been answered and research has not demonstrated that dispersants would even work in the waters of Prince William Sound, these concerns remain largely unaddressed and the council continues its advocacy for research into the many questions about dispersant use in cold seawater.

The council's formal position on dispersants, adopted in May 2006, is as follows:

> *After years of observing dispersant trials, dispersant effectiveness monitoring, advising and sponsoring independent research regarding chemical dispersant use, it is the position of the Prince William Sound Regional Citizens' Advisory Council (the Council) that dispersants should not be used on Alaska North Slope crude oil spills in the waters of our region. Until such time as chemical dispersant effectiveness is demonstrated in our region and shown to minimize adverse effects on the environment, the Council does not support dispersant use as an oil spill response option. Mechanical recovery and containment of crude oil spilled at sea should remain the primary methodology employed in our region.*

Aquatic Nuisance Species

Not all ballast water discharged in Port Valdez requires treatment to remove oil. Some tankers employ segregated ballast tanks where "clean" sea water is used for stability. This "clean" ballast is filled with living organisms that are discharged with it into Prince William Sound and Port Valdez as tankers approach the Alyeska terminal for loading. Because of the potential for invasions by harmful species, the council has made this issue a high priority since 1996.

In partnership with the U.S. Fish and Wildlife Service, NOAA's Sea Grant program, Alyeska, and the University of Alaska Fairbanks, the council has cosponsored a series of scientific studies conducted by the Smithsonian Environmental Research Center since 1997. At present, our financial partners are the U.S. Fish and Wildlife Service and the National Park Service.

The Smithsonian researchers were involved in two major efforts for the council this past year. The first was a pilot project to monitor for the presence of non-native tunicates, or sea squirts, because they can grow in high densities and cause problems for other marine species. The council staff helped by setting up monitoring stations at the Valdez Marine Terminal in the summer of 2006 and following up with another Port Valdez monitoring station in 2007. The 2006 monitoring in our region did not turn up harmful invasive tunicates. The 2007 monitoring is part of a global monitoring effort.

The Smithsonian researchers submitted a draft report forecasting the northward spread of four invasive species to Alaska waters. The report concludes that all four species – an invasive barnacle, the European green crab, the club tunicate, and the Atlantic periwinkle – could find suitable environments in Alaska waters to survive and could be indicative of other invasive species spreading to Alaska:

> *"Our analyses indicate that Alaskan coastal waters are at risk of invasion by nonindigenous species now present in western North America. . . . conditions exist in Alaska and other uncolonized regions that could support populations of all four species examined. More broadly, these results suggest that many nonindigenous species along the west coast may have the capacity for northward spread to Alaska."*

The council continues to stay active in an effort to establish a state-wide invasive species group that we hope will foster proactive management strategies, among other things. Other participants in this group include regulators, academia, and other non-governmental organizations.

In addition, we hold seats on the national Invasive Species Advisory Committee, the Western Regional Panel of the National Aquatic Nuisance Species Task

Force, and the West Coast Ballast Outreach Project Advisory Committee.

For many years, the council has sponsored a trapping effort in Port Valdez for the European green crab, which has traveled up the West Coast from San Francisco Bay at an alarming rate. Although it has not been reported in Alaska, it is of concern because ballast water is a known pathway for this crab. We have expanded the green crab monitoring network by working with organizations and students in our region. We expect the expansion to continue in the upcoming year and to be supported in other regions through a network being established by the Kachemak Bay Research Reserve. This will provide consistency in monitoring across the state.

The council organized a successful film festival with a major focus on invasive species as part of the Alaska Forum on the Environment held in February 2007. This was a great opportunity to provide important invasive species information in an entertaining fashion to a larger environmental community in Alaska.

More information on the council's invasive species program can be found at www.pwsrcac.org/projects/NIS on the Internet.

Regional Environmental Monitoring

In 1993, the council established a Long-Term Environmental Monitoring Program, called LTEMP, that continues today. It is designed to assess the status of hydrocarbon levels in our region, as well as long-term trends and any new developments that could have an effect on the levels.

Samples are collected at 10 intertidal sites in Prince William Sound and the Gulf of Alaska. Mussel tissues and sediments from the sites are analyzed in a laboratory to determine whether hydrocarbons are accumulating and, if so, their source. The result is the largest chronological set of data for hydrocarbons in Prince William Sound ever compiled. This data set is available for use by other researchers.

In the coming year, data from 1993 to 2005 will be analyzed by an independent contractor to evaluate how well the project is meeting its objectives and to help the council coordinate future environmental monitoring efforts.

A related project is investigating whether local fish species can accumulate hydrocarbons in their bodies by eating contaminated food from the marine environment.

Many LTEMP reports, along with additional information on the program, are available at www.pwsrcac.org/projects/EnvMonitor/ltemp.html on the council website.

MEMBER RELATIONS

The council has a full-time staff position, called Outreach Coordinator, to maintain productive relations with the 18 communities and interest groups that make up its membership. The coordinator visits communities in the region, attends member group functions, gives presentations, coordinates special events involving the council and its member groups and generally encourages citizen involvement in the council's work.

Outreach activities in the past year included participation at events in such council communities as Homer, Seldovia, Valdez, Kodiak, Cordova, Seward, Tatitlek, and Chenega Bay. The council's information booth was also set up at numerous conferences and meetings in places ranging from Anchorage to Seattle to Montreal to Edmonton.

The council has produced a film on educational and career opportunities in the areas of marine science and seafaring, and is developing a 30-minute film history of the Exxon Valdez oil spill. It will include personal interviews and footage of the spill, and will help commemorate the 20th anniversary of the spill in the spring of 2009.

The council has also updated and posted on its website an oil spill curriculum for use in schools, and has brought out the fourth edition of its coloring book for children.

CITIZEN OVERSIGHT AROUND THE WORLD

The Oil Pollution Act designates the Alaska citizens' councils as demonstration programs. In the years since our birth, we have seen the citizen oversight movement spread worldwide, and we have increasingly become a resource for citizens elsewhere who hope to establish their own programs.

In the fall of 2006, the council provided information to Congress on the question of a citizen oversight group for Alaska's North Slope. Interest in such a group rose after BP experienced pipeline leaks that eventually led to the shutdown of about half the Prudhoe Bay oilfield. Some of the council information was added to the Congressional record by Sen. Lisa Murkowski, but, so far, no such group has been formed.

In May 2007, the council's executive director traveled to Finland and Estonia at the request of the U.S. State Department to discuss oil spill prevention and response strategies with citizens of those countries. We stand ready to continue sharing the lessons we've learned since 1989 about the value of citizen oversight, and how to make it work.

PUBLICATIONS

The council increases public awareness on a wide range of issues pertaining to crude oil transportation through printed and electronic publications.

The Observer, a free quarterly newsletter, is distributed throughout Prince William Sound, the northern Gulf of Alaska, lower Cook Inlet and the Kodiak Archipelago. *The Observer* is also sent on request to interested citizens elsewhere, as well as to regulators and industry. In addition, it is posted on the council website, www.pwsrcac.org.

The Observer covers council activities, developments in the oil transportation industry and news about policy and operational issues related to marine oil transportation. Major oil spill drills are covered, and Alyeska is invited to submit a column for each issue. In the course of preparing articles for *The Observer*, the council frequently invites feedback from appropriate industry and regulatory personnel.

We publish a concise monthly email newsletter, *The Sound Approach*, which includes such regular departments as "Council News," "Reading Room," and "Featured Links." It also offers interesting tidbits about our region, oil transportation, and related topics.

The council maintains an extensive, award-winning website, www.pwsrcac.org, which provides information about our work, membership, mission, and projects. The council makes available a 14-minute video about its origins, mission and activities. This video, titled "A Noble Experiment: The Story of the Prince William Sound Regional Citizens' Advisory Council," is shown at conferences and other events attended by the council, and is distributed free to member entities for use in informing their constituents about the council. It can be viewed at video.google.com/videoplay?docid=39275729294009273 on the Internet. The council also places public service announcements about its work, mission, and concerns on radio stations in the Exxon Valdez oil spill region. Many of these announcements feature council volunteers telling about their own lives and why they decided to donate their time and energy to the council's work. These announcements are available for playback at www.pwsrcac.org/newsroom/radio.html on the council website.

And, once a year, the council summarizes its work in an annual report such as this one.

STATE GOVERNMENT RELATIONS

The council monitors state actions, legislation and regulations that relate to terminal or tanker operations, or to oil spill prevention or response. To track developments in the state capital, the council retains a monitor under contract during the legislative session. This area of council activity is coordinated by a Legislative Affairs Committee made up of members of the council board. During the legislative sessions of 2007, the committee focused its efforts on securing adequate long-term funding for the Alaska Department of Environmental Conservation's Division of Spill Prevention and Response.

FEDERAL GOVERNMENT RELATIONS

The council monitors federal government actions and issues through contract representatives in Washington, D.C. During the past year, we have increasingly focused on legislation to address the problem of aquatic nuisance species. In particular, we have monitored and been active on the issue of requiring domestic oil tankers bound for Valdez to exchange their ballast water at sea to reduce the threat of Alaska waters being invaded by non-indigenous species.

RECERTIFICATION

The Coast Guard certifies the council as the federally approved citizens' advisory group for Prince William Sound, pursuant to the Oil Pollution Act. The council has been the certified group since 1991.

Under the annual recertification process, the Coast Guard assesses whether the council fosters the general goals and purposes of the Act and is broadly representative of the communities and interests as envisioned in the Act.

As part of its recertification process, the Coast Guard considers comments from industry, interest groups, and citizens. The council fulfills the requirement for an industry-funded citizens advisory group, but it was established before the law was enacted.

Board of Directors

WHO WE ARE

The council is an organization of organizations. Our members include state-chartered cities and boroughs, tiny Alaska Native villages with tribal governments, Native corporations, commercial fishing organizations, an environmental consortium, and groups representing the tourism industry.

Each member entity chooses one representative to our board. The lone exception is Valdez. It has two representatives, giving our board a total of 19 members. The board meets three times a year. The January meeting is in Anchorage, the May meeting is in Valdez, and the September meeting rotates among other member communities in the oil spill region.

Who serves on the board?

The names and faces change, but current and recent board members have included commercial fishermen, a schoolteacher, the chief executive of a regional Native corporation, tour-boat operators, an oilfield engineer, and a village mayor.

* * *

Committees

As of June 30, 2007

Four standing committees advise the Board of Directors and the council staff on projects and activities. Committee volunteers also assist the staff on individual projects. The advisory committees are made up of interested citizens, technical experts, and members of the council board. Committee volunteers are selected through an annual application process. They are appointed to two-year terms and may serve consecutive terms.

Papers, Presentations, Reports, and Media Releases

An Assessment of the Role of Human Factors in Oil Spills from Vessels. Nuka Research, 8/1/2006. *852.431.060801.NukaHumanFac.pdf*

Contingency Plan Considerations for the Prince William Sound Tanker Escort System. Harvey Consulting and Nuka Research, 8/14/2006. *801.431.060814.CPConsideratn.pdf*

Review of The Status of Fire Protection Facilities and Fire Team Readiness at Alyeska's Valdez Marine Terminal. Loss Control Associates, 8/23/2006. *554.431.060823.LCAvmtRpt.pdf*

Report on the Non-Mechanical Response for the T/V Exxon Valdez Oil Spill. Citizens' council, 8/30/2006. *955.431.060830.EVOSresponse.doc*

Briefing Paper on the Role of Statutorily Established Citizen Oversight Councils in the Conduct of Oversight of Oil Transportation Operations, Facilities and Procedures. Citizens' council, 9/1/2006. *270.107.060901.RCACBackgrnd.doc*

2004-2005 Long Term Environmental Monitoring Report. James R. Payne, William B. Driskell, Jeffrey W. Short, and Marie L. Larsen, 11/1/2006, *951.431.061101.AnnualLT2005.pdf*

Biological Invasions in Alaska's Coastal Marine Ecosystems: Establishing a Baseline. Smithsonian Environmental Research Center, 11/1/2006. *952.431.061101.BioInvasions.pdf*

Corrosion Crisis Shows Need for Citizen Oversight at Prudhoe Bay. Guest editorial opinion by John Devens, 11/9/2006.

Prince William Sound Escort and Response System and Policies. Nuka Research and Planning Group, LLC., 12/1/2006. *801.431.061201.IssuesPolicy.pdf*

Response Gap Estimates for Two Operating Areas in Prince William Sound. Nuka Research and Planning Group, LLC., 12/22/2006. *756.431.061222.NukaRGFnlRpt.pdf*

VMT System Integrity Issues Summary of Findings of Facts, Allegations and Recommendations. Harvey Consulting, 4/5/2007. *505.431.070405.HrvyTankFind.pdf*

White Paper: The Imperative to Protect Alaska Waters from Aquatic Invasive Species. Citizens' council, 6/1/2007. *952.107.070601.AquInvasSpec.pdf*

Different Outcomes on Oil Spill Plans Show Value of Citizen Involvement. Guest editorial opinion by John Devens, 5/14/2007.

These are just a few of the many reports, papers, presentations, and media releases produced by the council in the past year. For further information, or to obtain copies, visit the council website or contact either council office (see facing page).

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■ THEN AND NOW – CHANGES IN OIL TRANSPORTATION SINCE THE EXXON VALDEZ SPILL

1989-1999

Prince William Sound Regional
Citizens' Advisory Council ■

[Pictures Omitted In Printing]

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Cover Photos:

Fishing vessel towing boom: Randy Brandon.

Cook Inlet Setnetters: Oil Spill Public Information Center.

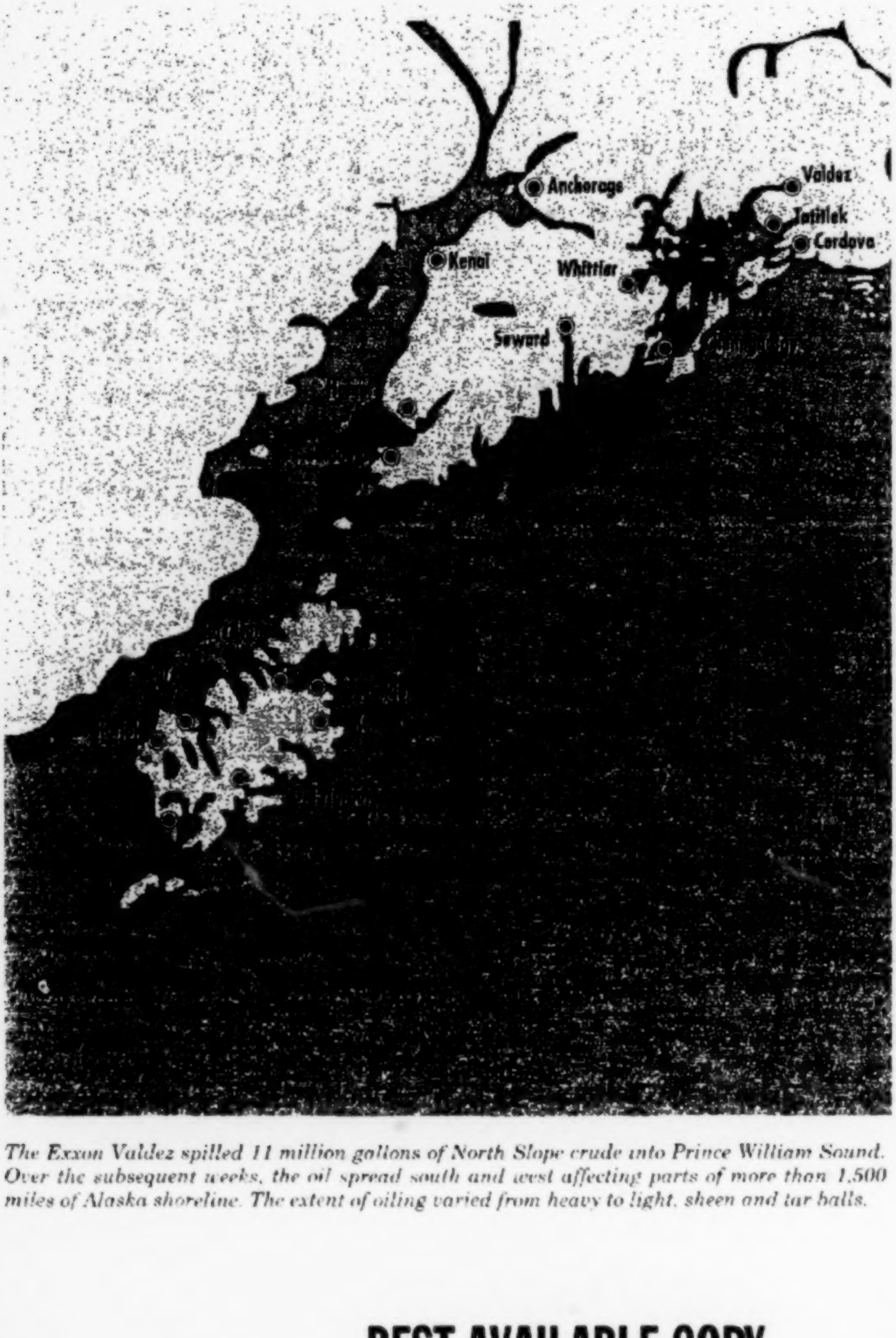
Cleaning oiled beach: Oil Spill Public Information Center.

Background photo of tanker with tethered tug: Patrick C. Welch

Page 6 background photo: © Dennis Remick

The Prince William Sound Regional Citizens' Advisory Council is an independent, non-profit corporation formed after the 1989 Exxon Valdez oil spill to minimize the environmental impacts of the trans-Alaska pipeline terminal and tanker fleet. The council has 18 member organizations, including communities affected by the Exxon Valdez oil spill and groups representing Alaska Native, aquaculture, environmental, commercial fishing, recreation and tourism interests in the spill region. The council is certified under the federal Oil Pollution Act of 1990 as the citizens' advisory group for Prince William Sound, and operates under a contract with Alyeska Pipeline Service Co. The contract, which is in effect as long as oil flows through the pipeline, guarantees the council's independence, provides annual funding, and ensures the council the same access to terminal facilities as state and federal regulatory agencies.

PATH OF OIL SPILLED FROM THE EXXON VALDEZ


Anchorage
Kenai
Whittier
Seward
Valdez
Tatitlek
Cordova

The Exxon Valdez spilled 11 million gallons of North Slope crude into Prince William Sound. Over the subsequent weeks, the oil spread south and west affecting parts of more than 1,500 miles of Alaska shoreline. The extent of oiling varied from heavy to light, sheen and tar balls.

BEST AVAILABLE COPY

INTRODUCTION – THEN & NOW

The Exxon Valdez oil spill was not simply a freak accident. While Exxon Corp. was immediately responsible, other factors were also at work. The oil industry, government agencies, elected officials and the citizens of Alaska share responsibility for the complacency that allowed the spill to occur and failed to ensure a prompt, effective cleanup.

The oil industry failed to maintain adequate systems for preventing and responding to oil spills.

Regulatory agencies failed to protect public resources because of ineffective or inadequate oversight.

State and federal elected officials failed to pass laws strong enough to protect the environment and give regulatory agencies the funds they needed to protect public resources.

Except for a few outspoken local citizens, most Alaskans simply failed to pay attention.

The result was a spill on March 24, 1989, of about 11 million gallons* of North Slope crude oil into Prince William Sound less than 30 miles from Valdez, the city for which the tanker had been named. The ship ran aground on Bligh Reef after leaving the designated tanker lanes because of earlier reports of icebergs in the area.

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* *Oil volumes are stated in gallons in this report for the convenience of the general reader. The oil industry, however, measures oil in barrels of 42 gallons. The Exxon Valdez spill was about 260,000 barrels.*

The Exxon spill could have been averted by stronger prevention practices and more vigilant government oversight. Better response planning in advance could have lessened the impacts of the spill.

Birds, beaches and otters were oiled and people in the region suffered psychological and economic harm. In some cases, the ill effects of the spill linger today.

This publication explores how factors that led to the nation's worst oil spill have been addressed in the decade since. Much has been done. New and revised federal and state laws and regulations are in place, and the oil industry operates with a heightened awareness of the consequences of a catastrophic spill.

Are the resources and communities of Prince William Sound and the Gulf of Alaska safer from a major oil spill than they were in 1989? Can Alaskans now relax?

The Prince William Sound Regional Citizens' Advisory Council, which produced this report, believes Alaska waters and the communities affected by the Exxon spill are, in fact, safer today. But we can never relax. Continued vigilance is essential to ensure that protections are not diluted and gains are not lost as memories of the spill fade.

Indeed, as this report goes to press, oil prices are in one of their periodic slumps and the industry is announcing cutbacks in several areas of its operations. Much to the council's concern, some of these cutbacks

– such as layoffs of spill-response personnel and delays in the construction of double-hull tankers – have the potential to affect safety. In the council's view, safety is a fixed cost of transporting oil and should not be subject to the vagaries of the oil market.

The council is an independent non-profit organization formed after the Exxon Valdez oil spill to promote environmentally safe operation of the crude oil terminal in Valdez and the tankers it serves.

Under a contract with Alyeska Pipeline Service Co., we monitor and advise Alyeska on terminal operations, spill prevention, response planning, and other environmental issues. We conduct independent research, monitor regulatory activity and advise tanker owners and operators, regulatory agencies and the public on issues related to oil transportation and its environmental impacts.

Our 18 member organizations include communities affected by the Exxon Valdez oil spill and interest groups with a stake in the affected region.

The federal Oil Pollution Act of 1990 requires an industry-funded citizens' advisory group for Prince William Sound; we are certified as meeting that requirement.

The views expressed here are ours, and we are solely responsible for the content of this report.

– Prince William Sound Regional
Citizens' Advisory Council

March 24, 1999

I. PREVENTION – REDUCING THE SIZE AND FREQUENCY OF OIL SPILLS

History shows that oil, once spilled on the sea, is never fully contained and recovered. Despite improvements in containment and cleanup technology, it has proven impossible to recover all the oil from a major spill even under the best of conditions. Indeed, the best-laid response plans in the world are no guarantee that any spilled oil will be recovered from the water since severe weather can defeat even a good plan.

The first line of defense must be prevention.

VESSEL TRAFFIC AND NAVIGATION

The U.S. Coast Guard's Vessel Traffic Service functions as the waterway manager for major shipping including tankers traveling to and from Alyeska Pipeline's Valdez Marine Terminal. The traffic service includes the Coast Guard's control center in Valdez, a system of designated lanes for separating inbound and outbound tankers, and electronic equipment for determining and displaying the positions of tankers in or near Prince William Sound.

Numerous improvements have been made to the traffic service since 1989. These changes enhance the traffic center's ability to monitor inbound and outbound tankers and to provide them with traffic advisories.

Ten years ago, radar coverage was limited, failing to detect the Exxon Valdez as it grounded on Bligh Reef less than 30 miles from the Coast Guard traffic center in Valdez. Today, the system has been upgraded to provide better resolution in varying weather conditions and at an extended range. The integration of satellite positioning data allows tracking of all tankers from the Valdez terminal through Hinchinbrook Entrance, where Prince William Sound opens into the Gulf of Alaska.

Coast Guard personnel now track tankers continuously in the Valdez Narrows and as often as once a minute in the rest of the Sound and out into the Gulf of Alaska.

In 1989, only two people were on duty in the Vessel Traffic Center when the Exxon Valdez ran aground. Today, a third person, the watch supervisor, is present to oversee the radar and radio watch standers. Qualifications and training for watch standers have also been upgraded and expanded.

Reporting and communications have been upgraded by the industry. New repeater towers installed by Alyeska Pipeline allow better communication between tankers and the Valdez Marine Terminal.

TANKER OPERATIONS AND ESCORT SYSTEM

The Exxon Valdez was traveling without an escort vessel at about 14 mph* when it approached icebergs northwest of Bligh Reef and deviated from the established tanker lanes to avoid the ice.

Today, loaded tankers in Prince William Sound are subject to speed limits, are under constant escort, and normally must remain in the tanker lanes at all times.

The Coast Guard has always required loaded tankers to have a tug escort through the Valdez Narrows. Now, a system of close escorts and vessels on station covers the tanker route from the berths at Valdez to the Gulf of Alaska at Hinchinbrook Entrance.

Each loaded tanker has at least two escorts; in Valdez Narrows, one of the escorts must actually be tethered to the tanker's stern. Another special restriction in Valdez Narrows: In times of high winds, three escorts are required.

At the north end of the Sound (from the Valdez terminal to Bligh Reef) and at the south end, where tankers enter the Gulf of Alaska via Hinchinbrook

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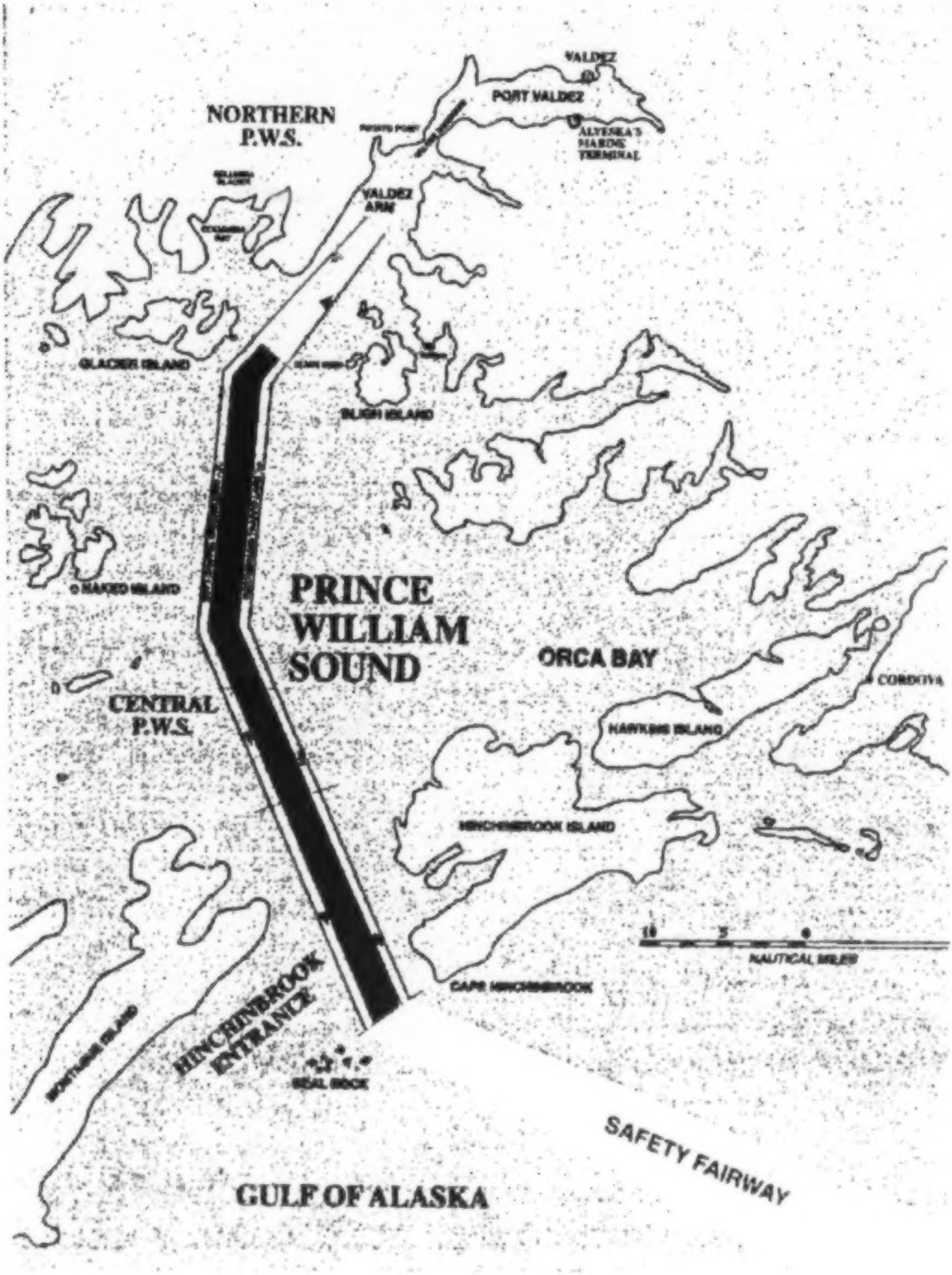
* *In 1998, oil shippers and Alyeska began using the "Protector," a class of tractor tugs more powerful and maneuverable than the conventional tugs that had been used. The Protector tugs are being replaced by new and even more powerful tugs. (See Page 7.) Photo courtesy Crowley Maritime, Inc.*

Entrance, all escorts must stay within a quarter-mile of the tanker.

However, in the central part of the Sound – from Bligh Reef to Hinchinbrook Entrance – there is more sea room and only one of the escorts is required to stay within a quarter mile of the tanker. The other escort – called a "Sentinel" – may be stationed a few miles away at one of three points along the route, where it remains under way for quick response.

PRINCE WILLIAM SOUND TANKER LANES


VALDEZ
PORT VALDEZ
POTATO POINT
ALYESKA'S MARINE TERMINAL
NORTHERN P.W.S.
VALDEZ ARM
GLACIER ISLAND
BLIGH ISLAND
NAKED ISLAND
PRINCE WILLIAM SOUND
ORCA BAY
CORDOVA
HAWKINS ISLAND
CENTRAL P.W.S.
HINCHINBROOK ISLAND
10
5
0
NAUTICAL MILES
CAPE HINCHINBROOK
HINCHINBROOK ENTRANCE
MONTAGUE ISLAND
SEAL ROCK
SAFETY FAIRWAY
GULF OF ALASKA

Tankers transit three zones as they head south from Valdez: Northern Prince William Sound (orange), Central Prince William Sound (purple) and Hinchinbrook Entrance (green). Speed limits, escort requirements and weather restrictions apply in each of the three zones.

After a tanker leaves Prince William Sound, a rescue tug must stay on station near Hinchinbrook Entrance until the tanker is at least 17 miles out to sea.

Escort vessels have several important functions: to watch for and report any sign of problems with a tanker, to assist if a tanker encounters trouble, and to provide the first response should a spill occur, as described in Section II.

At least one of the escorts is equipped with containment boom, oil skimmers, a work boat to deploy boom, storage capacity and a trained response crew.

Within the Sound, tankers are subject to various speed limits. The highest speed limit, 12 mph, applies in Port Valdez and Valdez Arm. The lowest, 6 mph, applies in Valdez Narrows.

In central Prince William Sound there is, technically speaking, no speed limit. However, the tankers can't outpace their escort vessels, creating an effective speed limit of about 12 mph.

TANKER CREWS

Until 1989, signs of alcohol use did not prevent tanker crews from returning to their vessels through the terminal. Now, under alcohol screening procedures instituted by Alyeska Pipeline, all tanker captains are given breath tests an hour before sailing. Crew members suspected of consuming alcohol are tested; any with blood alcohol content of 0.04 percent or greater are denied access to the terminal and their vessel.

In 1989, a state-certified ship's pilot was required to be aboard loaded tankers only until they reached Rocky Point, about 20 miles out from the terminal. Now the pilot remains aboard as far as Bligh Reef.

In all parts of Prince William Sound, two of the ship's licensed deck officers must be on the bridge at all times. A federally licensed pilot is also required; that role is normally filled by one of the deck officers. (A pilot is a licensed mariner familiar with local waters who is required to be aboard ship to assist the crew in prescribed areas.)

Today, unlike in 1989, federal law limits the number of hours crew members may work, to reduce the risk of fatigue-induced accidents.

In addition, tanker crews – as well as tugboat officers and state coastal pilots – receive bridge simulator training under conditions reproducing tug and tanker interactions in Prince William Sound.

Also, on-water rescue training has been increased for tugboat and tanker officers.

TANKER INSPECTIONS

The structural integrity of the tanker Exxon Valdez was not an issue in its grounding. However, in 1988, a report issued by the Coast Guard identified the Valdez fleet as disproportionately affected by structural failures. The problem was underscored in January 1989, when the tanker Thompson Pass spilled 71,000 gallons of crude oil at the terminal because of cracks in its hull. The Coast Guard and the state of Alaska now require more stringent inspections of tankers vulnerable to structural failure.

In addition, all tankers docked at the Valdez Marine Terminal are now surrounded with containment boom while oil is transferred.

WEATHER CONSIDERATIONS

Weather restrictions on tanker traffic were instituted after the Exxon Valdez oil spill.

The Valdez Narrows are now closed to large tankers when the wind exceeds 35 mph; when it exceeds 46 mph, smaller tankers are banned, too.

In addition, Hinchinbrook Entrance is closed to tankers if the wind exceeds 52 mph or the seas exceed 15 feet.

In the past, lack of information about weather and sea conditions in Prince William Sound and Hinchinbrook Entrance was a problem. Because of wind patterns and local topography, readings from the wind measuring station at Potato Point are not always a reliable gauge of actual conditions. The lack of other reporting stations in the Sound meant that frequently the only information available about wind and sea conditions was from a vessel already under way, or from a weather station at Middleton Island, in the Gulf of Alaska more than 100 miles from Valdez.

In 1995, that changed when weather equipment was installed at Potato Point, at Bligh Reef, in the center of Prince William Sound and at Hinchinbrook Entrance. The new equipment reports wind speed and direction, barometric pressure, temperatures, and wave action.

Thanks to the efforts of the citizens' council, the oil industry and regulators, Congress appropriated $500,000 to pay for the buoys. In 1998, weather equipment was installed on Middle Rock so that wind speeds in the Valdez Narrows would be more accurately reported.

MONITORING AND OVERSIGHT BY REGULATORY AGENCIES

The Alaska Department of Environmental Conservation and the U.S. Coast Guard are the agencies most directly responsible for oversight and monitoring of the Valdez Marine Terminal and oil tanker traffic. After the Exxon Valdez oil spill, both agencies were criticized for failing to either implement or enforce adequate prevention measures.

Changes have been made in both agencies.

At the state level, the Exxon Valdez oil spill focused public and political attention on the need for the Department of Environmental Conservation to have the authority and funding to monitor and oversee terminal and tanker operations, programs which had been under-funded through the late 1970s and '80s.

After 1989, state funding increased significantly for spill drills, facility and vessel inspections, and review of the voluminous oil spill contingency plans prepared by Alyeska Pipeline and the oil shipping companies.

Oil-related functions were consolidated into one division, called Spill Prevention and Response. State legislation passed in 1990 provided the authority, resources and funding that the Department of Environmental Conservation needed to monitor and oversee industry operations and implement spill prevention and response programs. New regulations implemented in 1998 require the industry to employ the best available technology in oil spill prevention and response.

The Department of Environmental Conservation now has the authority, which it didn't have before, to require and enforce prevention measures as a condition for approval of oil spill contingency plans. Those measures include more training, more equipment, more inspection and maintenance of equipment, better record-keeping and specific requirements for loaded tankers.

The Coast Guard is the federal agency most affected by the Exxon Valdez. As a result of the problems that emerged from the spill, the Coast Guard has a more direct role in spill prevention and response and much greater regulatory oversight of the oil transportation industry. It is responsible for implementing most of the new prevention measures required by the Oil Pollution Act of 1990 and by other federal regulations passed later.

ICE STUDIES

According to a 1995 study co-sponsored by the citizens' council, the oil industry, and regulators, one of the most serious remaining risks to tankers in Prince William Sound is posed by icebergs from Columbia Glacier.

This glacier has been disintegrating and retreating rapidly since 1980. Each year, it calves thousands of icebergs into Columbia Bay, about 25 miles southwest of Valdez. Some of these icebergs drift into the tanker lanes.

Besides playing a role in the Exxon Valdez grounding, ice from Columbia Glacier caused another major accident in 1994, when the empty tanker Overseas Ohio struck a berg and suffered more than $1 million in damage to its bow.

The citizens' council is funding research to find ways to predict when icebergs are likeliest to enter the tanker lanes, and technology to detect them in the water.

DOUBLE HULLS

One of the most important steps taken to prevent and reduce oil spills like the Exxon Valdez is the federal requirement that all oil tankers in U.S. waters have double hulls by 2015. Double hulls are to be phased in, with existing vessels in the Valdez trade to be converted or replaced on a schedule that depends on size and age.

Double hulls are important because studies indicate they can eliminate or dramatically reduce the size of oil spills. In the case of the Exxon Valdez, a Coast Guard study said a double hull could have cut the size of the spill by 60 to 80 percent.

Double-hulled vessels existed long before 1989, and more have been built since then. As this report was being prepared in early 1999, ARCO had three new double-hulled vessels under construction for the Prince William Sound trade.

However, only three double-hull tankers – all under charter to BP – were in actual service in the Sound. Some other tankers had double bottoms and some operators were leaving outer tanks partly empty to reduce oil loss in the event of a hull puncture.

Most of the tankers calling at the terminal in Valdez were built in the 1970s and the age of the fleet is becoming a concern to the citizens' council.

In addition, the council is concerned about possible slowdowns to the phaseout schedule in the Oil Pollution Act.

Until 1998, an ambiguity in the act permitted single-hull tankers to be remeasured – a process where their cargo capacity was reduced – in order to extend how long they could stay in service. Four such vessels that operate in Prince William Sound were remeasured before Congress eliminated the ambiguity in 1998. The council will be vigilant against other provisions that would permit single-hull tankers to remain in service past their original retirement dates.

The Coast Guard is currently considering a request from the oil industry to allow single-hulled tankers to extend their retirement dates by being retrofitted with double bottoms or double sides. The council is opposing this proposal, supporting a strict interpretation of the Oil Pollution Act that would take aging single-hull tankers out of service on the original schedule.

II. RESPONSE – REDUCING THE HARM FROM OIL SPILLS

Prevention measures can reduce the size and frequency of oil spills. But prevention efforts will never become fail-safe, so the industry, regulatory agencies and the public must be prepared to respond to spills that do occur. It is incumbent upon those who handle and carry crude oil, as well as regulatory agencies and the public, to make sure that spilled oil is contained and recovered to the greatest extent humanly possible.

The speed and effectiveness of the response to an oil spill depend on the availability of equipment, resources and trained personnel, on planning and preparation and, ultimately, on favorable weather.

CONTINGENCY PLANS

Anyone who handles or transports crude oil or refined products as cargo must have a government-approved contingency plan for preventing and responding to spills. What must be in the plan and what must be provided in the way of drills, training, acquisition of equipment, etc., are determined by state and federal laws and regulations. The requirements depend on the type of vessel or facility, the location, and the amount and type of cargo involved.

Alyeska Pipeline was required to have a contingency plan before the Exxon Valdez spill, but it was not well implemented. Spill-response duties were assigned to personnel with other day-to-day operational tasks and equipment was not adequately maintained. The initial response in March 1989 was slow, ineffective and poorly coordinated.

Since then, state and federal agencies have expanded plan requirements and changed some of the assumptions. The federal Oil Pollution Act of 1990 and Alaska state laws passed after the Exxon Valdez spill led to the first regulations requiring contingency plans for individual tankers.

Those who must have contingency plans to operate must provide greater assurances that personnel are being trained, that equipment and resources are available to be mobilized quickly, and that all players have practiced their roles in preparation for an actual spill.

The size of spill assumed in a response plan makes a tremendous difference in the resources and equipment that must be available. Alyeska Pipeline's 1987 contingency plan, approved by the state, said a spill of 8.4 million gallons (three-quarters the size of the Exxon Valdez spill) was highly unlikely and reasoned that "Catastrophic events of this nature are further reduced because the majority of tankers calling on Port Valdez are of American registry and all of these are piloted by licensed masters or pilots."

Both state and federal law now require planning for larger potential spills than in the past, and require more spill response equipment to be immediately available.

Plan holders must have enough equipment immediately available to deal with a spill of 12.6 million gallons of oil (slightly larger than the Exxon Valdez spill) within 72 hours.

They must also plan for spills of almost 40 million gallons, but may rely more on equipment to be brought in from outside the Prince William Sound area for these larger spills.

As the consortium that operates the trans-Alaska pipeline and terminal for its seven owner companies, Alyeska Pipeline holds the contingency plans for spills on the pipeline and at the Valdez tanker terminal.

In Prince William Sound, the tanker owners and operators must have their own approved contingency plans, although they contract with Alyeska Pipeline to provide the initial response described in the plans.

Under these contracts, Alyeska Pipeline manages the spill response for up to the first 72 hours after a spill. After that, it may transfer management of the response to the spiller, so long as the U.S. Coast Guard and the Alaska Department of Environmental Conservation agree that the spiller or its representative is ready to take over.

EQUIPMENT READY

The first three days after the Exxon Valdez oil spill afforded nearly ideal weather for oil recovery. Seas and winds were calm. But the equipment wasn't ready. Seventeen hours after the grounding, neither the leading edge of the spill nor the grounded tanker had been boomed and the few skimmers on-scene were operating ineffectively. Skimming soon halted because there was no more room to store the recovered oil-water mixture.

Throughout the first few days, debate raged about use of dispersants. Exxon argued for widespread dispersant use, but didn't have enough dispersant or the equipment to do the job and never received regulatory approval.

The situation now is quite different. Prince William Sound is home to Alyeska Pipeline's Ship Escort/Response Vessel System, or SERVS, one of the top oil spill response forces in the world.

SERVS has several functions. It helps tankers navigate safely through Prince William Sound and responds to a tanker problem or a spill. SERVS also responds to spills on the southern portion of the trans-Alaska pipeline and at the Valdez tanker terminal.

SERVS employs approximately 200 trained personnel; another 60 people comprise Alyeska Pipeline's crisis management team in the event of a spill.

The SERVS escort/response vessels are equipped to tow or otherwise assist tankers. Also, some carry spill response equipment and can contain, recover and – to a limited extent – store oil.

At least one escort vessel is always within a half-mile of each loaded tanker and in radio communication with the tanker's bridge until it reaches Seal Rocks, outside Hinchinbrook Entrance. After that, a rescue tug stands by until the tanker is 17 miles into the Gulf of Alaska.

Trained Alyeska Pipeline response crews are on duty around the clock and the response fleet is on standby alert whenever a loaded tanker is traveling in the Sound.

SERVS' response resources include 35 miles of containment boom (versus less than five miles in 1989), 37 high-volume skimming systems, barges to receive recovered oil and water mixture, and equipment to pump and transfer oil-water mix. SERVS also has 3,600 feet of fire boom with helicopter-carried igniter systems. Equipment is tested in drills and exercises, to reduce the chances of confusion and surprises in an actual incident.

Four open-water task forces, each with a trained crew and a large barge with three skimming systems on-board, are stationed in Prince William Sound. Two are in Port Valdez – the body of water where the city of Valdez and the Alyeska tanker terminal are located. The other two task forces are located elsewhere in the Sound, along the tanker route to Hinchinbrook Entrance.

Today, Alyeska Pipeline has at its disposal more than 60 skimming systems with a combined recovery capacity of over 12 million gallons of oil-water mixture in 72 hours. In 1989, only 13 systems were available; their combined capacity was about 1.2 million gallons in 72 hours.

Dispersants are now stockpiled in Anchorage, Valdez and outside Alaska, along with equipment to deliver them from ships, airplanes and helicopters.

Current state and federal laws and regulations hold that dispersants should be used only if it is clear that mechanical cleanup methods such as booming and skimming won't work. The citizens' council supports these laws and opposes efforts to loosen these restrictions.

Among the council's concerns is the scarcity of reliable scientific data about the efficiency, toxicity and persistence of dispersants and dispersed oil in actual Prince William Sound/Gulf of Alaska conditions. The council is participating in design of a study to resolve these questions.

More generally, the council is concerned that the oil industry may not be able to import spill-response equipment from outside the Prince William Sound region with the rapidity and in the quantities called for in the contingency plans. In a September 1998 drill, BP demonstrated it could import and deploy limited quantities of equipment from outside the region, but the council will continue to press government regulators to ensure the industry can perform on the scale required in this area.

NEARSHORE RESPONSE

Some of the changes since 1989 put more emphasis on shoreline protection, identification of sensitive areas such as hatcheries, and wildlife protection. A new term was coined – Nearshore Response – to describe the effort to protect shorelines threatened by spilled oil that has escaped initial containment.

Nearshore response is a major component of spill response, in which local personnel, knowledge and resources can be used to protect critical resources and shorelines. Industry groups, the citizens' council and regulatory agencies have worked cooperatively to develop nearshore response plans.

Local fishing vessels are part of Alyeska Pipeline's planned nearshore response. They are used, among other things, to transport response equipment, deploy and tend boom, and mobilize pre-staged equipment to protect fish hatcheries. Alyeska Pipeline has provided response training to over 300 fishing boats and their crews. The fishing vessels, based in communities in Prince William Sound, the Kenai Peninsula and Kodiak Island, are under contract with Alyeska Pipeline to respond to spills if willing and available at the time of an incident.

The oil industry has stockpiled spill containment and removal equipment at five fish hatcheries in Prince William Sound and at five community response centers that have been established in the Sound. They are at Chenega, Cordova, Tatitlek, Whittier and Valdez.

Two similarly equipped centers have been set up outside Prince William Sound. They are in Kodiak and Seldovia, and were established by the communities and the state of Alaska.

Each center provides manpower, equipment, and coordination of emergency responses. Response training for fishing vessel operators is provided by the industry, the state of Alaska, the Coast Guard and the communities themselves.

Storage capacity for recovered oil was a problem in the 1989 recovery effort, when only a single barge with room for 500,000 gallons of oil was available. Boats would pick up the emulsified oil, only to find there was nowhere to put it. Alyeska Pipeline now maintains storage capacity, much of it on barges, for over 34 million gallons of recovered oil and water mixture. However, the availability of adequate storage for recovered oil is still an outstanding question. The citizens' council has requested demonstrations to verify that lack of storage won't hinder nearshore oil recovery operations.

The oil industry is much better prepared today for nearshore response than it was a decade ago, but there is still room for improvement. The council believes the latest versions of the plans aren't specific enough about where boats and other equipment for nearshore response will come from. In particular, the council believes the full implementation of the nearshore plans as written would require the use of more commercial fishing vessels than are likely to be available at one time.

DRILLS, MANAGEMENT AND OTHER ASPECTS OF RESPONSE

Spill drills enable response personnel to become knowledgeable and proficient in the strengths and weaknesses of equipment and procedures. Before

1989, there were no major oil spill drills; today, major drills are conducted once a year, with frequent smaller drills. The major drills include state and federal agencies, fishing vessels, tanker owners and operators and the citizens' council.

An important aspect of spill response implemented since 1989 is use of the National Interagency Incident Management System, an incident command system first developed by fire fighters in California to coordinate management, resources and roles during an emergency response.

In Alaska, this approach integrates the party responsible for the spill, the state and the Coast Guard in a unified command structure that expands according to need. It also establishes a predetermined decision-making process and a common language that significantly reduces confusion and misunderstandings among personnel from different organizations. This structure has been adapted by industry and government agencies to define and coordinate their roles and responsibilities in the event of a spill. The Incident Command System has been tested and practiced extensively in drills.

The Incident Command System's need for quick, wide-ranging communications is supported by a radio repeater system installed to cover Prince William Sound, Cook Inlet and parts of the Gulf of Alaska.

STATE FUNDING FOR SPILL RESPONSE

After the Exxon Valdez oil spill, an existing spill response fund was expanded to ensure that reserves would be available for a major oil spill and to provide a long-term funding source for the state of Alaska's spill prevention and response programs. The money for this expanded role comes from a 5-cent conservation surcharge on every barrel of oil produced in Alaska. The surcharge drops to 3 cents when the reserve set aside for oil-spill response reaches $50 million; if the reserve is drawn down in an actual response, the surcharge rises to 5 cents again until the reserve is replenished.

FEDERAL FUNDING FOR SPILL RESPONSE

To ensure that money will be available to pay for responding to and cleaning up major spills nationwide, the federal Oil Pollution Act required establishment of a $1 billion oil spill liability trust fund, funded by the oil industry.

The Oil Pollution Act strengthened federal authority to order spill cleanup action and requires the Coast Guard to direct spill response actions when any spill poses a risk to public health or safety. It also provides tougher criminal penalties and higher civil penalties for the spiller.

COMMUNITY IMPACTS

Technological disasters, such as the Exxon Valdez spill, disrupt communities in many ways.

The most obvious and tangible disruptions occur to the ordinary flow of goods, services, and jobs. For example, the spill created thousands of high-paid jobs in cleanup work. As a result, ordinary employers in communities – village stores, Native corporations and city governments – lost workers and found it even harder to function normally during the crisis.

These kinds of disruptions are highly visible and usually straightforward to remedy. But disasters also damage communities in ways that are less obvious and longer-lasting.

For example, studies of Prince William Sound communities indicate that mental health problems caused by the Exxon spill still linger a decade after the event.

In 1989, there was no plan for helping communities deal with such problems.

Today, the citizens' council is applying the results of several years of socio-economic research to produce a guidebook explaining how communities can deal with technological disasters. Some strategies: a newspaper education program; training for community professionals such as school teachers, clergy, police and mental-health counselors; and even training so that community members can provide basic mental-health counseling to each other.

With the guidebook's assistance, the council hopes communities and individuals will be able to understand what a technological disaster is, how it differs from a natural disaster, what to expect during the disaster, and how to find help. The guidebook will be available in 1999.

III. OPERATIONAL POLLUTION - PROTECTING THE ENVIRONMENT WHEN THERE'S NOT A SPILL

While it was the Exxon Valdez accident that focused world attention on Prince William Sound 10 years ago, a catastrophic spill is not the only risk posed by the crude oil trade. The Sound and its residents are also at risk of pollution from routine operations – such things as small spills of crude oil or refined products by tankers and other vessels at the Valdez terminal, leaks or permitted discharges from the terminal itself, air pollution, and even the invasion of Prince William Sound by non-native sea life.

LONG-TERM ENVIRONMENTAL MONITORING

In 1993, the citizens' council started long-term environmental monitoring at nine sites in Prince William Sound and the Gulf of Alaska. The sites are monitored for hydrocarbons in the water and sediment. Samples are collected in summer and late winter. Results are presented in an annual report.

This information provides a benchmark for assessing the ongoing impacts of routine tanker and terminal operations. In addition, it will permit a better before-and-after assessment of the impacts if there is another catastrophic spill.

BALLAST WATER TREATMENT

Tankers arriving in Valdez carry ballast water in the same tanks used to haul crude oil south. This water, which picks up oil from the residue in the tanks, has to be off-loaded before the ships can take on a new cargo of crude oil.

A facility at Alyeska's tanker terminal receives this oily seawater, treats it, and discharges it into Prince William Sound at the rate of 16 million gallons a day.

The environmental effects of this wastewater, which carries traces of oil even after treatment, has been a concern for local citizens since oil first flowed through the Trans-Alaska Pipeline.

In the decade since 1989, the treatment plant has been improved, meaning less oil in the treated water going into the Sound. The levels of the most harmful compounds in the treated ballast water have fallen dramatically.

Still, the news is not all good. Oil is present in bottom sediments near the treatment facility, and in some "hot spots," organisms that live in those sediments are dropping in number and variety. And the facility continues to release petroleum vapors into the air, including cancer-causing benzene, from its basins and tanks.

In early 1999, Alyeska was working with the citizens' council and regulators to map the zone of contaminated mud. And the company agreed to put a device on the treatment plant's outlet pipe to continuously monitor the amount of petroleum hydrocarbons being discharged into public waters.

VAPOR CONTROLS

When tankers load crude oil at Alyeska Pipeline's Valdez terminal, thousands of tons of oily vapors containing the potent cancer-causing chemical benzene are forced out of their tanks. For two decades after oil first flowed through the trans-Alaska pipeline in 1977, those vapors were vented to the air, creating a health hazard for workers at the terminal and nearby residents.

In early 1998, Alyeska Pipeline activated equipment that captures those vapors and either burns them or pumps them into the crude oil storage tanks at the tanker terminal.

The citizens' council was a long-time advocate of vapor controls, and was pleased with the federal government's decision to require them at two of the terminal's four tanker berths.

However, the state of Alaska's official projections of future North Slope oil production have increased since the vapor control project began. The council now believes that oil production may exceed the handling capacity of the two berths equipped with vapor controls.

Accordingly, the council has called on Alyeska Pipeline to install vapor controls at a third berth. As of early 1999, the company was still analyzing the need for the third control system.

ALIEN INVADERS

Some ports, including the Great Lakes and San Francisco Bay, have been invaded by species not indigenous to the area. These non-indigenous species can compete with native species and cause severe ecological and economic damage. One example is the zebra mussel, a fresh-water species blamed for clogging intake pipes and displacing native species in many parts of the Lower 48.

The citizens' council has an ongoing project to study whether Prince William Sound is at risk of being colonized by non-indigenous species arriving in the ballast water of oil tankers.

Such invaders often arrive in the ballast water carried from one waterway to another by tankers and other large ships, raising concerns that the millions of tons of ballast water flushed from oil tankers could result in similar problems in Prince William Sound.

In 1997, the citizens' council and several cosponsors began a study of the invasion risk in Prince William Sound. The council's pilot study showed that plankton are abundant and diverse in the arriving ballast water and that some are not indigenous to Prince William Sound. The consultants doing the study concluded the Sound is at risk of invasion as a result, and the study was extended into 1999.

This effort includes further investigation into the content and management of ballast water as well as collection and analysis of samples from the Sound to see what non-indigenous species have already become established.

Further, the American Petroleum Institute contributed money to study whether exchanging ballast water at sea is a practical way of keeping non-indigenous species out of the Sound, and tanker companies have supported the effort with test exchanges during their trips north. This technique is of interest because mid-ocean waters typically carry fewer organisms than coastal waters, and mid-ocean species tend not to thrive if discharged near shore.

CONCLUSION:

CITIZEN INVOLVEMENT – A NEW TOOL FOR COMBATTING COMPLACENCY

Perhaps the most radical innovation to come out of the Exxon Valdez oil spill was the establishment of permanent, industry-funded citizens' councils to oversee both the oil transportation industry and its government regulators.

Before 1989, there was no mechanism, other than public hearings by regulatory agencies, for citizens to advise the oil industry or otherwise speak directly on operations affecting their communities and livelihoods. Earlier attempts by Prince William Sound residents to give their input to oil industry representatives were generally met with negative responses.

That began to change in the summer of 1989, when then-Alyeska Pipeline President James Hermiller actively supported formation of the Prince William Sound Regional Citizens' Advisory Council with Alyeska funding.

The citizens'-council concept was written into federal law in 1990, when Congress identified complacency on the part of the oil industry and government regulators as a root cause of the Exxon Valdez spill. In the Oil Pollution Act of that year, Congress mandated citizens' councils for Cook Inlet and Prince William Sound as a tool to prevent that complacency from re-emerging as memories of the spill faded.

The citizens' councils are the third leg of a tripod supporting safer oil transportation, the other two being industry and government.

While each of the three legs has an interest in environmental safety, the citizens' councils are unique in having no mission except promoting safety and informing the public about it, while industry and government must manage competing missions.

Industry must balance the need for environmental protection against the pressure for profits, while government agencies are always subject to political pressure to promote economic development and minimize the regulatory burden on industry.

The citizens' councils, by contrast, are relatively free from political and financial pressure.

For the Prince William Sound citizens' council, our long-term contract with Alyeska provides a fairly stable base of funding. At the same time, our advisory role and our diverse, community-based board largely insulates us from direct lobbying and the other usual forms of political pressure. We are immediately accountable to those we represent, the people and groups with the most to lose from another catastrophic oil spill in Prince William Sound. They include communities and interest groups in a region stretching from the Sound itself to Kodiak Island to lower Cook Inlet – all areas that were touched by oil from the Exxon Valdez spill.

Our influence depends on the quality of our analytical work on oil transportation safety, not on regulatory powers or political connections.

None of this can guarantee that complacency will not set in again, but we do serve as an early warning system to alert industry, government and the public of problem areas.

We monitor terminal and tanker operations, we conduct independent research and we advise industry and government on ways to prevent oil spills and respond effectively if spills do occur.

One of our jobs is to monitor the adequacy of spill response, so we participate in drills and actual responses in several ways. Our representatives convey local concerns, advice and observations to the officials managing the response. They also help communicate developments in the response effort to local communities.

By 1995, the safeguards adopted after the Exxon Valdez spill had reduced the likelihood of another such accident by 75 percent, according to a risk assessment study of tanker operations in the Sound.

Many risks remain and there is still room for improvement, of course, but this should not obscure the very substantial overall progress made by industry, regulatory agencies and the citizens we represent.

We at the Prince William Sound Regional Citizens' Advisory Council believe Alaska's people and environment are better protected from marine oil spills today than they were in 1989. We intend to do all in our power to make sure this is still true on March 24, 2009, the 20th anniversary of the Exxon Valdez tragedy.

* * *

Importance of Maintaining the Prince William Sound Escort System for Double-Hulled Tankers

Report to
Prince William Sound Regional Citizens' Advisory Council

[All Pictures And Maps Omitted In Printing]

December 3, 2004

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Importance of Maintaining the Prince William Sound Escort System for Double-Hulled Tankers

Report to the
Prince William Sound Regional Citizens' Advisory Council
December 3, 2004

Introduction

The Prince William Sound tanker escort system is one of the most significant prevention programs in place to prevent oil spills from laden tankers transiting Prince William Sound (PWS). Laden oil tankers are escorted by two high-powered tugs, in varying configurations, from the time they leave the dock at the Valdez Marine Terminal (VMT) until the tanker has transited safely into the Gulf of Alaska.

The Oil Pollution Act of 1990 (OPA 90) mandates that "single hulled tankers over 5,000 gross tons transporting oil in bulk shall be escorted by at least two towing vessels" as they travel through areas of PWS.[1] U.S. Coast Guard regulations at 33 CFR 168 implement this requirement by outlining the responsibilities of tanker operators, defining the specific geographic bounds of the escort system, and establishing operational standards and performance requirements for laden tankers and escort tugs.

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[1] P.L. 101-380, Section 4116(c).

The Vessel Escort and Response Plan (VERP), which was developed by the PWS tanker owners, has been approved by the Coast Guard as the plan of operations for the PWS escort vessels. The introduction to the VERP states that the plan is "designed as a port specific plan to provide information regarding the capabilities of the Prince William Sound Escort vessels and operating procedures for the effective use of these escorts in the event of an equipment failure aboard the tanker."[2]

Issue Summary

The federal statutes and regulations that require the operation of the PWS tanker escort system specify that escort tugs are required for single-hulled, laden tankers only.[3] However, the introduction to the VERP implies that the escort system shall be utilized by all laden tankers, regardless of hull configuration: "These procedures apply to all tankers operating in Prince William Sound."[4]

Federal law calls for the phase out of all single-hulled oil tankers trading at US ports by 2010, and the phase out of older double-bottomed vessels by 2015.[5] According to industry estimates, the Trans-Alaska Pipeline Service (TAPS) tanker fleet will be comprised of 100% double-hulled vessels by as early as 2007, and many of these vessels will have redundant safety and operating systems. At that point, the disposition of the federal requirement for the PWS escort system is unclear. The VERP language suggests that the system is intended for operation beyond single hull phase out, but there is no clear regulatory guidance. As the system currently operates, the same escort configuration is applied for all laden tankers, even the newer double-hulled, redundant tankers. PWSRCAC appreciates and commends the TAPS shippers for adhering to the existing PWS escort system for double-hulled tankers by recognizing that two escort vessels assigned to each laden tanker (single or double hull) is a best practice.

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[2] *Vessel Escort and Response Plan*, Alyeska-SERVS, 2001.

[3] 33 CFR 168.20 and P.L. 101-380, Section 4116(c).

[4] *Vessel Escort and Response Plan*, Alyeska-SERVS, 2001.

[5] 46 USC Sec. 3703a.

Because of this ambiguity regarding the long-term operation of the PWS tanker escort system, which is such a critical safety and prevention measure, Prince William Sound Regional Citizens' Advisory Council (PWSRCAC) has developed this report to confirm its strong support for the continued operation of the escort system in its present configuration and to recommend potential avenues for ensuring its continued operation.

Discussion

Description of PWS Escort System

Escort vessels are typically high-powered tugs that are assigned to a specific tanker during its transit through a specific water body. The Prince William Sound escort vessels have several important functions. They watch for and report any sign of problems with a tanker and are available to assist if a tanker encounters trouble. They also provide the first response should a spill occur. The escort vessel system is further strengthened by safety measures that include speed limits and weather restrictions.

The 2001 VERP describes the operation of the PWS escort system for laden and ballasted tankers. Several different types of escort vessels are described.

- An **escort vessel** is any vessel that is assigned and dedicated to a tanker during escort transit and is fendered and outfitted with towing gear.
- An **escorting response vessel** is a vessel fitted with skimming and onboard storage capabilities practicable for the initial oil recovery planned for a cleanup operation.
- An **enhanced tractor tug (ETT)** refers to the Prince William Sound class tugs.
- **A Hinchinbrook tug** is a vessel capable of ocean escort and rescue service. The vessel is stationed in the vicinity of Hinchinbrook Entrance (HE) to provide assistance as a sentinel escort for tankers in ballast transiting HE, and laden tankers transiting into or out of the Gulf of Alaska to 17 miles off Cape Hinchinbrook. This vessel may also be utilized

as a close escort for laden tankers transiting through HE.

- **A primary escort** is a PWS class (ETT) or Prevention and Response class tug (PRT). A Protector class tug may be the primary escort for tankers 90,000 DWT or less, provided an escorting response vessel is also assigned to the transit.
- **A sentinel escort** is a vessel stationed in Northern Sound, Central Sound, or HE to provide assistance to tankers.

The PWS escort system operates on the basis of several different zones that require different escort vessel configurations and capabilities based on navigational considerations and other risk factors (Figure 1). The normal escort procedures for laden tankers (inbound or outbound) specify that ***at least two*** escort vessels must be assigned to each laden tanker transiting the Sound. As described above, the primary escort must be an ETT or PRT, in most cases. An escort vessel that is fitted with skimming and onboard storage capability must either be part of the escort convoy or be pre-positioned on sentinel duty during the transit.

In the Northern Prince William Sound zone, two escort vessels must maintain close escort (within ¼ nm of the tanker), except when one of the escorts is also serving as an ice scout. The primary escort must be tethered to the laden tanker as it transits Valdez Narrows.

In the Central Prince William Sound zone, the primary escort must maintain close continuous contact (within ¼ nm of the tanker), while the second escort may be a sentinel vessel stationed underway off Bligh Reef or east of Naked Island, or off Montague Point, based on the tanker's location in the Sound.

At Hinchinbrook Entrance, outbound laden tankers must maintain two close (within ¼ nm of the tanker) escorts. The Hinchinbrook tug may serve as one of these escorts. Inbound laden tankers must have two vessels in close escort beginning before they cross the line between Cape Hinchinbrook Light and Seal Rocks.

Once an outbound laden tanker reaches Hinchinbrook Entrance, a sentinel escort is stationed underway between Cape Hinchinbrook and Seal Rocks until the tanker reaches a point 17 miles seaward of Cape Hinchinbrook.

Escort System Protects Against Spills Caused by Human Factors

The U.S. Coast Guard estimates that nearly 85% of oil spills and marine accidents can be attributed to human factors – either individual errors or organizational failures.[6] Technological improvements such as double hulls can reduce the severity of an oil spill caused by grounding, collision, or allision, but they cannot interrupt the chain of events that may cause the accident to occur in the first place. Redundant steering or propulsion systems increase the chances of recovering from certain navigational emergencies before they can lead to a serious incident, but these systems are only as good as the people that operate them. As new technologies come online, they create the need for new training and job aids to ensure that human operators put the technology to use properly. In coming years as double-hulled oil tankers are phased in, the human element will continue to be a significant risk factor.

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[6] USCG. 1998. Safety: We are the enemy. Safety Alert. http://www.uscg.mil/hq/g-m/moa/docs/sa0998.htm accessed 9/14/04.

In a recently published article, the Coast Guard historian writes, "Technology has eliminated or greatly reduced many of the other variables that have historically created the circumstances for shipwrecks and maritime disasters." Yet, despite these advances, "casualties caused by human error such as the Feb 4, 1999 grounding of the Panamanian-flagged bulk carrier *New Carissa* will continue."[7] This sentiment, that advances in technology and engineering cannot overcome the proclivity for human error, is repeated in countless publications about marine accidents in general, and oil spills in particular.

The significant role of human and organizational error as an oil spill cause is directly relevant to the issue of maintaining the PWS tanker escort system. As more and more double-hulled, redundant tankers are phased into the vessel fleet, it is possible that the Prince William Sound shippers may suggest that the prevention gains realized through these mechanical and technological improvements somehow justify a reduction in the configuration of the PWS escort system. This would amount to a major step backward in spill prevention.

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[7] Browning, R.M. Jr. "Ship Ashore: An Overview of Marine Vessel Casualties" *Proceedings of the Marine Safety and Security Council of the U.S. Coast Guard* Vol 61, No. 1, Spring 2004.

A 1998 study by the National Research Council (NRC) confirmed that advances in vessel technology, such as double hulls and redundant systems, do not erase the need for additional prevention measures.[8] The NRC report considered the results of outflow analyses, which attempt to measure the prevention value of double hulls by assessing how oil outflow might be reduced or avoided in an incident involving a double-hulled vessel as compared to a single hull. These outflow analyses showed that four out of every five oil spills attributable to collisions and groundings would be eliminated, and a two-thirds reduction would be realized in the total volume of oil spilled from collisions and groundings. These predictions validate the popular belief that double hulls have a significant and positive effect on reducing the risk and the severity of oil spills, however they also show that double hulls are not a perfect prevention measure, thus enforcing the need to continue with other prevention programs.

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[8] NRC, 1998. *Double Hull Tanker Legislation: An Assessment of The Oil Pollution Act of 1990.* National Academy Press, Washington, D.C. See a full analysis of the human factors issue in DeCola, "In Search of the Double Hull Mariner: Assessing the Contribution of Human Factors to Oil Spills from Vessels and Measuring the Effectiveness of Prevention Programs," report to PWSRCAC, November 2004.

The PWS tanker escort system is currently utilized by double-hulled, redundant tankers that trade at the Valdez Marine Terminal. Since the escort system has been in place, there have been no major oil spills from PWS tankers, and 2003 was the first spill-free year for PWS tankers since the pipeline was built, with not a single drop of crude oil spilled in the Sound by the TAPS tanker trade. The escort system certainly contributed to this success, and there is no reasonable justification for removing or reducing such an effective, proven prevention program.

Escort System Provides National Security Benefit

As national attention is increasingly focused on issues of port security, it is important to recognize the value of the PWS tanker escort system as a security measure. By facilitating the safe passage of laden tankers through the Sound, the escort system protects against the potential for accidents caused by a number of factors, including acts of war or terrorism. The escort tugs have rescue and assist capabilities that may save a vessel, her crew, and cargo in the event of a security incident.

Conclusions

Ensuring Continued Operation of the PWS Escort System

The only way to ensure the continued operation of the PWS escort system is through a legal or regulatory imperative. It is essential that such a directive specify that the system continues to operate in its current state where two escort vessels are assigned to each laden tanker in varying configurations depending upon location in PWS.

There are several potential mechanisms for creating this imperative. The U.S. Coast Guard could develop new regulations or amend existing regulations at 33 CFR 168 to specify that the two escort system in PWS applies to double-hulled and redundant tankers as well as single-hulled vessels. The State of Alaska could also develop such a requirement through the rulemaking authority of the Department of Environmental Conservation. A states' right to regulate escort vessels in well-defined geographic areas based on special considerations is borne out in U.S. case law through United States v. Locke, 529 U.S. 89 (2000) and *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978).

Until a regulatory solution is implemented, the Coast Guard Captain of the Port (COTP) in PWS could use his authority to implement a Regulated Navigation Area that requires the escort system to operate in its current configuration, or he could develop a COTP directive that requires each individual tanker operator to continue to comply with the escort system as currently configured.

Recommendations for PWSRCAC Position

In order to express support for the continued operation of the PWS tanker escort system in its current configuration, PWSRCAC should consider adopting the following position.

> "Maintaining a strong and reliable escort fleet and preserving the practice of requiring two escorts for laden tanker transits is essential to the safe transportation of oil in Prince William Sound. As the TAPS tanker fleet composition moves toward full compliance with the Oil Prevention Act of 1990 double hull requirements, the risk of another major tanker spill to the waters of Prince William Sound will decrease. But it would be dangerous and imprudent to allow these improvements in vessel engineering to replace proven prevention programs that have been implemented in the years since the *Exxon Valdez* spill.
>
> The Prince William Sound tanker escort system safeguards against oil spills caused by navigational errors, severe weather, and human or organizational failure. The Prince William Sound Regional Citizens' Advisory Council, as part of its mission to promote the environmentally safe operation of the Alyeska Pipeline marine terminal in Valdez and the oil tankers that use it, supports the continued operation of the PWS tanker escort

program in the configuration described in the 2001 Vessel Escort and Response Plan, whereby: two escorts stay in close configuration through Northern Prince William Sound with the primary escort tethered through Valdez Narrows; one close escort and a sentinel are assigned through Central Prince William Sound; two close escorts are maintained through Hinchinbrook Entrance; and a sentinel is stationed until a laden tanker reaches a distance of 17 miles seaward of Cape Hinchinbrook."

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IN THE
Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,
Petitioners,

v.

GRANT BAKER, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF UNITED STATES SENATOR THEODORE F. STEVENS, UNITED STATES SENATOR LISA MURKOWSKI, AND UNITED STATES REPRESENTATIVE DON YOUNG IN SUPPORT OF RESPONDENTS

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OTHER AUTHORITIES

David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997).... 9

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S. REP. NO. 92-414 (1971).. 7

Susan J. Buck, UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW (3d ed. 2006)................. 5

Theodore F. Stevens, Erie R.R. v. Tompkins *and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950).. 8

STATEMENT OF INTEREST[1]

Amici curiae Senator Theodore F. Stevens is the State of Alaska's senior member of the United States Senate and a member of the Bar of this Court; Senator Lisa Murkowski is the State of Alaska's junior member of the United States Senate and the only member of Congress born in the State of Alaska; and Representative Don Young is the State of Alaska's lone member of the United States House of Representatives and the only licensed mariner in Congress. The EXXON VALDEZ oil spill of 1989 directly impacted thousands of Alaskans as it disrupted the State's fisheries and other natural resource industries. Over 20,500 of the claimants in this case are residents of the State of Alaska.

Having entered the United States Senate in 1968, Senator Stevens was involved with the Clean Water Act from its earliest stages of development. He co-sponsored the Magnuson-Stevens Fishery Conservation and Management Act of 1976, the primary law governing marine fisheries management in United States federal waters, and sponsored the 1996 and 2006 amendments to that Act. Senator Murkowski, as someone who was born and raised in Alaskan coastal fishing communities, and as a member of the Senate Energy and Natural

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than the *amici* made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Resources Committee, has a unique interest in helping to ensure that the adverse impacts of the EXXON VALDEZ oil spill are adequately and rightly redressed. Representative Young has served as a member of the Merchant Marine Fisheries Committee; Chairman of the House Transportation and Infrastructure Committee, with jurisdiction over the Clean Water Act; and is the current Ranking Member and former Chairman of the House Natural Resources Committee, with jurisdiction over domestic and international fishery issues.

Each member of Alaska's Congressional delegation has been a champion of commercial and subsistence fishermen, as well as the coastal communities in Alaska that depend on marine resources for their survival. Petitioners' reading of the law would jeopardize the interests of Alaskans and would run contrary to the collective efforts of Congress in protecting our Nation's navigable waters, holding violators accountable for their actions, and providing redress to those harmed. For these reasons, *amici curiae* urge the Court to affirm the judgment of the court of appeals.

SUMMARY OF THE ARGUMENT

The Clean Water Act (CWA) does not preclude the federal maritime common law remedy of punitive damages. In order to preempt long-established common law principles, a statute must provide clear intent to do so and speak directly to the question that the common law addresses. Moreover, when enacting legislation, Congress is presumed to be aware of and supplementing—not supplanting—existing damages frameworks.

Punitive damages have been available under maritime law since the earliest years of admiralty litigation. Neither the CWA itself, nor its legislative history, indicates that Congress intended to revoke Respondents' access to punitive damages. In fact, the CWA states that vessel owners and operators retain all obligations, under any provision of law, to persons suffering damages from oil spills or removals. The Senate and House Public Works Committee Reports reaffirm the notion that the CWA was intended to build upon, and not undermine, the preexisting foundation of common law remedies.

This case, involving a single, reckless oil spill from a vessel in transit, is distinguishable from cases where the Court has found that the CWA's comprehensive enforcement mechanism for permitted discharges from point sources preempts common law claims that would interfere with the federal effluent standards. Here, Respondents do not seek to modify federal standards, and likewise the CWA does not affect Respondents' right to punitive damages.

ARGUMENT

I. The Clean Water Act Does Not Displace Federal Maritime Common Law Remedies.

A. Neither the Clean Water Act, Nor Its Legislative History, Indicates Congressional Intent to Abrogate Punitive Damages.

Congress began the pursuit of environmental protection of our Nation's waterways with the passage of the Federal Water Pollution Control Act (FWPCA) in 1948. 62 Stat. 1155. Despite later efforts to amend the FWPCA to strengthen its protections and enforcement measures, the legislation proved inadequate in this regard as evidenced by the Cuyahoga River fire of 1969. In response, early in the 92nd Congress, the Senate and House Public Works Committees conducted a number of hearings to address the nation's continuing water quality problems. These efforts culminated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 817, as amended 33 U. S. C. §§1251 *et seq.*, commonly known as the Clean Water Act (CWA). The CWA was heralded as the nation's first comprehensive water pollution legislation, building upon existing law designed to reduce pollution before it began, while "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). The CWA was one of the linchpins of the "Environmental Decade," along with the creation of the Environmental Protection Agency and the Clean Air Act amendments. Susan J. Buck, UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW 26-27 (3d ed. 2006). The general theme of this era's environmental statutes rarely allowed industry a means of escape from any form of liability.

Despite the importance of reforming our Nation's federal water pollution laws, passage of the CWA was by no means ensured. Destined to be vetoed by President Nixon, an environmental statute as far reaching as the CWA required a supermajority in Congress. This was a task of enormous significance, especially for Alaskans. Within its rivers, lakes, streams, wetlands, and coastal waters, the State of Alaska possesses a greater overall amount of water than any other state in the Union. The CWA had the potential to impact Alaska and Alaska's people more than any other state and its citizens. Consequently, members of Alaska's Congressional Delegation worked closely with their colleagues throughout the legislative process.

The notion that the CWA altered or replaced common law concepts regarding punitive damages, as alleged by Petitioners in this case, is not supported by the record. The statute itself, as well as the committee reports, evidence this. The simple truth is there is no record of debate on the CWA indicating the intent to cancel the rights of injured parties to seek punitive damages.

Unlike the original 1948 legislation that provided no federally required goals, objectives, limits, or even guidelines, the CWA as we know it today has the stated goal of maintaining and restoring our Nation's waters, and aspires to achieve fishable and swimmable status through discharge regulation and assurance of available federal cleanup funds. 33 U.S.C. §§ 1251 *et seq.* Since 1972, section 1321 of the CWA has operated as the chief mechanism for establishing liability for oil spill damages. *See* 33 U.S.C. § 1321. While this section carries with it certain maritime law implications, at no point does Congress indicate any preemption of maritime or common law remedies, including punitive damages, for oil spills.

Legislation that implicates the common law or general maritime law should be read with a presumption that nothing therein should alter long-established and familiar principles, except when a contrary statutory intent is evident. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). For a statute to abrogate a common-law principle, the statute must "speak directly" to the question that the common law addresses. *U.S. v. Tex.*, 507 U.S. 529, 534 (1993) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *Milwaukee v. Ill.*, 451 U.S. 304, 315 (1981)). Particularly in the area of redress, Congress is presumed to be aware of and not overriding existing rights to damages relative to the legislation it enacts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

To avoid the appearance of conflicting liability regimes, Congress specified in the CWA that vessel owners and operators would retain all obligations, under any provision of law, to persons suffering damages from oil spills or removals. 33 U.S.C. § 1321(o)(1). Referring specifically to this provision, the Senate Public Works Committee noted that the modifications to existing law merely "*add liability* for the clean-up of any hazardous material discharged." S. REP. NO. 92-414, at 65 (1971) (emphasis added). The added cleanup liability established a contingency fund, the existence of which expressly does not affect a discharger's liability for all resultant damages. H.R. REP. NO. 95-139, at 26 (1977).

Likewise, the CWA's citizen suit provisions plainly read that the statute does not restrict any common law rights or any other relief. 33 U.S.C. § 1365(e). The Senate Committee Report expressly reinforced this principle:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

S. REP. NO. 92-414, at 81 (1971).

The plain reading of the CWA is consistent with the legislative history. Furthermore, at no point in the statute, or in the supporting documents or testimony, are punitive damages so much as given mention, much less eliminated as a remedy. Congress should not be assumed to have displaced punitive damages in favor of any CWA provisions. Congress preserved common law damages, concurrent with and foundational to the additional statutory protections.

B. The Clean Water Act Does Not Bifurcate Remedies for Oil Spills.

Congress undertook the framing of the CWA's oil spill provisions with the understanding that courts would apply the new statute in concert with existing maritime and common law remedies. "It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles . . . ." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970).

Admiralty courts may, in some circumstances, adopt and enforce rights based on common law and state statutes, and courts characteristically do so in a supplementary nature to extend liability where maritime law is inadequate.[2] There is well-documented controversy over exactly when punitive damages are available in claims implicating several areas of maritime, statutory, and common law. *See*

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[2] For an extended historical discussion of the relationship between maritime and common law, see generally Theodore F. Stevens, Erie R.R. v. Tompkins *and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950).

McMonagle v. Northeast Women's Center, Inc., 493 U.S. 901, 902 (1989) (White, J., dissenting). In spite of that controversy, punitive damages have been recognized as generally available since the beginning of American admiralty litigation for reckless or wanton conduct. *See Amiable Nancy*, 16 U.S. 546, 558 (1818) (indicating the general availability of punitive damages in maritime law for cases of "gross and w[a]nton outrage"). Subsequently, courts have seen fit to award punitive damages in maritime property damage cases both under general federal common law and maritime law, indisputably recognizing the availability of such awards in appropriate circumstances. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 160 (1997).

The Court has now specified—and limited—areas where federal pollution legislation preempts certain torts. In *Middlesex County*, a private nuisance action for the intentional, repeated discharge of pollutants (mainly sewage from stationary sources subject to permitting requirements), was preempted by the FWPCA. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (citing 33 U.S.C. §§ 1251 *et seq.*) In that case, however, the Act's elaborate enforcement mechanism directly addressed the underlying problematic activities. *Id.* at 13-14. Essentially dealing with scheduled effluent discharge, *Middlesex County* amounted to a nuisance suit where the Court determined congressional indicia within FWPCA to be adequate in providing remedies for such nuisance. *Id.* at 15.

Here, Respondents' punitive damages suit is distinguishable due to its contrasting attributes of a reckless, single incident discharge of oil from a vessel in transit, for which there are no "effluent standards" or permits under the CWA. Furthermore, it would be a gross understatement to term the EXXON VALDEZ spill a mere nuisance. As evidenced by the record, Exxon's action in placing a known, relapsed alcoholic at the helm of a supertanker carrying fifty-three million gallons of crude oil constitutes the willful and wanton misconduct recognized by this Court in *Amiable Nancy,* 16 U.S. 546, and its progeny as permitting the award of punitive damages.

Even under a nuisance claim reading, the Court has more recently held that the CWA does not preempt state common law nuisance claims, with the rare exception of those suits that could require standards of effluent control that are incompatible with the federal standards. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-97 (1987). In *International Paper*, property owners sued a paper mill operator under Vermont state law for creating the sustained nuisance of pollutants discharged into Lake Champlain, for remedies including $100 million in punitive damages. *Id.* at 484. The Court declined to bifurcate CWA relief and separate state punitive damages from state compensatory damages, finding "no suggestion of such a distinction in either the Act or the legislative history". *Id.* at 499 n.19. The Court held that unless Congress meant to "split" a particular remedy for preemption purposes, the full availability of any cause of action under state law is assumed. 479 U.S. at 499 n.19 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)). This Court in *International Paper* agreed with Congress that the full scope of tort remedies, including punitive damages, are preserved where, as in this case, the common law action is not in conflict with the statutory regime. *Id.*

In the present case, Respondents did not pursue Exxon for a violation of the CWA. Rather, they brought this tort action against Exxon for its demonstrably reckless and wanton conduct in spilling over eleven million gallons of crude oil into Alaska's pristine waters and directly impacting the lives and livelihoods of Alaskans. The CWA's standards have no effect on the Respondents' right to recovery. Here, the CWA expressly allows for full and concurrent recovery of punitive damages.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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AMICUS
CURIAE
BRIEF

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SUPREME COURT, U.S.

In the Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL., PETITIONERS,

v.

GRANT BAKER, ET AL., RESPONDENTS.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR *AMICI CURIAE* TRANSPORTATION INSTITUTE, INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS, INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS, AND OVERSEAS SHIPHOLDING GROUP, INC. IN SUPPORT OF PETITIONERS

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CASES

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Am. Dredging Co. v. Miller,
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Am. Soc'y of Mech. Engineers, Inc. v. Hydrolevel Corp.,
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The Amiable Nancy,
16 U.S. 546 (1818) .... *passim*

Boudoin v. J. Ray McDermott & Co.,
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Boyle v. United Techs. Corp.,
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California v. Deep Sea Research, Inc.,
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CEH, Inc. v. F/V Seafarer,
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Chamberlain v. Chandler,
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Conaco Inc. v. Skinner,
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Petition of Den Norske Amerikalinje A/S, 276
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United States Steel Corp. v. Fuhrman, 407
F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S.
958 (1970) 10, 29

Edmonds v. Compagnie Generale
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Executive Jet Aviation, Inc.
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409 U.S. 249 (1972) 13

Exxon Corp. v. Cent. Gulf Lines, Inc.,
500 U.S. 603 (1991) 12

Flink v. Paladini (The Henrietta),
279 U.S. 59 (1929) 14

Guevara v. Mar. Overseas Corp., 59 F.3d 1496
(5th Cir. 1995) (en banc), *cert. denied,* 516 U.S.
1046 (1996) 5

The H.A. Scandrett,
87 F.2d 708 (2d Cir. 1937) 27

Halcyon Lines v. Haenn Ship, Ceiling
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Page

Indep. U.S. Tanker Owners Comm. v. Lewis,
690 F.2d 908 (D.C. Cir. 1982) 20, 21

Petition of the Kinsman Transit Co.,
338 F.2d 708 (2d Cir. 1964), *cert. denied*,
380 U.S. 944 (1965) 26

Kolstad v. American Dental Ass'n,
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Lake Shore & M.S. Ry. Co. v. Prentice,
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Lewis v. Lewis & Clark Marine, Inc.,
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The Main v. Williams,
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Marine Carriers Corp. v. Fowler,
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McDermott, Inc. v. AmClyde,
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McGuire v. The Golden Gate,
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Miles v. Apex Marine Corp.,
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Mobil Oil Corp. v. Higginbotham,
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Moore v. Am. Transp. Co.,
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Moragne v. States Marine Lines, Inc.,
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Muratore v. M/S Scotia Prince,
845 F.2d 347 (1st Cir. 1988) 10

Norfolk S. Ry. Co. v. Kirby,
543 U.S. 14 (2004) 12

Northwest Airlines, Inc.
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Norwich Co. v. Wright,
80 U.S. 104 (1871) 14

In the Matter of P & E Boat Rentals, Inc.,
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Pacific Packing & Navigation Co. v. Fielding,
136 F. 577 (9th Cir. 1905) 10

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Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985), *aff'g* 585 F. Supp. 1062 (D. Or. 1984) .... *passim*

The Rebecca, 20 F. Cas. 373 (D. Me. 1831) (No. 11,619) 15

Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) 26

Spencer Kellogg & Sons, Inc. v. Hicks, 285 U.S. 502 (1932) 7, 28

The State of Missouri, 76 F. 376 (7th Cir. 1896) 9

Suzuki of Orange Park, Inc. v. Shubert, 86 F.3d 1060 (11th Cir. 1996) 14

Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957) 5

Tittle v. Aldacosta, 544 F.2d 752 (5th Cir. 1977) 17

United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970) 9-10, 29, 30

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Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261 (1968) 12

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 7

Waterman Steamship Co. v. Gay Cottons, 414 F.2d 724 (9th Cir. 1969) 16-17, 28

STATUTES AND LEGISLATIVE MATERIALS

Carriage of Goods by Sea Act, 46 U.S.C. § 30701 note 13, 18

Harter Act, 27 Stat. 445 (1893), currently codified at 46 U.S.C. § 30702-30707 13

46 U.S.C. § 30706(a) 17

Jones Act of 1920, ch. 250, 41 Stat. 988 (1920), currently codified at 46 U.S.C. § 50101 22

Limitation of Liability Act of 1851, 9 Stat. 635, currently codified at 46 U.S.C. §§ 30501-30511 13

46 U.S.C. § 30505 14

46 U.S.C. § 30505(b) 16

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Maritime Security Act of 1996, 46 U.S.C. § 53102 24

Act of March 1, 1817, ch. 31, § 4, 3 Stat. 351 21

Ch. 858, title I, §101, 49 Stat. 1985 (1936) 24

1 Stat. 27 (1789) 21

1 Stat. 287 (1792) 21

S. Rep. No. 66-573 (1920) 22-23

RULES

S. Ct. R. 37.6 1

MISCELLANEOUS

Charles Abbott & Joseph Story, Treatise of the Law Relative to Merchant Ships and Seamen (2d American ed. 1810) 25, 26

American Law Institute, 50th Annual Meeting Proceedings (May 16, 1973) 33

American Law Institute, Restatement (Second) of Torts, Tentative Draft No. 19 (Mar. 30, 1973) 33

Page

2A Benedict on Admiralty (7th ed. 2005) 18, 19

3 Benedict on Admiralty (7th ed. 2005) 13, 16

IV Albert J. Beveridge, The Life of John Marshall (1919) 9

James J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 Tul. L. Rev. 999 (1979) 16, 27

Felix Frankfurter & James M. Landis, The Business of the Supreme Court (1927) 12

Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty (2d ed. 1975) 15-16, 18, 21, 22, 32

Robert L. McGeorge, *United States Coastwide Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of a Global Economy*, 11 NW. J. Int'l L. & Bus. 62 (1990) 20

Wharton Poor, *A Shipowner's Right to Limit Liability in Cases of Personal Contracts*, 31 Yale L.J. 505 (1922) 15, 28

Restatement (Second) of Torts (1979) 4, 32, 33

Restatement (Second) of Agency (1958) 33

Page

1 Linda L. Schlueter, PUNITIVE DAMAGES (5th ed. 2005) 16, 25, 30

1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW (4th ed. 2004) 8, 24

2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW (4th ed. 2004) 13

Bernard Schwartz, A HISTORY OF THE SUPREME COURT (1993) 9

Transportation Institute, *The Jones Act: An American Tradition* (1996) 20

INTEREST OF THE *AMICI CURIAE*[1]

The Transportation Institute was established in 1967 as a Washington-based, non-profit organization dedicated to maritime research and promotion. The Institute advocates and works for sound national maritime policy to help maintain America's political and economic strength and national security. The Institute is comprised of companies that participate in the nation's deep sea foreign and domestic shipping trades, and barge and tugboat operations on the Great Lakes and on the 25,000 mile network of America's inland waterways. All Transportation Institute companies operate U.S.-flagged vessels crewed by American citizens, and the Institute recognizes that an adequate and well-trained work force of seafarers and other maritime employees is essential to the maritime industry.

The Transportation Institute believes that a balanced, competitive, and efficient waterborne transportation system is indispensable to America's economy and security. A privately-owned, citizen-crewed, U.S-flagged merchant fleet has been the foundation for the commercial and military success of this nation in times of peace and of war. Excessive punitive damages awarded against U.S.-flag vessel owners, especially if imposed vicariously, such as the staggering $2.5 billion punitive-damages award at issue in this case, threaten the continued viability of the U.S. fleet that the Transportation Institute promotes in the interests of U.S. commerce and national defense.

---

[1] Petitioners and respondents each have filed a blanket consent with the Clerk. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The International Association of Independent Tanker Owners ("Intertanko") is an unincorporated, not-for-profit association of independent tanker owners and operators. Its independent members, which are neither owned nor controlled by cargo owners such as oil companies, operate more than 2,500 vessels representing 70% of the world's independent tanker fleet.

The International Association of Dry Cargo Shipowners ("Intercargo") is an unincorporated, not-for-profit association of owners, operators, and managers of dry bulk cargo vessels. These vessels carry bulk (non-containerized) commodities such as ores and other minerals, grains, steel, coal, and timber throughout the world.

Both Intertanko and Intercargo trade extensively at United States ports on the Atlantic, Pacific, and Gulf coasts and the Great Lakes. As such, they are deeply concerned about maritime liability rules. Moreover, many of their member companies are relatively small, privately held enterprises that cannot sustain large punitive-damages awards.

Overseas Shipholding Group, Inc. ("OSG") is one of the world's leading bulk shipping companies engaged primarily in the ocean transportation of crude oil and petroleum products. OSG owns and operates vessels in both domestic and international maritime commerce, and is the only major global tanker company with a significant U.S. Flag fleet. The company participates, among other things, in the Alaska North Slope Crude Oil Transportation through its 37.5% equity interest in the joint venture, Alaska Tanker Company, LLC.

As the second largest publicly traded tanker company in the world, OSG is substantially concerned that excessive punitive damages, imposed vicariously for the reckless behavior of a vessel's master, would adversely affect the financial position of the company and the entire maritime industry and thus undermine the commercial and national-security interests of the United States.

SUMMARY OF ARGUMENT

From the time of this Court's decision nearly 200 years ago in *The Amiable Nancy*, 16 U.S. 546 (1818), federal maritime law has held that a shipowner is not vicariously liable in punitive damages for the acts of a captain at sea. No circuit has departed from this rule except for the Ninth Circuit in this case based on its prior opinion in *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985).

The rule of *The Amiable Nancy* comports with traditional maritime principles. It also reflects long-established congressional policies (1) to limit the liability of shipowners under legal principles that do not apply in other areas of the law, and (2) to promote the maritime industry in order to further the commercial and national-security interests of the United States. The rule against vicarious punitive-damages liability is firmly grounded in these maritime principles and congressional policies.

The *Amiable Nancy* rule is further supported by the unique and critical role of a captain at sea. Of necessity, the captain must be the absolute master and have undivided authority over the ship under sail. The captain aboard ship must be able to make instantaneous decisions in an emergency that will be promptly and unquestionably obeyed. A captain has never been, and cannot be, expected to confer with the owner on land to have his orders reviewed or approved. The Ninth Circuit's ruling, by imposing liability and therefore responsibility on the owner for the acts of the captain at sea, is irreconcilable with the captain's settled and essential duty.

Finally, the Ninth Circuit erred in adopting as a matter of federal maritime law the vicarious-liability provision of the RESTATEMENT (SECOND) OF TORTS. The Restatement has no basis in maritime law and indeed by its terms does not apply where, as in admiralty, special legal rules exist. Furthermore, the Ninth Circuit, by resting its ruling on its own policy view that broad corporate liability for punitive damages is desirable, far exceeded the proper role of even a common-law court to determine the law, not to adopt judges' policy preferences in the guise of law.

ARGUMENT

UNDER FEDERAL MARITIME LAW, A SHIPOWNER IS NOT VICARIOUSLY LIABLE IN PUNITIVE DAMAGES FOR THE WRONGFUL CONDUCT OF THE SHIP'S CAPTAIN AT SEA.

I. FEDERAL MARITIME COMMON LAW SHOULD REFLECT ESTABLISHED MARITIME PRECEDENTS AND CONGRESSIONAL MARITIME POLICIES.

Maritime law is a form of federal common law. Accordingly, it should reflect federal policies and be consonant with the laws of Congress. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994); *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1513 (5th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1046 (1996). Maritime law therefore looks to Congress for "'policy guidance.'" *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207 (1994).

As Justice Harlan explained, courts in developing federal maritime common law take account of the "legislative establishment of policy," and such policy becomes part of the "decisional law." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 390-91 (1970); *see also id.* at 392-93, 395 (referring to "the general policies of federal maritime law"). *See also, e.g., Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (courts fashion federal common law "from the policy of our national . . . laws"); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988). Thus, as this Court summarized:

> Admiralty is not created in a vacuum; legislation has always served as an important

> source of both common law and admiralty principles.
>
> * * *
>
> [A]n admiralty court should look primarily to these legislative enactments for policy guidance.

Miles v. Apex Marine Corp., 498 U.S. 19, 24, 27 (1990).

Against this background, the Court usually has recognized the wisdom of entrusting to the legislature rather than to the judiciary fundamental changes in maritime law. *See, e.g., Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272-73 (1979); *Halcyon Lines v. Haenn Ship, Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952); *see also Miles v. Apex Marine Corp.*, 498 U.S. at 36; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26 (1978); *Moragne*, 398 U.S. at 400-02. In this case, it is Congress that is in the better position to determine the applicable facts and weigh the policy and economic considerations in order to decide whether longstanding maritime law should be radically and abruptly upset in the manner done by the Ninth Circuit's decision. Indeed, as Judge Kozinski noted below, "[f]or centuries, companies have built their seaborne businesses on the understanding that they won't be subject to punitive damages [on the basis of vicarious liability]." Pet. App. 291a (Kozinski, J., dissenting from the denial of rehearing en banc). If the maritime law of punitive damages is to be fundamentally altered, Congress is the appropriate branch to do so.[2]

As next discussed, settled maritime law for almost two centuries – save for the singular exception of the Ninth Circuit in this case relying on its previous decision in *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985) – has held that a shipowner is not vicariously liable for punitive damages based on the conduct of its captain at sea. *See The Amiable Nancy*, 16 U.S. 546 (1818); pages 8-11, *infra*. Furthermore, from the founding of the Republic to the present, congressional policy consistently has limited rather than expanded the liability of shipowners and has protected and promoted the shipping industry in order to further the commercial and national-security interests of the United States. *See* pages 11-25, *infra*. And, directly contrary to the Ninth Circuit's position, this Court recognized 75 years ago that in an "emergency ... there is no opportunity of . . . bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying rules and using reasonable judgment." *Spencer Kellogg & Sons, Inc. v. Hicks*, 285 U.S. 502, 511-12 (1932). *See* pages 25-31, *infra*. Only by overturning 200 years of precedent, and by ignoring congressional maritime policies, can this Court uphold the Ninth Circuit's aberrational view of the maritime law of vicarious liability for punitive damages.

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[2] This is particularly true insofar as the sound resolution of the vicarious-liability issue turns on determinations of legislative fact about the maritime industry, including the role of a captain at sea and the captain's relationship to the owner on land. *See* pages 25-31, *infra*. Congress is in a better position than the Court to ascertain and evaluate such factual questions. *See, e.g.*, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985).

II. FEDERAL MARITIME LAW DOES NOT IMPOSE VICARIOUS LIABILITY FOR PUNITIVE DAMAGES ON A SHIPOWNER BASED UPON THE ACTS OF THE CAPTAIN AT SEA.

A. The Established Rule Of Maritime Law Prohibits Vicarious Liability For Punitive Damages.

For hundreds of years, ships have set to sea not under the command and control of their owners but of their captains. During that time, many ships have sunk or caused damage to others in the hazardous and unpredictable conditions encountered at sea. And, unfortunately, some of those accidents have been due to the wrongful conduct of the ship's captain. Yet, prior to the ruling below, *no* shipowner to our knowledge has ever been held vicariously liable for punitive damages based upon the acts of the captain at sea.

It literally is hornbook law that "admiralty cases deny punitive damages in cases of imputed fault." 1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 5-17, at 246 (4th ed. 2004). Thus, although a shipowner may be subject to punitive damages for its own acts if it "participated in or ratified the wrongful conduct" (*id.*), it cannot be held liable in punitive damages for the wrongful acts or omissions of the ship's captain at sea. Accordingly, a shipowner is answerable in punitive damages not vicariously but only if it was itself complicit in the wrongful conduct at issue.

This "complicity" rule was adopted by the Court as federal maritime law in 1818. In *The Amiable Nancy*, the Court held shipowners could be held vicariously liable for compensatory but not punitive damages for wrongful conduct at sea. Writing for a unanimous Court, Justice Story explained that punitive damages would not lie against the owners who were "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree." 16 U.S. at 559.[3] *See also Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893).

Following *The Amiable Nancy*, every circuit to consider the issue, with the sole exception of the Ninth Circuit, has recognized that maritime law does not hold a shipowner vicariously liable for the wrongful conduct of its captain at sea but rather requires some culpability on the part of the owner itself. *See The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) ("[u]ndoubtedly the damages to be awarded must be compensatory, and not exemplary, where recovery is sought against the master for the unauthorized tort of the servant"); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969) ("punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master"), *cert. denied*, 398 U.S. 958 (1970); *In the Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642, 650 (5th Cir. 1989) (specifically rejecting the Ninth Circuit's decision in *Protectus Alpha*; "the principal is liable in punitive damages only if it authorizes or ratifies wanton actions of an agent"); *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995) (denying vicarious liability for punitive damages against vessel owner for acts of "managerial" employees absent "some level of culpability [of the owner] for the misconduct"). *See also Muratore v. M/S Scotia Prince*, 845 F.2d 347, 355 (1st Cir. 1988) ("[i]t would be unfair to punish the charterer when it was not aware actually or constructively of its staff's misconduct and had not encouraged such misconduct").

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[3] Justice Story "has been considered the father of American admiralty law." IV Albert J. Beveridge, THE LIFE OF JOHN MARSHALL 119 (1919). "Early American commercial and admiralty law were largely the creation of [Justice] Story's decisions." Bernard Schwartz, A HISTORY OF THE SUPREME COURT 60 (1993).

United States Steel Corp. v. Fuhrman is particularly instructive. There, the district court, without citation to any supporting maritime precedent, held a shipowner vicariously liable for punitive damages. *See Petition of Den Norske Amerikalinje A/S*, 276 F. Supp. 163 (N.D. Ohio 1969). Relying upon *The Amiable Nancy* and other decisions, the Sixth Circuit reversed, explaining that "punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master." 407 F.2d at 1148.

What is more, the Ninth Circuit itself, more than 100 years ago, recognized the complicity rule under federal maritime law. *See Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577 (9th Cir. 1905) (maritime case holding that company was not liable in punitive damages for wrongful actions of captain at sea). And even before that, lower courts in the Ninth Circuit had applied that rule in maritime. *See McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856) (No. 8,815) (holding, in maritime case, that "damages may be inflamed to teach offenders their duty; but not when the proceedings are against the owners . . . who . . . did not commit or in any manner countenance the wrong").

This longstanding and, but for the Ninth Circuit, otherwise unbroken principle is correct and has been soundly followed by numerous courts. Moreover, as demonstrated in subsections II-B and II-C, *infra*, it properly reflects both congressional maritime policy and the time-honored role and responsibilities of the captain at sea. Finally, as discussed in subsection II-D, *infra*, the Ninth Circuit erred in deviating from the *Amiable Nancy* line of maritime cases in its decisions in *Protectus Alpha* and the present case.

B. The Rule Against Vicarious Punitive-Damages Liability For Shipowners Reflects Congressional Maritime Policy Limiting The Liability Of Owners And Protecting The Maritime Industry In Order To Further The Commercial And National-Security Interests Of The United States.

As discussed above, federal maritime common law should be informed by and consistent with congressional maritime policies embodied in the United States Code. Congress has enacted two categories of legislation that support the established rule of *The Amiable Nancy*. First, it has adopted several acts that limit the liability of shipowners in ways that differ from traditional liability principles applicable in other areas of law. Second, beyond the specific issue of liability, Congress also has passed a variety of statutes to foster broadly the U.S. maritime industry.

These congressional enactments recognize that the U.S. maritime industry is unique in this country and unlike any other economic sector that has been before the Court in previous punitive-damages cases. It is long-established federal policy to promote this industry in order to protect it from undue liability under federal maritime law (*see* section II-B-1, *infra*) and to further our nation's economic and national-security interests (*see* section II-B-2, *infra*). Maritime commerce was "'the jugular vein of the Thirteen States'" as was "'recognized by every shade of opinion in the Constitutional Convention.'" *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (quoting Felix Frankfurter & James M. Landis, THE BUSINESS OF THE SUPREME COURT 7 (1927)). Thus, "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (internal quotation and citation omitted). *See also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004). "Because the shipping industry is vitally important both to our national commerce and national defense, the Federal Government has maintained a special interest in trying to promote its growth and stability." *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 297 (1968) (Douglas, J., dissenting in part).

1. Congress has narrowly limited the maritime liability of shipowners.

A hallmark of federal maritime legislation is the limitation of a shipowner's liability for acts occurring on the vessel at sea. "Limitation of liability [of carriers] is an important theme of admiralty law" and "is accepted as necessary to serve the needs of commercial practicality as well as the shipowner." 2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 15-1, at 136 & n.1 (4th ed. 2004). "[L]imitation of liability" has "long" been a principal feature of "[t]he law of the sea." *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 270 (1972). Furthermore, this principle of limited liability "springs from the general maritime law"; "[i]t was not recognized either by the [general] common law or by the civil law." 3 BENEDICT ON ADMIRALTY § 4, at 1-31 (7th ed. 2005). *See The Main v. Williams*, 152 U.S. 122 (1894).

The three principal statutes limiting the liability of shipowners are the Limitation of Liability Act of 1851, 9 Stat. 635, currently codified at 46 U.S.C. §§ 30501-30511; the Harter Act, 27 Stat. 445 (1893), currently codified at 46 U.S.C. §§ 30702-30707; and the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 note.

a. *The Limitation of Liability Act of 1851.*

Section 3 of the Limitation of Liability Act of 1851 provides that the liability of a shipowner for "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner" is limited to "the value of the vessel and pending freight." 46 U.S.C. § 30505. Accordingly, absent privity or knowledge, the owner's personal liability – even for compensatory damages – is limited to its interest in the vessel and cargo.

As the statutory text makes plain, Congress's "real object . . . was to limit the liability of vessel owners to their interest in the adventure." *The Main v. Williams*, 152 U.S. at 130. Such a policy was necessary

> to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. . . . [T]hose who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount.

Norwich Co. v. Wright, 80 U.S. 104, 121 (1871). *See also Moore v. Am. Transp. Co.*, 65 U.S. 1 (1860); *Flink v. Paladini (The Henrietta)*, 279 U.S. 59 (1929); *Am. Car & Foundry Co. v. Brassert*, 289 U.S. 261 (1933); *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1064 (11th Cir. 1996).

In adopting this statute, Congress codified an existing principle of maritime law. It is "difficult, if not impossible, to say when and where the restrictions . . . [on liability absent privity or knowledge] originated." *The Main v. Williams*, 152 U.S. at 126. However, they were recognized in the pre-Liability Act laws of the shipping states of Maine and Massachusetts, and, even absent positive legislation, the "limitation of the responsibility of the owners, for the tortious acts of the master, . . . appears to be founded in justice, and is recommended by strong and obvious motives of public policy." *The Rebecca*, 20 F. Cas. 373, 381 (D. Me. 1831) (No. 11,619).

Thus, this limitation of liability is not only embodied in federal statute but represents a principle of maritime law "as old as the law itself . . . that a shipowner does not incur liabilities exceeding the value of his ship and her pending freight." Wharton Poor, *A Shipowner's Right to Limit Liability in Cases of Personal Contracts*, 31 YALE L.J. 505, 505 (1922).

> [T]he right of a shipowner to limit his liability is recognized in some form or other by the maritime law of all nations. . . . The most satisfactory argument in favor of the right to limit liability is that sea adventures are peculiarly liable to mishaps of appalling extent; that the owner "blameless but powerless" must entrust his ship to servants who, no matter how carefully selected, may by a moment's inattention or carelessness, cause disaster; that in view of these considerations, investments in shipping would be discouraged if unlimited liability were thrown upon shipowners.

Id. This principle of limited liability is directly contrary to the Ninth Circuit's unprecedented imposition of vicarious punitive-damages liability. *See* Grant Gilmore

& Charles L. Black, Jr., THE LAW OF ADMIRALTY § 10.22, at 879 (2d ed. 1975) ("the theory of the Limitation Act and the doctrine of *respondeat superior* are at opposite poles"); James J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 TUL. L. REV. 999, 1007 (1979) (English statute of 1734 limiting shipowners' liability was enacted because "English maritime interests were ... burdened by the common law doctrine[ ] ... of *respondeat superior*").

In addition, the "privity or knowledge" exception to this principle further confirms the error of the decision below. The limitation of the owner's liability to the value of the vessel and its cargo is applicable only where the tortious act occurred "without the privity or knowledge of the owner." 46 U.S.C. § 30505(b). Such privity or knowledge exists, and thus the owner is exposed to full and unrestricted liability, where the plaintiff's "loss resulted from the shipowner's 'personal act or omission, [and was] committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result.'" 1 Linda L. Schlueter, PUNITIVE DAMAGES § 10.5, at 827 (5th ed. 2005) (citation omitted; alteration in original).

In applying that standard, courts have recognized that "the men who actually go to sea in ships, and the shore staff who are less than managerial rank, are persons whose knowledge or privity does not affect a corporate shipowner." 3 BENEDICT ON ADMIRALTY § 42, at 5-17. Thus, an owner's privity or knowledge is not a function of the actions of the captain at sea, and no case has imputed the captain's conduct to the owner. *Id.* at n.4 (collecting cases). *See also Waterman Steamship Co.*

v. Gay Cottons, 414 F.2d 724, 730 & n.16, 734-35 (9th Cir. 1969) ("we have found no case which has attributed the negligence of the master to the corporate owner"); *Tittle v. Aldacosta*, 544 F.2d 752, 756 (5th Cir. 1977) ("the errors in navigation or other negligence by the master or crew are not attributable to [the owner] on respondeat superior for limitation purposes"). This settled maritime law squarely forecloses the Ninth Circuit's attempt to hold the owner vicariously liable under maritime law for punitive damages based on the actions of the captain at sea.

b. *The Harter Act of 1893.*

The Harter Act of 1893 also significantly limits the liability of shipowners by protecting them from liability for "error[s] in the navigation or management of the vessel":

> If a carrier has exercised due diligence to make the vessel in all respects seaworthy and to properly man, equip, and supply the vessel, the carrier and the vessel are not liable for loss or damage arising from an *error in the navigation or management of the vessel.*

46 U.S.C. § 30706(a) (emphasis added).

Thus, the Harter Act distinguishes between the acts of the owner when the ship is in port and those of the captain when the ship is at sea, holding the owner liable for the former and exempting it from liability for the latter. "The net position of the Harter Act came down to this: . . . if [the shipowner] did use due care to send a seaworthy vessel on the voyage, he could not be held liable for the defaults of those he put in charge, in regard to running her." Gilmore & Black, § 3-24, at 143. This statutory policy too is violated by the Ninth Circuit's decision to hold the owner vicariously liable in punitive damages for the misconduct of the captain at sea.

c. *The Carriage of Goods by Sea Act of 1936.*

The Harter Act was the "principal statute governing the carriage of goods by sea to and from the United States for over forty years" until the passage of the Carriage of Goods by Sea Act of 1936 ("COGSA"), 46 U.S.C. § 30701 note. 2A BENEDICT ON ADMIRALTY § 11, at 2-5 (7th ed. 2005). Much like the Harter Act, COGSA contains a congressional limitation of liability for the shipowner due to the acts of its shipboard employees, including the captain, while at sea.

In pertinent part, COGSA provides that the shipowner, although generally liable for the unseaworthiness of the vessel and for the vessel's condition before it leaves port, shall not be liable for loss or damage arising or resulting from the "[a]ct, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." 46 U.S.C. § 30701 note. As did the Harter Act, COGSA imposes responsibilities on the owner while the vessel is in port; in particular, the owner's responsibility for seaworthiness "is either fulfilled or not fulfilled when the vessel 'breaks ground' on the voyage." Gilmore & Black, § 3-27, at 152. *See also* 2A BENEDICT ON ADMIRALTY §§ 136-37, at 13-20. However, providing that the captain and crew were properly selected, the owner is not liable for their acts at sea. In particular, the owner is not liable, even for compensatory damages, if the negligence of the captain causes the ship to run aground and be stranded – essentially what happened to the EXXON VALDEZ here. *Id.*, § 135, at 13-18 & n.1 (collecting cases). Once again, the Ninth Circuit extension of vicarious liability for punitive damages cannot be reconciled with this established maritime policy.

2. Congressional policy protects the U.S. maritime industry in order to promote commerce and national security.

In addition to the foregoing statutory limitations of liability, Congress also has enacted numerous other statutes to protect and further the U.S. maritime industry. Once again, these congressional enactments foreclose the exorbitant punitive-damages burden that the decision below would impose on shipowners under maritime law by making them vicariously liable for the wrongful conduct of captains at sea.

From the inception of our nation, maritime law, including congressional enactments, provided special aid and assistance to the U.S. maritime industry. This longstanding maritime policy reflects both the commercial and the national-security interests of the United States. In particular, in order to promote a strong U.S. maritime industry, maritime law has furthered the interests of carriers, shipbuilders, seafarers and other maritime employees, and consumers. Moreover, as experience has tellingly borne out, our national security requires a strong maritime industry, including an adequate number of vessels, a domestic capacity to build and repair such vessels, and sufficient workers to crew the ships and to build and repair them. *See Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 911 (D.C. Cir. 1982) ("[i]t has long been recognized that an adequate merchant marine, with U.S.-flag ships and trained American sailors, is vital to both the national defense and the commercial welfare of our country").

Preliminarily, to put the following discussion in context, a number of the statutes discussed below involve "cabotage" or shipments between ports in the United States. A cabotage statute advantaging U.S. carriers was among the initial enactments passed by the First Congress, and this legislative policy continues unbroken to the present. Some 50 other countries also have cabotage statutes protecting their own carriers within their domestic commerce. *See* Robert L. McGeorge, *United States Coastwide Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of a Global Economy*, 11 NW. J. Int'l L. & Bus. 62, 62-63 (1990) ("[t]he right of a nation to exclude foreign vessels from its domestic maritime trade is accepted without question in the international community; and most coastal nations, including the United States, have adopted cabotage laws to enforce that right"); Transportation Institute, *The Jones Act: An American Tradition* 2 (1996).

In the United States, the cabotage statute requires that waterborne shipments between U.S. ports be made by ships that are U.S.-owned, U.S.-flagged, U.S.-built, and U.S.-crewed. This preference is needed because "[t]he American merchant marine as a whole seemingly cannot now or in the foreseeable future operate in free competition; our ships are too expensive and our wages are too high for that." Gilmore & Black, § 11-5, at 968; *see also id.*, § 11-6, at 970. Accordingly, to ensure the existence and viability of U.S. carriers in the interest of our country's economy and national security, this congressional cabotage policy is necessary. *See Indep. U.S. Tanker Owners*, 690 F.2d at 911 ("[s]ince the earliest days of the Republic, preferential legislation has mandated that only U.S.-built and U.S.-flag vessels can be operated in commerce between points in the United States"); *Conaco Inc. v. Skinner*, 970 F.2d 1220, 1221-22 (3d Cir. 1992); *Marine Carriers Corp. v. Fowler*, 429 F.2d 702, 708 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971).

a. *The Acts of 1789-1817.*

"In 1789, in the second law passed under the new Constitution, Congress enacted a discriminatory tax on foreign vessels in the coasting trade, making it impractical economically for them to operate [between U.S. ports]." Gilmore & Black, § 11-4, at 963 n.34. *See* 1 Stat. 27 (1789). Following independence, "the maintenance of the shipbuilding industry, and the creation of an operating merchant marine, were among the most urgent tasks facing the Congress and the nation." Gilmore & Black, § 11-4, at 963. Thus, the "coastwide trade was early reserved to domestic vessels." *Id.; see also* 1 Stat. 287 (1792).

In 1817, Congress expressly prohibited foreign carriers from transporting goods between two U.S. ports. *See* Act of March 1, 1817, ch. 31, § 4, 3 Stat. 351.

This provision was part of a broader statute designed to protect the domestic maritime industry.

b. *The Jones Act of 1920.*

This early federal cabotage policy – which provided that "the coastwide trade was prohibited outright to foreign ships" – "has lasted down to now." Gilmore & Black, § 11-4, at 963 n.34. This policy is currently embodied in the Jones Act of 1920 (Section 27 of the Merchant Marine Act of 1920), ch. 250, 41 Stat. 988 (1920), currently codified at 46 U.S.C. § 50101. Enacted in the aftermath of World War I, the restriction of cabotage trade to U.S. carriers was justified in terms of the critical need to "develop and encourage a merchant marine" in order to serve "the national defense" and "foreign and domestic commerce":

> [I]t is necessary for the *national defense* and for the proper growth of its foreign and domestic *commerce* that the United States shall have a merchant marine of the best equipped and most suitable types of vessels *sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency*, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine.

Ch. 250, 41 Stat. 988 (1920), currently codified at 46 U.S.C. § 50101 (emphasis added). *See also* S. Rep. No.

66-573, at 1 (1920) (national policy favors "an American merchant marine, built in American shipyards by American labor, manned by American seamen, flying the American flag"; "[w]e need such a fleet, not only for our commercial growth, but for the Nation's defense in time of war and the stability of domestic industry in time of peace").

c. *The Merchant Marine Act of 1936.*

The next important expression of congressional policy was the Merchant Marine Act of 1936. Adopted in the shadow of World War II and in the midst of the Great Depression, the Act declared it "to be the policy of the United States to foster the development and encourage the maintenance of . . . a merchant marine," which "is necessary for the national defense and development of its foreign and domestic commerce":

> It is necessary for the *national defense* and development of its *foreign and domestic commerce* that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as *a naval and military auxiliary in time of war or national emergency*, (c) *owned and operated under the United States flag by citizens of the United States* insofar as may

> be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, *constructed in the United States and manned with a trained and efficient citizen personnel.* It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

Ch. 858, title I, § 101, 49 Stat. 1985 (1936) (emphasis added). "The Merchant Marine Act of 1936 is designed to develop and maintain an adequate and well-balanced American merchant marine and shipyard industry." 1 Schoenbaum, § 10-2, at 582.

d. *The Maritime Security Act of 1996.*

Most recently, the Maritime Security Act of 1996 continues to recognize the importance of the U.S. maritime industry to commerce and national security. It provides that "[t]he Secretary of Transportation ... shall establish a fleet of active, commercially viable, militarily useful, privately owned vessels to meet national defense and other security requirements and maintain a United States presence in international commercial shipping." 46 U.S.C. § 53102.

* * * * *

The foregoing discussion, of course, concerns matters of policy, and respondents presumably will advance their contrary policy arguments. But that policy debate is irrelevant to this case. These are the policies that Congress has duly and consistently adopted into law over the history of our country. Whether these policies should be modified is for Congress to decide. So long as these represent congressional policy, they provide the basis for federal maritime common law.

C. The Maritime Rule Against Vicarious Punitive-Damages Liability For Shipowners Reflects The Unique And Critical Role Of Captains At Sea.

The question of a shipowner's vicarious punitive-damages liability for the acts of the captain at sea must be informed by the unique and critical role of the captain and the consequent relationship between the owner on land and the captain aboard the ship. The maritime rule against such vicarious liability reflects the singular authority and responsibilities of the captain. For this reason, the issue of vicarious liability in the maritime industry is markedly unlike any other context in which the Court has considered either vicarious liability or punitive damages. *See* 1 Schlueter, § 10.2, at 809 (referring to "the peculiar nature of the maritime setting").

The captain at sea is the absolute master of the ship. This principle was long settled at the time our country was founded and *The Amiable Nancy* decided. The captain's authority is "analogous to that of a parent over his child, or of a master over his apprentice or scholar," and "[s]uch an authority is *absolutely necessary to the safety of the ship*, and the lives of the persons on board." Charles Abbott & Joseph Story, TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN 188 (2d American ed. 1810) (emphasis added). Thus, "the entire management of the ship is entrusted to the master." *Id.* at 265 (English maritime law).

This Court too has recognized the captain's absolute authority at sea and the differences between the principal-agent rules that apply in the unique maritime context and the traditional rules generally applicable in other areas of the law.

> Ever since men have gone to sea, the relationship of master to seaman has been *entirely different from that of employer to employee on land.* The lives of passengers and crew as well as the safety of ship and cargo are entrusted to the master's care. Every one and every thing depend on him. . . . *Authority cannot be divided. These are actualities which the law has always recognized.*

Southern S.S. Co. v. NLRB, 316 U.S. 31, 38 (1942) (emphasis added). *See also Petition of the Kinsman Transit Co.*, 338 F.2d 708, 715 (2d Cir. 1964) (Friendly, J.) (owner "must . . . rely on the skill of a master . . . when a vessel is at sea"), *cert. denied*, 380 U.S. 944 (1965); *Chamberlain v. Chandler*, 5 F. Cas. 413, 414 (C.C.D. Mass. 1823) (No. 2,575) ("[t]he authority of a master at sea is necessarily summary, and often absolute").

This special maritime principle is grounded in the realities and lessons borne of centuries of seafaring experience. First and foremost, waterborne shipping can be extremely hazardous, involving dangerous and unpredictable weather, currents and tides, and maritime obstructions. Given the distance and duration of sea voyages, ships frequently encounter fierce storms, large swells, icebergs, and submerged hazards.

> [I]t is the nature of the calling of the shipmaster to know of the tempestuous forces of wind and tide and seas. He has to make assessments often from confusing or inadequate facts and then translate them into effective decisions.

Boudoin v. J. Ray McDermott & Co., 281 F.2d 81, 84 (5th Cir. 1960) (John R. Brown, Jr., J.).

Moreover, ships must and do traverse wide stretches of water and do not travel on fixed and marked courses. This significantly increases the dangers facing ships at sea and the difficulties of predicting and averting such perilous conditions.

So, too, a ship's captain has only limited means available to avoid hazards. Ships cannot pull over to wait in safety until a storm passes. They cannot easily maneuver or quickly stop in response to an immediate threat. And ships cannot await help from the home office or call the motor club if they become stranded or equipment breaks down.

In addition, the risks presented by such dangers are enormous. Life itself can be at stake, as can the enormous cargo carried on ships – cargo that typically is many times larger than that of non-maritime conveyances. *See The H.A. Scandrett*, 87 F.2d 708, 711 (2d Cir. 1937); Donovan, 53 Tul. L. Rev. at 1002 ("sea carriers incurred greater financial risks than land carriers as 'sea adventures are peculiarly liable to mishaps of appalling extent'") (quoting Poor, 31 YALE L.J. at 505).

In view of these dangers, the captain's authority must be complete and undivided. Maritime experience has tellingly demonstrated the necessity for the captain – on the scene and cognizant of the current conditions – to make instantaneous decisions that do not have to be cleared by anyone else and will be obeyed immediately and without question. Captains never have been, and cannot be, expected to confer with the shipowner on shore or have their orders subject to review or approval by the owner. As this Court has explained:

> [E]mergenc[ies] must be met by the master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying rules and using reasonable judgment.

Spencer Kellogg & Sons, Inc., 285 U.S. at 511-12.

To be sure, communications and other technologies have changed since the time of *The Amiable Nancy*. Even today, however, and even for those ships that do in fact have the most advanced technological features, decisions are entrusted to the captain on the spot and cannot be delegated to or second-guessed by the landside owner removed from the conditions at sea. *See Waterman Steamship*, 414 F.2d at 735-36 ("[a]lthough modern communication and transportation facilities make all acts performed in any foreign port within the potential control of the shipowner, we believe that . . . [a change in law] should only come from Congress"); *Fuhrman*, 407 F.2d at 1148 (owner not vicariously liable for punitive damages even though suggestions could have been sent to the captain by radio).

The Sixth Circuit recognized this imperative point in *United States Steel Corp. v. Fuhrman.* There, the district court awarded punitive damages against a shipowner on the theory of vicarious liability, reasoning that the captain's ability to communicate with the owner during an emergency justified the owner's vicarious punitive liability. *See* 276 F. Supp. at 181. The court of appeals reversed, adhering to the established maritime rule against such liability. As it explained:

> The relationship of the ship master and the authority and control he exercises over his ship in such emergencies is unique. In order to avoid chaos aboard in such situations it is imperative that the vessel remain under the control of a single individual with complete and undisputed authority. The master of the vessel must assume authority in such a crisis and he has the responsibility to make the final decision as to what the proper course of action must be in view of all the factors concerned. To hold otherwise would result in hesitations and disastrous delays on the part of the master while he obtains advice and authority from his superiors many miles from the scene. On this very point the Supreme Court in *Columbian Insurance Co. v. Ashby and Stribling*, 38 U.S.

(13 Pet.) 331, 344 (1839), speaking through Mr. Justice Story, said:

> "Indeed, in many, if not most, of the acts done on these melancholy occasions, there is little time for deliberation or consultation. What is to be done, must often, in order to be successful, be done promptly and instantly by the master, upon his own judgment and responsibility. The peril usually calls for action, and skill, and intrepid personal decision, without discouraging others by timid doubts or hesitating movements."

407 F.2d at 1147. Thus, the court declined to hold that in a punitive-damages suit the "company officials sitting hundreds of miles away had the obligation under the facts of the case to make a decision as to the best course of action to be taken and to countermand the orders of the master who was on the scene and in the middle of an emergency." *Id.*

Indeed, any other rule would be a prescription for, literally, disaster. In an emergency, the captain's full attention must be focused on the command of the ship without the distraction or interruption of consultations and debates with the shore-side owner. Any inattention or carelessness, even momentarily, can be catastrophic for the ship and its crew and cargo. The considered and time-tested judgment embodied in maritime law is that divided authority would lead to less rather than more safety for ships at sea. *See* 1 Schlueter, § 10.2, at 809 ("a punitive damages award would lead future shipowners to override the orders of the person on the scene, resulting in even more loss of life or property"). There simply is no basis in experience, and no room in the law, for the maritime rule invented by the Ninth Circuit in this case.

D. The Present Case And *Protectus Alpha* Were Wrongly Decided And Depart From Sound Maritime Principles.

In imposing vicarious punitive-damages liability on shipowners for the wrongful acts of captains at sea, the Ninth Circuit here relied entirely on its prior decision in *Protectus Alpha*. *See* Pet. App. 84a-86a. However, *Protectus Alpha* was wrongly decided and, as the panel below acknowledged (*id.* at 82a-86a & n.84), departs from the settled *Amiable Nancy* line of cases in this Court and the other courts of appeals.

In *Protectus Alpha*, a fire occurred aboard a ship while it was refueling at an onshore facility. As the fire was almost under control, the dock foreman arrived at the scene and – without consulting any of the firemen who had been battling the fire, and indeed contrary to their directive – ordered that the ship be cast off from the dock. *See* 767 F.2d at 1381, 1384. Insofar as relevant here, the owner of a grain storage facility was held vicariously liable for punitive damages based on the acts of the dock foreman it employed. *Id.* at 1386.

The Ninth Circuit affirmed. Notably, the court cited *no* maritime cases, including *The Amiable Nancy*. Instead, it referred to non-maritime law imposing punitive-damages liability on a corporation for the acts of its agent even in the absence of corporate approval or ratification. *See* 767 F.2d at 1386 (citing *Am. Soc'y of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982) (antitrust case)). The court of appeals adopted Section 909 of the RESTATEMENT (SECOND) OF TORTS (1979) to hold that, as a matter of maritime law, "'[p]unitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, . . . the agent was employed in a managerial capacity and was acting in the scope of employment.'" 767 F.2d at 1386 (quoting RESTATEMENT (SECOND) OF TORTS § 909(c)).

Protectus Alpha is incorrect and provides no sound basis for the decision below in the present case. To begin with, *Protectus Alpha* has no foundation in maritime law. As discussed above, the settled maritime rule is expressed in the *Amiable Nancy* line of cases rejecting a shipowner's vicarious liability for punitive damages on the basis of the captain's wrongful acts at sea. Nowhere did the Ninth Circuit address either this Court's decision in *The Amiable Nancy* or the decisions in other circuits following *The Amiable Nancy*. In ignoring maritime law, the court of appeals uncritically adopted the general principles it thought applicable in other areas of law. Whatever the correctness of those general principles in such other areas,[4] they have no place – and certainly not a dispositive place – in maritime law. *See* Gilmore & Black, § 10-22, at 879-80 (the owner's limitation of liability "has been much more successfully maintained with respect to his seagoing employees than with respect to his shoreside organization").[5]

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[4] This Court rejected the Restatement with respect to vicarious liability for punitive damages under Title VII in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

Indeed, the Restatement itself recognizes as much. The RESTATEMENT (SECOND) OF AGENCY, from which Section 909 of the RESTATEMENT (SECOND) OF TORTS is derived (*see* note 5, *supra*), explicitly states that its provisions do not apply where "special rules exist." RESTATEMENT (SECOND) OF AGENCY, Scope Note (1958). Maritime law plainly is an area where, for centuries, such "special rules" have existed, as this Court recognized in *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001): "Admiralty and maritime law includes a host of special rights, duties, rules, and procedures." Accordingly, by its own terms, the Restatement does not provide the legal rules that are applicable in maritime law.

Nor has any court other than the Ninth Circuit ever applied the Restatement in a maritime case to determine the vicarious liability of a shipowner for punitive damages based on the conduct of a captain at sea. The panel admitted as much (*see* Pet. App. 82a-83a) and in fact recognized that *Protectus Alpha* "was specifically rejected by the Fifth Circuit" (*id.* at 85a n.84) in *Matter of P&E Boat Rental.*

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[5] The adoption of Section 909 in the RESTATEMENT (SECOND) OF TORTS was quite adventitious. The Reporter and the Torts Advisers voted 9–2 to strike Section 909. Section 909 remained, however, solely because the previously published RESTATEMENT (SECOND) OF AGENCY included an identical provision in Section 217c. *See* American Law Institute, 50TH ANNUAL MEETING PROCEEDINGS 236-37 (May 16, 1973); American Law Institute, RESTATEMENT (SECOND) OF TORTS, Tentative Draft No. 19, at 85 (Mar. 30, 1973).

In addition, *Protectus Alpha* ultimately rested not on law but on the naked policy preferences of the judges on the panel. Purporting to "reflect[ ] the reality of modern corporate America" (767 F.2d at 1386) – *but see* Pet. App. 288a n.1 (Kozinski, J., dissenting from the denial of rehearing en banc) – the *Protectus Alpha* court expressly stated that its decision was intended to ensure that, as a matter of desirable policy, corporations are broadly responsible for punitive damages: "[i]t seems obvious that no corporate executive or director would approve the egregious acts to which punitive damages would attach and, therefore, *no recovery for more than compensatory damages could ever be had against a corporation* if express authorization or ratification were always required." 767 F.2d at 1386 (emphasis added). As a matter of policy, that is highly dubious and, at the very least, certainly debatable. But as a matter of law, it simply is untenable. Even under federal common law, courts remain legal bodies that decide, and are constrained by, the law grounded in precedent, tradition, and congressional policy; they are not a policy-making branch of government free at will to adopt policy views as law. *See Miles v. Apex Marine*, 498 U.S. at 36 ("maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent on them"); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 & n.34 (1981) ("we consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial branch, of government; therefore, federal common law is 'subject to the paramount authority of Congress'") (citation omitted).

Furthermore, as essentially conceded by the court of appeals in this case (*see* Pet. App. 85a n.84), this portion of *Protectus Alpha* was dictum. There, the district court had rested its liability ruling on the established grounds that the employer both had required the dock foreman's conduct as a matter of corporate policy and had subsequently ratified the conduct. *See* 585 F. Supp. 1062, 1068-69 (D. Or. 1984). Inexplicably, the Ninth Circuit eschewed those grounds (*see* 767 F.2d at 1387) in order to reach out unnecessarily (and ultimately incorrectly) to render a broader ruling.

Finally, *Protectus Alpha* held that the dock foreman was a "managerial" employee under the Restatement. *See* 767 F.2d at 1387. The issue of an employee's "managerial" capacity often is a vexing one under general law, and in fact the Restatement does not define the term. *See Kolstad*, 527 U.S. at 543. In maritime law, however, it is settled that a captain at sea does not affect the shipowner's privity or knowledge for purposes of limitation of liability (*see* pages 16-17, *supra*); for the same reasons, the captain's acts should not subject the owner vicariously to punitive damages.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

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EXXON SHIPPING CO.
and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF AMICUS CURIAE OF TRUSTEES FOR ALASKA, ALASKA CENTER FOR THE ENVIRONMENT, ALASKA COMMUNITY ACTION ON TOXICS, ALASKA MARINE CONSERVATION COUNCIL, COOK INLETKEEPER, DEFENDERS OF WILDLIFE, ENVIRONMENTAL LAW & POLICY CENTER, EYAK PRESERVATION COUNCIL, HUMANE SOCIETY OF THE UNITED STATES, IZAAK WALTON LEAGUE OF AMERICA, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, NORTHERN ALASKA ENVIRONMENTAL CENTER, PRINCE WILLIAM SOUNDKEEPER, WATERKEEPER ALLIANCE AND THE WILDERNESS SOCIETY IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The environmental *amici curiae*[1] have long engaged in environmental and wildlife protection and natural resources preservation activities in Alaska and across the nation. They work to implement and enforce the Clean Water Act and other federal environmental statutes, federal and state common law, and state laws and policies in order to advance their organizational goals and the public's environmental interests.

Environmental *amici* address the limited issue of whether the federal Clean Water Act should be held to preempt maritime law remedies for damage to private property and other economic damages caused by oil spills. Such preemption would create an unwarranted gap in the framework of federal and state statutes and federal and state common law governing clean water protection. The Clean Water Act is designed to "restore and maintain" the integrity of our nation's waters. 33 U.S.C. § 1251(a). It should not shield a private company from part of its liability for damages arising from an environmental disaster for which it is responsible.

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned Environmental *amici*: Trustees for Alaska, Alaska Center for the Environment, Alaska Community Action on Toxics, Alaska Marine Conservation Council, Cook Inletkeeper, Defenders of Wildlife, Environmental Law & Policy Center, Eyak Preservation Council, Humane Society of the United States, Izaak Walton League of America, National Wildlife Federation, Natural Resources Defense Council, Northern Alaska Environmental Center, Prince William Soundkeeper, Waterkeeper Alliance and The Wilderness Society represent that (1) each party has filed with the Court blanket consent to the filing of *amicus curiae* briefs, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

Environmental *amici* seek to protect the public's interests in the integrity and effectiveness of the nation's integrated system of environmental statutes and common law remedies to preserve our natural resources and achieve cleaner waters.

◆

SUMMARY OF THE ARGUMENT

The Clean Water Act (CWA), state statutes and common law rights and remedies together provide a complementary and robust legal structure for cleaning up our nation's waters. Exxon's argument that the CWA "leaves no room" for maritime law punitive damages remedies would create a gap in this structure even though Congress stated no such intent. The CWA's text and the legislative history indicate that Congress intended the Act to supplement private remedies by enhancing the federal government's ability to deter and clean up oil and other water pollution, not to displace shipowners' existing obligations and incentives to keep clean water clean. Moreover, Congress' silence in the statute cannot be deemed to imply preemption, especially when the CWA includes savings clauses that explicitly preserve private remedies for damages to property and allow any person, under common law, "to seek any other relief. . . ." There is a legal presumption favoring the retention of common law remedies where Congress has not directly spoken.

When the text, structure and history of the CWA are given their due regard, it becomes clear that: (1) Exxon's reliance on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), is misplaced, and (2) punitive damages awards for economic losses of private parties do not inherently conflict with the administration of the CWA, nor frustrate any purpose of the federal remedial scheme. Exxon has not overcome the presumption that when Congress passes legislation, it intends to retain common law remedies. *United States v. Texas*, 507 U.S. 529, 534 (1993). This case is much like *Silkwood v. Kerr-McGee* in which the Court held that state-imposed punitive damages for the release of plutonium from a nuclear power plant were available despite the extensive federal regulatory framework governing nuclear safety. 464 U.S. 238 (1984).

Effective environmental protection depends on the interwoven fabric of federal statutory and regulatory standards, state statutory and regulatory standards, and federal and state common law remedies. Federal environmental laws often work in combination with, and leave room for, pre-existing private remedies, and they should be interpreted to preserve common law remedies unless Congress has directly spoken to displace them. Under Exxon's theory, Congress would be compelled to write even more detailed and lengthier statutes lest a gap be implied even when a savings clause is specifically enacted.

Exxon's conduct in this case – leaving a relapsed alcoholic in command of a supertanker – resulted in an environmental disaster and widespread property damage. Accepting Exxon's overreaching preemption argument in this case could lead to the ironic and unfortunate result of the federal CWA being used as a shield against, rather than a sword to help achieve, cleaner water. Such a result would undermine Congress' objectives and weaken the nation's efforts to protect the environment.

◆

ARGUMENT

I. The Text, History and Purposes of the Clean Water Act Preserve Common Law Remedies for Property Damage Caused By Oil Spills.

A. The Text of the Clean Water Act Does Not "Speak To" Private Remedies for Property Damage, Except to Explicitly Retain Them.

Exxon contends that the CWA "speaks directly and comprehensively" to plaintiffs' claims. Exxon Br. 33. However, no provisions of the Act affirmatively define a private remedy for property damages, and the plain language shows that Congress decided not to displace tort claims for property damage when it enacted the oil spill liability provisions of the Act:

> *Nothing* in this section shall affect or modify *in any way* the obligations of *any* owner or operator of *any* vessel . . . to *any* person or agency under *any* provision of law for damages to *any* publicly owned or privately owned property resulting from a discharge of *any* oil or hazardous substance. . . .

33 U.S.C. § 1321(o)(1) (emphasis added). Similarly, the CWA's citizen suit provision states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law . . . to seek any other relief. . . .

33 U.S.C. § 1365(e). These broadly worded savings clauses "negate[ ] the inference that Congress 'left no room'" for common law remedies. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

B. The Legislative History of the Clean Water Act Confirms That Congress Did Not Intend for the Act to Provide Exclusive Remedies for Oil Spills.

The CWA's legislative history confirms that the oil pollution liability section "in no ways affects the rights of third parties against the party causing the discharge." S. Rep. No. 91-351, at 5 (1969). Exxon argues that the CWA "prescribes a comprehensive, calibrated scheme of public enforcement." Exxon Br. 40. However, the oil liability provisions at issue here are different than the CWA's section 402 pervasive regulatory program for permitting point source discharges.[2] The federal oil liability regime has "historically provided only partial protection." It set statutory liability limits "with respect to Federal oil spill removal costs and natural damages," but provided "no coverage or compensation for other damages." S. Rep. No. 101-94, at 3 (1989) (Legislative History of the Oil Pollution Act of 1990) (describing the federal provisions as they existed at the time of the *Exxon Valdez* disaster).

Exxon's argument that the CWA was intended to be the exclusive remedy for oil spills is also incorrect. Congress has noted that, in 1989, "at least five statutes" dealt with the issue of oil spill liability and compensation. S. Rep. No. 101-94, at 3. "Each is different, and each is inadequate." *Id.* Moreover, if the CWA provisions had been intended to limit the liability of shipowners in third-party tort suits, Congress would not have explicitly preserved the ability of States to provide "additional requirements and penalties" that are "separate and independent from those imposed by [the federal Act]." H.R. Rep. No. 91-940, at 42 (1970) (Conf. Rep.). Nor would Congress have included the savings clauses at sections 1321(o) and 1365(e) of the CWA. *See Askew v. American Waterways Opers., Inc.*, 411 U.S. 325 (1973) (holding that the 1970 Water Quality Improvement Act did not preempt strict liability under Florida's Oil Spill Prevention Act, in part, because "no remedy under the Federal Act exists for state or private property owners damaged by a massive oil slick").[3]

---

[2] *See* discussion *infra* at 13-14. The preemptive effect of the section 402 regulatory program was considered in *City of Milwaukee v. Illinois*, 451 U.S. 304, 318-19 (1980); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); and *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). These cases, involving the Act's "pervasive" and "all-encompassing" program for regulating permitted discharges from point sources under section 402 of the Act, are not directly relevant to the Court's evaluation here of the more limited oil pollution liability provisions at section 311 of the Act.

C. Exxon Mischaracterizes the Goals and Purposes of the Clean Water Act in Arguing that Congress Intended to Cap the Liability of Shipping Companies.

Exxon argues that the CWA involves "twin goals," which are "carefully calibrated": "protecting the environment *and* limiting the liability of shipowners." Exxon Br. 16, 32, 39-41. However, the legislative history contradicts this argument, which incorrectly elevates benefits for the shipping industry to one of Congress' principal purposes in this part of the Act. Congress instead recognized that oil pollution was a growing national problem that requires a multi-pronged approach, including both federal clean-up actions and penalty authority while explicitly preserving existing state and common law remedies.

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[3] As of 1990, 24 States had oil spill liability and compensation laws, and 17 of them had liability *without* specified limits. S. Rep. No. 101-94, at 7.

For example, following "extensive discussion," the Senate Committee on Public Works reported that "[t]wo factors" influenced the decision regarding liability for oil spills: "First, the increasing volume of oil being handled by an increasing number of vessels and facilities enhances the risk of major disaster, and, second, the protection of our vital water resources and shorelines is more and more imperative." S. Rep. No. 91-351, at 5-7 (1969). In conclusion, the Committee explained that "[w]hile the legislative approach is complex, the intent of the committee is clear. The legislation is designed to encourage preventive action to eliminate discharges of oil wherever possible and to provide adequate authority to clean up those discharges which do occur and assess the cost on the responsible party. . . ." *Id.* at 7. The report clarified that the "oil pollution section deals only with the matter of clean up of discharges and costs associated therewith," and "in no ways affects the rights of third parties against the party causing the discharge." *Id.* at 5.

Twenty years later, Congress considered, but ultimately decided against, changing the "longstanding policy" that federal oil liability provisions are a floor, not a ceiling. *See* S. Rep. No. 101-94, at 6-7, 17 (history of the Oil Pollution Act of 1990). Thus, even after enacting the Oil Pollution Act, Congress plainly intended that the owners or operators of vessels would be liable in accordance with "[the new Act] and section 311 of the Clean Water Act . . . [*and*] *under maritime tort law*. . . ." *Id.* at 14 (emphasis added). At that time, the shipping industry argued vigorously for a federal liability cap. *See id.* at 17 ("Preemption has been discussed by the members of the Committee more than any other single issue."). The shipping companies' arguments then, which sound remarkably like Exxon's policy arguments now, were explicitly rejected by Congress:

> It is sometimes argued that liability must be limited in order for the owner or operator to afford reasonably priced insurance coverage. Some arguments are so extreme as to suggest that tankship companies and offshore producers would not operate in an atmosphere of "unlimited" risk. *But these claims are totally unfounded.* Even in the 17 States without liability limits, oil shipping and producing companies are not refusing to do business. None of the testimony received by the Committee contained evidence that any shipper or producer has avoided these 17 States or has chosen to quit the business.

S. Rep. No. 101-94, at 7 (emphasis added).

Exxon's preemption argument here would allow the shipping industry to achieve a liability cap through the courts where it has been unable to achieve such a policy through Congress. Just as courts should not "supplement" Congress' answer when a federal statute speaks directly to limit available remedies, *Miles*, 498 U.S. at 31, the courts should refrain from unnecessarily limiting the common law where Congress gives "no affirmative indication of an intent to preclude the judicial allowance of a remedy." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970).[4] The Court should reject Exxon's preemption argument as contrary to the CWA's text, legislative history and purposes and should allow for common law remedies for property damage caused by oil spills.

II. Exxon Cannot Overcome the Presumption Favoring Retention of Pre-Existing Common Law Remedies.

When statutes "invade the common law," there is a presumption favoring the retention of existing law "except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534-35 (1993).

Exxon attempts to avoid this presumption in two ways. First, it claims that there is a "presumption *in favor of preemption*" in this case because it involves federal common law. Exxon Br. 29, citing *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). But the Court has held that the presumption favoring the retention of existing law applies equally to cases involving preemption of federal common law as it does to preemption of state law. *United States v. Texas*, 507 U.S. at 534. Here, the CWA does not "speak to" private remedies for private oil spill damages, and thus "no presumption of preemption arises." *Oswego Barge*, 664 F.2d at 345.

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[4] In *Moragne*, the Court, guided by "major legislative innovations" at both the state and federal level, held that a federal cause of action for wrongful death exists under general maritime law. 398 U.S. at 392-93. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine*, 498 U.S. 19 (1990), the Court limited the remedies available for maritime wrongful death claims, finding that "Congress has spoken directly to the question of recoverable damages on the high seas" in the Death on the High Seas Act and the Jones Act, respectively.

Second, Exxon incorrectly portrays this case as asking the courts to "supplement" and create new "judge-made" remedies after passage of the CWA. Exxon Br. 28, 33. However, admiralty law developed long before the passage of the CWA, and courts have "freely awarded punitive damages in property damage cases" arising under admiralty law. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 137-38, 360-67 (1997).

This is not a case like *City of Milwaukee v. Illinois*, 451 U.S. 304 (1980), in which the Court was determining whether the creation of federal common law was necessary to fill an "interstice" in the existing decisional framework. *See id.* at 323, 324 n.18. The real question here is not whether the Court should *supplement* the CWA; it is whether Exxon can demonstrate an evident statutory purpose to *supplant* pre-existing maritime law with respect to claims for property damage caused by oil pollution. *United States v. Texas*, 507 U.S. at 534-37.

Exxon then makes two general claims in attempting to meet its burden of showing that the statutory purpose of the CWA requires preemption of punitive damages. First, citing *Miles,* Exxon argues that the CWA "speaks directly" to the issue and "leaves no room" for maritime law. Exxon Br. 31-36. Second, citing *City of Milwaukee* and *Sea Clammers,* Exxon argues that punitive damages will interfere with Congressional policies and "obliterate" the balance that Congress has struck. Exxon Br. 33-41. These arguments, however, are not rooted in the CWA's text or purpose or sound policy. They fail to rebut the presumption favoring retention of preexisting common law remedies.

A. The Clean Water Act's Silence Regarding Punitive Damages Does Not Imply an Affirmative Congressional Purpose to Supplant Maritime Law.

The Court's preemption analysis is straightforward when a federal statute speaks directly to the types of remedies available. In the Death on the High Seas Act (DOHSA), for example, Congress explicitly limited recoverable damages in wrongful death suits to "pecuniary loss." When Congress has "spoken directly to the question . . . the courts are not free to 'supplement' Congress' answer. . . ." *Miles*, 498 U.S. at 31 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

In this case, however, Exxon overlooks the "basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil,* 436

U.S. at 625. Here, when "Congress has not spoken" to the obligations of shipowners for private property damages, there is "no basis" to apply *Miles*. *See CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 701 (1st Cir. 1995). The Clean Water Act does not speak directly to private parties' property damage claims under maritime law, except to explicitly preserve them through the savings clauses.

The best Exxon can do is argue that the word "obligations" in the savings clause at section 1321(o) was not intended to include punitive damages because punitive damages are "never awarded as of right." Exxon Br. 37, citing *Smith v. Wade*, 461 U.S. 30, 52 (1983). *Smith*, however, does not support Exxon's interpretation. In that case, the Court broadly interpreted the text of 24 U.S.C. § 1983 to *include* the availability of punitive damages in appropriate circumstances because the defendant had failed to provide a "persuasive reason" based on the "policies and purposes" of the federal statute that would "require a departure from the rules of tort common law." *Id.* at 48-49, 51. Notably, the Court rejected the defendant's argument that the phrase "for redress" at the end of section 1983 meant that Congress intended to limit recovery to compensatory damages. *Id.* at 36 n.5. Here, as in *Smith*, the defendant's "novel construction is strained." *Id.*

Exxon argues that Congress' silence "speaks volumes." Exxon Br. 33. Actually, it says nothing at all. The Court specifically rejected this line of argument in *Silkwood v. Kerr-McGee*:

> Kerr-McGee focuses on the differences between compensatory and punitive damages awards and asserts that, at most, Congress intended to allow the former. This argument, however, is misdirected because our inquiry is not whether Congress expressly allowed punitive damage awards. . . . Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted. Thus, it is Kerr-McGee's burden to show that Congress intended to preclude such awards.

464 U.S. at 255. *See also Racich v. Celotex Corp.*, 887 F.2d 393, 396 (2d Cir. 1989) ("Since a common-law tort action for personal injury by definition includes the element of damages, including punitive damages where factually appropriate, the omission in the [New York statute] and the legislative silence with respect to punitive damages do not preclude such a recovery.") (citations omitted).[5]

In this case, as with Kerr-McGee in *Silkwood*, Exxon "is unable to point to anything in the legislative history or in the regulations that indicates that punitive damages were not to be allowed." 464 U.S. at 255. When the text, history and purpose of the CWA are taken into consideration, the better conclusion is that Congress did not intend to "speak to" property damage claims at all. *See Ouellette*, 479 U.S. at 499 n.19 (finding "no suggestion" of a distinction between compensatory and punitive damages remedies in either the Act or its legislative history); *Poe v. PPG Indus.*, 782 So.2d 1168, 1174 (La. Ct. App. 2001) ("Simply stated, we fail to discern the existence of any applicable relevant legislation which eviscerates the deterrent protection of punitive damages. . . ."). In this regard, this case is more like *Moragne* than it is like *Miles.*[6]

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[5] Exxon also argues that "Congress knows how to provide punitive damages" when it "thinks they are necessary." Exxon Br. 33. While this is true, Congress also knows how to explicitly forbid punitive damages when it wants to do so. *See, e.g.*, 28 U.S.C. § 2674 (Federal Tort Claims Act); 2 U.S.C. § 1361 (Congressional Accountability Act); 3 U.S.C. § 435 (Presidential and Executive Office Accountability Act); 6 U.S.C. § 442 (Homeland Security Act of 2002). Thus, it is not appropriate to draw conclusions from Congress' silence. *Cf. Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (repeals by implication are disfavored).

The CWA's express savings clause and evident purpose are the proper guideposts for the Court here. *See, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215-16 (1996) (considering the relevant savings clause and congressional purpose underlying DOHSA in determining that *Miles* does not bar state remedies for deaths in territorial waters). "Taking into account what Congress sought to achieve," *id.* at 216, the

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[6] *See Moragne*, 398 U.S. at 397-98 (DOHSA's provision of a statutory cause of action for wrongful death on the high seas does not implicitly bar a maritime cause of action for deaths in territorial waters because Congress' "failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act.").

Court should reject Exxon's argument that *Miles* controls this case and that Congressional silence should be construed as a deliberate and complete shield to a punitive damages remedy for reckless conduct.

The Court of Appeals below correctly concluded:

> It is reasonable to infer that had Congress meant to limit the remedies for private damage to private interests, it would have said so. The absence of any private right of action in the Act for damage from oil pollution may more reasonably be construed as leaving private claims alone than as implicitly destroying them.

In re Exxon Valdez, 270 F.3d 1215, 1231 (9th Cir. 2001).

B. Punitive Damages Do Not Frustrate the Purposes of the Clean Water Act.

Even though Congress did not "speak directly" to the availability of punitive damages in the CWA, Exxon contends that punitive damages would somehow frustrate the Act's purpose. However, this is not a case like *City of Milwaukee*, *Sea Clammers* or *Ouellette,* each of which involved the Act's detailed section 402 program for regulating permitted discharges from point sources and potential interference through common law of expressly permitted activities. The CWA's oil pollution provisions do *not* involve permitted activities and common law does not so interfere.

In *Sea Clammers*, the Court noted that respondents' claims "appear to fall into two categories," both involving the government's administration of permits under the CWA and the Marine Protection, Research, and Sanctuaries Act (MPRSA). *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 12 (1981).[7] In other words, the specific claims in *Sea Clammers* were based on "substantive violations" of sections of the CWA and MPRSA that provide their own "comprehensive enforcement mechanisms." *Id.* at 20. The Court recognized that claims arising under other statutes or common law would be "far different." *Id.* at 21 n.31. Likewise, *Ouellette* states: "[t]he CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act." 479 U.S. at 497.

In this case, there are no effluent standards applicable to oil spills, and Exxon could not apply for and receive a CWA permit to crash one of its supertankers against a reef. Therefore, unlike those cases involving permits for discharges, there is no opportunity for a court in this case to rebalance CWA obligations and common law principles or rewrite rules that Congress or the implementing agencies have enacted.

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[7] The main contention is that the EPA and the Army Corps of Engineers have permitted the New Jersey and New York defendants to discharge and dump pollutants in amounts that are not permitted by the Acts. In addition, they seem to allege that the New York and New Jersey defendants have violated the terms of their permits.

Id. at 12.

When reviewing the "evident purpose" of a federal statute as part of a preemption analysis, the Court has taken care to avoid finding unnecessary conflicts. *United States v. Texas*, 507 U.S. at 536; *see, e.g., Silkwood*, 464 U.S. at 257 (punitive damages would not "frustrate any purpose" of the federal atomic energy remedial scheme); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431, 451 (2005) (private remedies "would seem to aid, rather than hinder" the functioning of federal pesticide law). The Court has rejected arguments that advance a false "balancing" purpose as Exxon contrives here. *See Hillsborough County v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 720 (1985) (even if local regulations restricted the national blood supply, they were not preempted because neither Congress nor the FDA had "struck a particular balance between safety and quantity," but had merely intended to "establish minimum safety standards").[8]

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[8] *See also Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003) ("We take it as true that Congress wanted to reduce pollution caused by motor vehicles, but at the same time did not want to harm the nation's economy by causing gasoline prices to rise too much. But saying that Congress might not have wanted to cause a substantial increase in gasoline prices is not the same as saying that assuring inexpensive gasoline was a goal of the Act.").

In *United States v. Texas*, the Court recognized that the Federal Debt Collection Act was passed "in order to strengthen the Government's hand in collecting its debts," but under the reading proposed by respondents, it "would have the anomalous effect of placing delinquent States in a position where they had less incentive to pay their debts to the Federal Government than they had prior to its passage." 507 U.S. at 536-37.[9]

The same logic holds here. Congress passed the CWA to restore and maintain water quality. Exxon misconstrues the statute in ways that would have the anomalous effect of weakening overall incentives to keep clean water clean. *See* S. Rep. No. 101-94, at 7 (preemption of state oil pollution laws might result in "a decrease in the degree of protection from oil spill damage, rather than an increase"). The Court should reject Exxon's preemption argument as contrary to the CWA's purposes and because Exxon has not demonstrated that punitive damages would result in "irreconcilable conflict" or would otherwise "frustrate the objectives" of federal law. *Silkwood*, 464 U.S. at 256.

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[9] Chief Justice Rehnquist's opinion in *United States v. Texas*, 507 U.S. at 534, rested in part upon maritime law, *Mobil Oil v. Higginbotham*, and CWA case law, *City of Milwaukee v. Illinois*.

III. Federal Environmental Laws Do Not "Wipe Out" Common Law Tort Remedies in Cases Involving Pollution.

Congress passes environmental laws to enhance environmental protection, not to "wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it was enacted." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (Posner, J.) (discussing the Comprehensive Environmental Response, Compensation, and Liability Act, "CERCLA").

Congress typically designs federal environmental laws to work in combination with existing common law tort remedies. CERCLA, for example, preempts certain types of claims – e.g., contribution and indemnity – for which the Act specifically provides a private cause of action, but "preserve[s] to victims of toxic wastes the other remedies they may have under federal or state law." *PMC, Inc.*, 151 F.3d at 617. Thus, courts regularly uphold common law remedies in toxic tort cases for damages to persons or property. *See, e.g.*, *Satsky v. Paramount Commc'ns*, 7 F.3d 1464, 1470 (10th Cir. 1993) (CERCLA does not cover private property); *In re Cropwell Leasing Co. v. NMS, Inc.*, 5 F.3d 899, 901 (5th Cir. 1993) (traditional maritime claims not barred by CERCLA); *Alabama v. Ala. Wood Treating Corp.*, 2006 U.S. Dist. LEXIS 37372 at *43 (S.D. Ala. 2006) (punitive damages not barred by CERCLA).

The same complementary framework exists in other federal environmental statutory contexts. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984) (Federal Insecticide, Fungicide and Rodenticide Act would preempt state damage actions "only if FIFRA were viewed not as a regulatory statute aimed at protecting citizens from the hazards of modern pesticides, but rather as an affirmative subsidization of the pesticide industry"); *Bates,* 544 U.S. at 450-51 (private remedies "would seem to aid, rather than hinder, the functioning of FIFRA"); *Wilson v. Chevron Chem. Co.*, 1986 U.S. Dist. LEXIS 16368 (S.D.N.Y 1986) (punitive damage awards not preempted by FIFRA); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 472 (6th Cir. 2004) (Clean Air Act does not foreclose companion punitive damage claims under common law); *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, 457 F. Supp. 2d 324 (S.D.N.Y. 2006) (Clean Air Act does not preempt common law remedies, despite comprehensive federal Reformulated Gasoline Program); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1284 (W.D. Tex. 1992) (preemption of private damage claims "is clearly not intended under, and would not further the goals of, the Clean Air Act").

Plaintiffs' claims here bear the same relationship to the CWA as toxic tort claims do to CERCLA. They neither duplicate any statutory cause of action, nor do they interfere with any statutory purpose. Thus, courts can and often do award punitive damages for private torts that involve water pollution. *See, e.g.*,

Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320 (11th Cir. 1999) (polluting stream with acidic water); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (contaminating water supply); *Knabe v. Nat'l Supply Div.*, 592 F.2d 841 (5th Cir. 1979) (dumping industrial waste); *Doralee Estates, Inc. v. Cities Servs. Oil Co.*, 569 F.2d 716 (2d Cir. 1977) (spilling oil).[10]

In this case, the "relevant misconduct" – indeed, the "critical factor" – was Exxon's failure to remove Captain Hazelwood from command. Pet. App. 22a, 155a-156a. Leaving a relapsed alcoholic in charge of a supertanker set in motion a series of events that ultimately resulted in a massive and catastrophic oil spill from the *Exxon Valdez*. Consequently, the fishing grounds were closed, and the plaintiffs incurred enormous economic harm.

By enacting the Clean Water Act, Congress did not intend to immunize defendants like Exxon from maritime liability simply because one of the links in the causal chain between recklessness and harm happens to involve oil pollution. The Act does not "speak to" this matter of maritime tort law. *See Poe*,

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[10] "Exemplary damages are intended to inject an additional factor into the cost-benefit calculations of companies who might otherwise find it fiscally prudent to disregard the threat of liability. To function effectively, the award must be 'of sufficient substance to 'smart' . . . the offender.'" *Doralee Estates*, 569 F.2d at 723 (quoting *Reynolds v. Pegler*, 123 F. Supp. 36, 41 (S.D.N.Y. 1954)).

782 So.2d at 1174 (holding that the Clean Water Act is "not sufficiently relevant . . . to invoke a shield against punitive damages").

Exxon's expansive preemption theory fails to account for the Act's savings clauses, and it is contrary to the presumptions against preemption and in favor of the retention of existing common law remedies. Exxon's argument, if accepted, would weaken environmental protections, threaten principles of federalism, and undermine Congress' efforts to protect the nation's waters.

◆

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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AMICUS
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No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus addresses the following question only:

Was the $2.5 billion punitive damages award within the limits permitted by federal maritime law and/or other sources of federal common law?

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Reid Hastie, *et al.*, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damages Awards*, 23 LAW & HUM. BEHAV. 445 (1999) 25

Landes & Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987) 18

David Schkade, *et al.*, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000) 24

Schwartz, *Deterrence & Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV. 133 (1982) 19

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation[1] is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, tort reform activities constitute a substantial portion of WLF's work. WLF is concerned that economic development and consumer welfare not be impeded by improper and excessive punitive damages awards. WLF has regularly appeared before this and other federal courts in cases raising punitive damages issues. *See, e.g., Philip Morris USA v. Williams,* 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999); *BMW of North America v. Gore*, 517 U.S. 559 (1996). WLF also filed briefs in this case in 1997 when it was before the U.S. Court of Appeals for the Ninth Circuit, and in this Court in support of the petition for a writ of certiorari.

WLF fully supports Petitioners' efforts to overturn the judgment below based on each of the three Questions Presented. WLF is submitting this brief because of its particular interest in persuading the federal courts to establish clearer limits, based on federal common law, on the availability and size of punitive damages awards. The Ninth Circuit essentially held that no such limits exist. WLF urges the Court to declare that that holding is inconsistent with the Court's traditional view of remedial issues arising under federal causes of action.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. By blanket letters of consent, all parties have consented to the filing of this brief.

STATEMENT OF THE CASE

The EXXON VALDEZ ran aground in Prince William Sound, Alaska in 1989, spilling several hundred thousand barrels of oil into the Sound. Petitioners (collectively, "Exxon") subsequently spent $2.1 billion in cleaning up the spill and paid private claims totaling $300 million. The proceedings commenced against Exxon by state and federal governments were settled in 1991, with Exxon agreeing to pay environmental and natural resources damages of $900 million. Exxon also paid criminal and restitution fines in the amount of $125 million. The total liabilities incurred by Exxon as a result of the oil spill exceeded $3.4 billion. Notwithstanding the liabilities that Exxon had already incurred, an Alaskan jury awarded an additional punishment of $5 billion as punitive damages. The U.S. Court of Appeals for the Ninth Circuit upheld a punitive damages award of $2.5 billion, several orders of magnitude larger than the next highest punitive damages award ever upheld by a federal appellate court. The petition requests the Court to hold that, under the circumstances of this case, federal law does not permit an award of punitive damages or, alternatively, does not permit a punitive damages award of that magnitude.

The immediate cause of the grounding of the EXXON VALDEZ is not in dispute. As the ship was leaving Valdez harbor, Joseph Hazelwood (the ship's captain) explained to Gregory Cousins (the officer on watch) a maneuver that would be required to avoid ice detected in the ship's path. In violation of Exxon's written policy regarding operation of Exxon vessels, Hazelwood then left the ship's bridge and went to his cabin, leaving Cousins and a helmsman alone on the bridge. Cousins failed to steer the ship away from a reef (the final step necessary to complete the maneuver Hazelwood had explained to him), and the ship ran aground. Hazelwood had a history of alcoholism (a history of which Exxon was aware), and there was evidence at trial that he was drinking heavily on the night of the grounding.

In an action filed in federal district court in Alaska, the plaintiffs (a certified class consisting of all persons who possessed or asserted a punitive damages claim arising from the spill) sought punitive damages under federal maritime law against Hazelwood and Exxon. The case was tried in 1994 along with compensatory damages claims filed by commercial fishermen who alleged that their economic losses exceeded the compensation they had received under Exxon's claims program.

In the first phase of the trial, the jury was instructed to determine whether Hazelwood and/or Exxon had acted recklessly (a necessary predicate for a punitive damages award). It was instructed that because Hazelwood was a supervisory employee, his conduct (even though it violated official Exxon policy) was attributable to Exxon, and thus that if it found that Hazelwood acted recklessly, it should also find that

Exxon acted recklessly. The jury found that both acted recklessly.[2]

In the second phase of the trial, the jury considered the economic damages claims of commercial fishermen. Rejecting the great majority of those claims, the jury awarded $287 million in compensatory damages; after Exxon was given credit for its prior claims payments, the net award was $19.6 million. In the third phase, the jury considered punitive damages. It awarded $5,000 in punitive damages against Hazelwood and $5 billion in punitive damages against Exxon. The trial court entered judgment on those awards.

On appeal, the Ninth Circuit in November 2001 affirmed in part, vacated in part, and remanded. Pet. App. 57a-117a. The court rejected each of Exxon's challenges to the permissibility of a punitive damages award. *Id.* 68a-79a. In particular, it rejected Exxon's claim that such damages were impermissible because, in light of the $3.4 billion paid by Exxon in the aftermath of the spill, a punitive damages award would serve neither of the accepted purposes of such awards: deterrence and retribution. *Id.* 68a. The court said:

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[2] The plaintiffs contended – and submitted relevant evidence hotly disputed by Exxon – that Exxon also should be deemed reckless based on actions of Exxon officials other than Hazelwood. For example, the plaintiffs contended that Exxon officials acted recklessly in allowing Hazelwood to continue to captain the EXXON VALDEZ despite their knowledge of his history of alcoholism. But the jury made no separate finding on that claim; it was instructed to arrive at a finding that Exxon acted recklessly once it determined that Hazelwood acted recklessly.

> Exxon's argument has some force as logic and policy. But it has no force, in the absence of precedent, to establish that the law, or the Constitution, bars punitive damages in these circumstances. . . . [W]e reject the argument.

Id.

The appeals court also rejected Exxon's argument that federal maritime law bars punitive damages awards against a shipowner on the basis of the ship master's reckless conduct, in the absence of a finding that the owner directed, countenanced, or participated in that conduct. *Id.* 80a-86a. The court said it was bound in that regard by an earlier Ninth Circuit decision in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), which held that punitive damages could be imposed on a maritime company based on the grossly negligent conduct of a dock foreman employed in a managerial capacity and acting within the scope of his employment. *Id.* 84a-85a.[3] The court did not address Exxon's alternative argument that even when punitive damages are permitted under maritime law, it strictly limits the size of such awards.

The court held that the $5 billion punitive damages award was too high to withstand review under the Due Process Clause. *Id.* 90a-104a. The court noted that the district court had upheld the verdict prior to this Court's decision in *BMW* and thus did not have an opportunity to apply that decision's three guideposts for review of punitive damages awards – degree of reprehensibility, disparity between the harm or potential harm suffered by the victim and his punitive damages award, and the difference between the award and the civil/criminal penalties authorized in comparable cases. *Id.* 94-95 (*citing BMW,* 517 U.S. at 574-75). After discussing how those three factors might be applied in this case and suggesting that a more appropriate punitive damages award might well be significantly less than $5 billion, the court vacated the $5 billion award and remanded "so that the district court can set a lower amount in light of the *BMW* and *Cooper Industry* standards." *Id.* 104a.

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[3] The appeals court conceded that it was impossible to determine from the verdict whether the jury's finding that Exxon acted recklessly was based on anything other than an imputation from Hazelwood's recklessness. *Id.* 88a. Accordingly, the determination that Exxon acted recklessly – and thus can be held liable for punitive damages – depends on whether *Protectus Alpha* is a proper interpretation of federal maritime law.

The case made two more round-trips to the district court and back to the appeals court, with each decision focusing on due process limitations on the punitive damages award. Finally, in May 2007 a Ninth Circuit panel announced that it was "time to for this protracted litigation to end," and directed the district court to reduce the punitive damages award to $2.5 billion. *Id.* 1a-56a. The appeals court denied Exxon's petition for rehearing *en banc*, with two judges writing dissents from the denial. *Id.* 285a-293a. Judge Kozinski dissented on the ground that the panel decision conflicted with a well-established federal maritime law prohibition against vicarious punitive damages awards against ship owners. *Id.* 287a-292a. Judge Bea agreed with Judge Kozinski that punitive damages were not awardable in this case, and added that the award was excessive under *State Farm* because the ratio between punitive and compensatory damages was too high. *Id.* 292a-293a.

SUMMARY OF ARGUMENT

Even in an era in which punitive damages awards are often "many times the size of such awards in the 18th and 19th centuries,"[4] the $2.5 billion award in this case stands out as particularly noteworthy. It is nearly 100 times larger than the largest punitive damages award ever previously affirmed by a federal appeals court. It is imposed in a case lacking any of the usual hallmarks of particularly culpable conduct, *e.g.*, personal injury, intentional misconduct, or efforts to cover up the results of one's wrongdoing. It is imposed in a field of law (maritime law) with a long tradition of limiting damage awards in tort suits. WLF agrees with Petitioners that an award of punitive damages in this case is inconsistent with that maritime law tradition, and also agrees that Congress, when it adopted the Clean Water Act, 33 U.S.C. § 1311 *et seq.*, intended to preclude such awards in cases involving either negligent or intentional maritime oil spills.

WLF writes separately to focus on the third Question Presented by the Petition, which addresses limitations imposed by federal maritime law on the *size* of punitive damages awards. WLF respectfully suggests that the lower federal courts are in need of guidance regarding federal common law limitations on the size of punitive damages awards arising (as here) under federal law causes of action. When such cases arise, the lower federal courts all too often confine their analysis of limits on the size of punitive damages awards to a due process analysis. If the size of the award passes muster under the *State Farm/BMW* line of cases, the analysis comes to an end. That is essentially what happened here: the Ninth Circuit spent a decade examining whether the size of the punitive damages award violated the Due Process Clause, but it barely glanced at the substantial statutory and federal common law arguments raised by Exxon.

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[4] *Philip Morris USA v. Williams*, 127 S. Ct. at 1064.

Yet it stands to reason that the federal common law imposes far more demanding standards on punitive damages awards than does the Due Process Clause. This Court has long recognized that state courts are entitled to a significant degree of deference regarding how they go about furthering a State's legitimate interests in punishing unlawful conduct and deterring its repetition. For that reason, the *State Farm/BMW* line of cases grants States substantial leeway in determining the proper size of punitive damages awards, and only steps in to impose limits when an award is so large as to amount to arbitrary punishment that serves no legitimate state interest.

The need for deference disappears when (as here) the punitive damages award arises in a case raising federal questions. In such cases, whether punitive damages are an appropriate remedy and, if so, the appropriate size of such awards are issues that must be settled by the federal government alone. When Congress has adopted legislation that addresses those issues, the job of the federal courts is relatively easy; they simply do their best to discern congressional intent. Petitioners make a strong case that Congress has indeed addressed the issues raised here, and has decreed, through adoption of the Clean Water Act, that punitive damages are unavailable in federal maritime suits alleging negligent or intentional maritime oil spills. But Congress often fails to address punitive damages issues when creating new causes of action, thereby leaving it to the courts to fill in the blanks through the creation of federal common law.

Rather than fulfilling that role in the appropriate manner – by, for example, turning for guidance to the general common law or discerning rules based on the purposes sought to be served by punitive damages awards – lower federal courts often turn to the *State Farm/BMW* line of cases. But those cases articulate due process rules that are intended to create an absolute minimum level of fairness, not to govern proceedings peculiarly within the province of the federal courts.

The Ninth Circuit inappropriately abdicated its role in creating rules governing the appropriate size of punitive damages awards in federal-question cases, by devoting virtually its entire analysis to the due process limits on the size of the punitive damages award. For example, the Ninth Circuit conceded that there was "some force as logic and policy" behind Exxon's argument that punitive damages were inappropriate because its $3.4 billion in post-spill payments had already "thoroughly punished and deterred any similar conduct in the future." Pet. App. 68a. But it was unwilling to adopt federal common law rules implementing that "logic and policy," because it was unable to locate any case law establishing precedent for doing so. *Id.* WLF agrees with Petitioners that – in light of overwhelming evidence that prior criminal and civil penalties imposed on Exxon have already satisfied any reasonable interest in punishment and deterrence – the Ninth Circuit erred in failing to impose federal maritime law limitations on punitive damages. Moreover, in the absence of an explicit congressional directive to the contrary, that same evidence would preclude (or at least strictly limit) punitive damages awards under *any* federal-law cause of action, regardless whether it arose at sea or on land. WLF urges the Court to provide lower courts with guidance regarding the propriety of adopting federal common law rules governing punitive damages awards. In the absence of such guidance, lower courts will continue to focus solely on due process limitations – limitations that often are insufficient by themselves to ensure that punitive damages awards are properly serving society's interests in deterrence and retribution.

Guidance is particularly warranted in light of recently developed empirical evidence demonstrating that juries are largely incapable of producing consistent and predictable punitive damages verdicts. Although jurors exhibit a fair degree of consistency in ranking the "outrageousness" of wrongful conduct, their translation of that ranking into dollar values is enormously variable. Accordingly, if the consistency (and, ultimately, the legitimacy) of federal-law punitive damages awards is to be maintained, federal judges must play a greater role in overseeing the size of such awards, to ensure that they are properly serving their legitimate functions. Such oversight is fully consistent with the proper allocation of roles between judges and juries because, as the Court has explained, "'the level of punitive damages is not really a fact tried by the jury.'" *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 427 (2001) (quoting *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 459 ((1996) (Scalia, J., dissenting).

ARGUMENT

I. FEDERAL COMMON LAW, AND FEDERAL MARITIME LAW IN PARTICULAR, IMPOSE STRICT LIMITATIONS ON THE SIZE OF PUNITIVE DAMAGES AWARDS ARISING UNDER FEDERAL-LAW CAUSES OF ACTION

In a line of case stretching back 16 years, the Court has recognized that the Fourteenth Amendment's Due Process Clause imposes limitations on the size of punitive damages awards. The Court has recognized that when such awards can fairly be categorized as "grossly excessive" in relation to a State's interests in punishment and deterrence, they "enter the zone of arbitrariness that violates the Due Process Clause." *BMW*, 517 U.S. at 568.

At the same time, however, the Court has been cognizant that States have very legitimate interests in imposing punitive damages for purposes of punishment and deterrence. Accordingly, the Court has repeatedly expressed federalism-based warnings that its due process standards are not intended to dictate to state courts all facets of their punitive damages jurisprudence but instead impose bare minimum standards designed to prevent only those awards that most clearly constitute nothing more than arbitrary punishment. Thus, in *BMW*, the Court explained, "In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id.* In *Cooper Industries*, the Court said, "As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards." *Cooper Industries,* 532 U.S. at 433 (2001). *See also Philip Morris USA*, 127 S. Ct. at 1065 ("States have some flexibility to determine what kinds of procedures" they will adopt to ensure that punitive damages award comport with due process.).[5]

Similarly, those justices who have opposed recognition of substantive due process limits on the size of punitive damages awards have based their opposition in part on a reluctance to invoke the U.S. Constitution to interfere with States' prerogatives to decide how best to punish and deter wrongdoing. *See, e.g., TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., concurring in the judgment) ("State legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime, and have frequently exercised that authority in recent years."); *BMW*, 517 U.S. at 598-99 (Scalia, J., dissenting) ("[T]he Court's activities in this area are an unjustified incursion into the province of State governments. . . . The Constitution provides no warrant for federalizing yet another aspect of our Nation's culture"); *id.* at 607, 613 n.3 (Ginsburg, J., dissenting) ("The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain. . . . In any 'lawsuit where state law provides the rule of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.'") (quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989)).

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[5] The Court's reluctance to interfere with state law governing punitive damages has been evident in its consideration of standard-of-proof issues. The Court has noted that state laws requiring a plaintiff seeking an award of punitive damages to prove her claim by "clear and convincing" evidence is "an important check against unwarranted imposition of punitive damages." *Honda Motor Co. v. Oberg,* 512 U.S. 415, 433 (1994). Nonetheless, the Court has declined to impose "clear and convincing" standards as an element of a defendant's due process rights. The Court stated in *Haslip* that "there is much to be said in favor of a State's requiring" a higher standard of proof, but held that Alabama's much lower standard, that the jury be "reasonably satisfied from the evidence," was constitutionally permissible. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991).

By way of contrast, in lawsuits where (as here) it is *federal* law that provides the rule of decision, there are no federalism-based reasons for federal courts to restrict themselves to adopting bare-minimum fairness standards, and every reason to adopt rules to ensure that punitive damages awards are serving their proper purposes. This Court has stated repeatedly that punitive damages serve two legitimate purposes only: deterrence and retribution. *State Farm*, 538 U.S. at 419 ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *BMW*, 517 U.S. at 568, 584-85; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

Moreover, the proper level of deterrence and retribution is an issue of law to be determined by Congress and the courts – not simply handed off to the jury with instructions to do its best to come up with a result that it deems just. As the Court explained in *Cooper Industries,* it is wholly appropriate for courts to impose strict limits on the size of permissible punitive damages awards in federal-law cases and to review such awards carefully to ensure that juries adhere to those limits; unlike the measure of actual damages suffered, "'the level of punitive damages is not really a fact tried by the jury.'" *Cooper Industries,* 532 U.S. at 437 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).[6]

Petitioners have convincingly demonstrated that Congress has already addressed the availability of punitive damages awards in cases of this sort -- it determined (when adopting the Clean Water Act) that such awards are impermissible in tort suits involving either negligent or intentional maritime oil spills. Pet. Br. 27-43. But were this Court to determine that Congress had not addressed the issue, it would then be incumbent on federal courts to determine, as a matter of federal common law, whether punitive damages should be available in cases of this sort and, if so, what limitations should be imposed on such awards.

Although federal courts have assumed that punitive damages are available under a wide range of federal-law causes of action, Congress generally has not directly addressed their availability or how federal courts should go about quantifying such damages. Only a handful of federal statutes provide explicit caps on punitive damages awards. *See, e.g.,* 42 U.S.C. § 1981a(b)(3) (imposing $300,000 monetary cap on punitive damages in cases filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*). By and large, when enacting new federal-law causes of action, Congress generally has not specified whether punitive damages are among the available remedies. Even when it has specified that punitive damages *are* available, it has left to the courts the job of fleshing out federal common law rules governing the size of punitive damages awards.[7] *See, e.g.,* 15 U.S.C. § 1681n(a)(2) (providing for award of punitive damages in such amount "as the court may allow" against one who "willfully fails to comply" with provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, *et seq.*).[8]

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[6] *Cooper Industries* determined that because a jury's award of punitive damages does not constitute a finding of fact, careful appellate review of a district court decision upholding the award "does not implicate" Seventh Amendment jury-trial rights. *Id.*

Unfortunately, rather than fulfilling that function, many federal appeals courts have simply turned to the due process limitations imposed by the *State Farm/BMW* line of cases as the sole check on excessive punitive damages awards in federal-law causes of action. *See, e.g.*, *Bach v. First Union National Bank*, 486 F.3d 150 (6th Cir. 2007) (applying due process limitations, court reduces from $2.2 million to $400,000 punitive damages award under FCRA); *Gaffney v. Riverboat Servs. of Indus.*, 451 F.3d 424, 464 (7th Cir. 2006) (rejecting challenge to size of punitive damages award under 46 U.S.C. § 2114, which prohibits discharge of seamen for acting as whistleblowers; only review available besides due process review is abuse-of-discretion review), *cert. denied*, 127 S. Ct. 933 (2007); *Bowles v. Osmose Utils. Servs., Inc.*, 443 F.3d 671 (8th Cir. 2006) (applying due process limitations, court rejects challenge to award of punitive damages under 42 U.S.C. § 1981 for racial harassment of employee); *Evans v. Fogarty*, 241 Fed. Appx. 542 (10th Cir. 2007) (reinstating jury's $1.35 million punitive damages award under 42 U.S.C. § 1983; declined to consider defendants' challenge to the size of award because defendants had not raised a due process challenge).

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[7] When confronted with federal statutes that provide little guidance regarding appropriate standards for awarding punitive damages, the Court has not hesitated to establish federal common law standards not grounded in the statute itself. *See., e.g., Kolstad*, 527 U.S. at 541-46 (turning to general common law for guidance in determining corporate employer's vicarious liability for punitive damages under the Civil Rights Act of 1991, 42 U.S.C. § 1981a).

[8] The meaning of the phrase "willfully fails to comply" was at issue in the Court's recent decision in *Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201 (2007). The federal courts continue to be inundated with putative class action suits seeking punitive damages awards under the FCRA.

That is precisely what the Ninth Circuit did in this case. It simply declined to consider Exxon's argument that federal common law imposed limits on the size of the punitive damages award. Pet. App. 68a.[9] Exxon argued that such damages were impermissible because, in light of the $3.4 billion paid by Exxon in the aftermath of the spill, a punitive damages award would serve neither of the accepted purposes of such awards: deterrence and retribution. *Id.* While acknowledging that "Exxon's argument has some force as logic and policy," it declined to consider the argument in the absence of precedent supporting Exxon's position. *Id.* But cases of this type provide compelling circumstances for adoption of federal common law rules limiting the size of punitive damages awards. If, in fact, Exxon's prior payment of $3.4 billion meant that a punitive damages award would have little or no deterrent or retributive effect, then the appeals court should have applied federal common law to reduce or eliminate the punitive damages award in this case.

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[9] That federal common law argument was in addition to Exxon's arguments that both federal maritime law and the Clean Water Act prohibited *any* punitive damages. *See id.* at 80a-86a, 73a-78a.

II. THE $2.5 BILLION AWARD CANNOT BE JUSTIFIED ON EITHER DETERRENCE OR RETRIBUTION GROUNDS

The overwhelming evidence indicates that the huge $2.5 billion punitive damages award cannot be justified on either deterrence or retribution grounds. Because this Court has held repeatedly that deterrence and retribution are the *only* grounds that can justify a punitive damages award, federal common law principles dictate that no punitive damages are properly awardable in this case – even without taking into account Congress's identical determination, expressed through the Clean Water Act.

A. Deterrence

As Justice Breyer has noted, economic theory holds generally that proper deterrence will be achieved if defendants pay the total cost of the harm they cause.

BMW, 517 U.S. at 592-93 (Breyer, J., concurring). When tort law requires defendants to compensate for such harm, it forces them to "internalize" the harm's cost, thereby providing appropriate incentives for them to invest in precaution (or scale back activities where accidents may occur) up to the point where social welfare is maximized, *i.e.*, where the marginal cost of increased precaution equals the marginal cost of reduced accidents. *See generally*, Landes & Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987). Here, Exxon has already incurred liabilities exceeding $3.4 billion as a result of the oil spill. The Ninth Circuit's failure to give serious consideration to the deterrent impact of these liabilities already incurred by Exxon cannot be squared with this Court's precedents. It defies reason to suggest that accident costs of $3.4 billion would not induce Exxon (or any similarly situated company) to implement corrective measures.

There is only one scenario that economists cite under which compensatory damages might not fully deter unintentional torts: the so-called "underenforcement" or "undercompensation" rationale. This rationale posits that compensatory damages may deter incompletely where difficulties in detection or shortfalls in enforcement diminish the likelihood that a defendant will incur liability for the full social cost of its conduct. *See* Ellis, *Fairness & Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982). However, that scenario has no bearing to the facts of this suit, where there is no fear that the harm and attribution of liability will go undetected. Injury is evident, the defendant is known, and mass lawsuits for all compensatory damages soon follow.

Nonetheless, much judicial treatment of punitive damages, despite reliance on the deterrence objective, remains strikingly "oblivious[] to the basic point that ordinary civil damages – in the course of providing compensation – concurrently function to deter." Schwartz, *Deterrence & Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV., 133, 137 (1982). The Court should make clear to lower courts that plaintiffs seeking punitive damages in federal-law causes of action must support their claims with evidence that a punitive damages award – over and above all compensatory awards – is necessary for deterrence purposes. If the tort system is going to hand out multibillion dollar awards based on the ostensible need for deterrence, federal common law demands no less. The courts below failed even to consider whether the $3.4 billion paid by Exxon as a result of the EXXON VALDEZ spill is sufficient to induce shippers to take all practicable steps to prevent a recurrence. That failure requires reversal of the judgment below.

The Ninth Circuit's justified its imposition of $2.5 billion in punitive damages on Exxon's great wealth. But as Justice Breyer has pointed out, the relevance of wealth to deterrence is difficult to understand, given "the distant relation between a defendant's wealth and its responses to economic incentive." *BMW*, 517 U.S. at 591 (Breyer, J., concurring). Emphasis on wealth is particularly misguided in the case of corporations:

> For natural persons the marginal utility of money decrease as wealth increases, so that higher fines may be needed to deter those possessing great wealth. . . . Corporations[, however,] are abstractions; investors own the net worth of the

> business. These investors pay any punitive award (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992).

Moreover, excessive punitive damages may actually lead to "overdeterrence," a result that harms not only the defendant but society as well. Punitive damages exceeding the amount needed to fill any deterrence gap promote inefficiency and misallocation of resources. *See BMW*, 517 U.S. at 593 (Breyer, J., concurring) (larger damages can potentially "'over-deter' by leading potential defendants to spend more to prevent the activity that causes harm, say, through employee training, than the cost of the harm itself."). In sum, the overwhelming evidence before the court of appeals was that the $2.5 billion punitive damages award was unnecessary to deter future misconduct.

B. Retribution

Nor can the punitive damages award be justified as a means of punishing Exxon. As a practical matter, it is doubtful whether retribution could ever be substantially or meaningfully served by the assessment of punitive damages against fictitious entities such as corporations. As the Supreme Court said in *City of Newport v. Fact Concept, Inc.*, a case forbidding assessment of punitive damages against municipal corporations as a matter of law:

> Under ordinary principles of retribution, it is the [individual] wrongdoer himself who is made to suffer for his unlawful conduct. . . . A municipality, however can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the government entity itself.

453 U.S. 217, 267 (1981) (emphasis in original).

The same, obviously, is true of private corporations, particularly widely held corporations whose shareholders have no meaningful ability to manage their day-to-day affairs. The goal of retribution may be served by punishing individual corporate agents who commit blameworthy acts – as the jury did in this case by assessing punitive damages against Captain Hazelwood – but it is not served by punishing entities incapable of having malice (or any other blameworthy state of mind sufficient for punitive damages) independent of that of their separately punishable agents. As commentators have long noted, "[T]he entire notion of punishment-as-punishment becomes deeply problematic when applied to the corporate form." Schwartz, *supra* at 144.

A number of courts have made this same point, not least the Supreme Court in *City of Newport*:

> Regarding retribution, it remains true that an award of punitive damages against a municipality

> "punishes" only the taxpayers, who took no part in the commission of the tort. . . . Neither reason nor justice suggests that such retribution should be visited upon shoulders of blameless or unknowing taxpayers. . . . Whatever its weight, the retributive purpose is not significantly advanced, if advanced at all, by exposing municipalities to punitive damages.

453 U.S. at 267-68. At the very least, the fact that the award comes entirely at the expense of innocent parties precludes any sanction of the massive magnitude assessed here.

The appropriateness of a $2.5 billion award is particularly problematic when compared to the $125 million paid by Exxon in connection with criminal proceedings. That amount represented the considered judgment of officials of the United States and Alaska governments regarding the appropriate level of "punishment." There can certainly be no more legitimate measure of society's disapprobation than the penalties enforced by society's elected officials.

By contrast, there is no principled reason for allowing punitive damages juries to impose much greater sanctions, at the behest of self-interested tort victims and their lawyers, on the theory that the public interest in retribution demands more than the public's official representatives have found appropriate. Such a procedure confuses retribution – a purely public expression of social disapproval – with private revenge, a consideration that courts have never recognized as a proper purpose of punitive damages.

In sum, neither deterrence nor retribution can justify a punitive damages award anywhere near the $2.5 billion upheld by the Ninth Circuit. More importantly, the Ninth Circuit failed even to consider whether, as a matter of federal common law, the absence of any deterrence or retribution rationale required elimination or substantial reduction of the punitive damages award. That failure requires reversal of the punitive damages award and, at the very least, remand to permit the appeals court to consider the issue in the first instance.

III. JURIES ARE LARGELY INCAPABLE OF PRODUCING CONSISTENT AND PREDICTABLE PUNITIVE DAMAGES VERDICTS

Guidance from this Court regarding the propriety of adopting federal common law rules governing punitive damages awards is particularly warranted in light of recently developed empirical evidence demonstrating that juries are largely incapable of producing consistent and predictable punitive damages verdicts. Although jurors exhibit a fair degree of consistency in ranking the "outrageousness" of wrongful conduct, their translation of that ranking into dollar values is enormously variable.

Much of that research is collected and synthesized in a recent book written by preeminent scholars in a variety of relevant fields. *See* Cass R. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* ("*How Juries*

Decide") (2002).[10] Among their other principal findings:

- Deliberation by groups of jurors does not moderate the unpredictability of punitive damages awards. Instead, it exacerbates such unpredictability – juries deliberating collectively return consistently higher and more variable awards that do individual jurors. *Id.* at 43-61; *see also,* David Schkade, *et al.*, *Deliberating About Dollars: The Severity Shift*, 100 Colum. L. Rev. 1139 (2000).

- Juries will not and cannot apply standard economic deterrence theories, even when instructed on how to do so. Instead, juries will impose punitive damages based on an amount they deem an appropriate level of punishment, without regard to whether other payments by the defendant have adequately deterred future misconduct and whether a punitive damages award will result in overdeterrence. *How Juries Decide*, 132-41; *see also* Cass R. Sunstein, *et al.*, *Do People Want Optimal Deterrence?*, 29 J. Legal Stud. 237, 241-46 (2000); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. Legal Stud. 313, 325-37, 342-44 (2001).

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[10] The authors are experts in the area of behavioral analysis of the law (Professor Cass R. Sunstein of the University of Chicago), cognitive psychology (Professors Daniel Kahneman of Princeton University, David A. Schkade of the University of Texas, and John W. Payne of Duke University), jury decisionmaking (Professor Reid Hastie of the University of Chicago), and behavior economics (Professor W. Kip Viscusi of Harvard University).

- Juries assess punitive damages in significantly varying amounts based on factors bearing no relation to the purposes such awards are intended to serve (deterring future misconduct and imposing a punishment commensurate with the severity of the past misconduct) – such as the amount of punitive damages requested by plaintiffs' counsel and bias in favor of local plaintiffs suing out-of-state defendants. *How Juries Decide*, 62-74. *See also,* Reid Hastie, *et al.*, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damages Awards,* 23 Law & Hum. Behav. 445 (1999).

- Juries impose punitive damages based on hindsight bias and on irrational attitudes toward risk – such as awarding higher punitive damages against defendants that conduct cost/benefit analyses than against those that do not. *How Juries Decide*, 96-108, 112-31; *see also*, W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act*, 52 Stan. L. Rev. 547, 552-59 (2000).

The empirical research consisted of large-scale studies of jury-eligible citizens. Researchers initially provided 899 individuals with materials describing ten personal injury scenarios of varying degrees of reprehensibility. They asked the mock jurors to rank the scenarios on a bounded scale of one to six, by both degree of outrageousness and severity of punishment that should be imposed, and then to specify the dollar punishment the defendant should have to pay. *How Juries Decide*, 17-26, 31-42; *see also*, Cass R. Sunstein, *et al.*, *Assessing Punitive Damages (with Notes on*

Cognition and Valuation in Law), 107 Yale L.J. 2071 (1998). In a follow-up study, 3,000 mock jurors were asked to perform the same task individually, and then as members of about 500 deliberating juries. *How Juries Decide*, 43-61. Both studies demonstrated the striking unpredictability of punitive damages awards even when juries agree on the blameworthiness of the defendants' conduct, and the second study demonstrated that that variability only increases when deliberations are conducted in a group setting. *Id.* at 31-62.

The researchers proposed two highly plausible explanations for this huge variability and the increased variability that comes with joint deliberations. First, jurors asked to compute punitive damages have no frame of reference: they are unlikely to have engaged previously in any similar exercise, and they essentially are told that punitive damages can be imposed within a range of zero to infinity. *Id.* at 41. Second, because zero is the lower bound on a punitive damages award but there is no upper bound, juries - once they have collectively decided to award a non-zero amount – tend to resolve their collective disagreements by shifting toward the unbounded end. *Id.* at 58.

Regardless of the causes of the huge variability, its existence is not open to serious challenge and has major implications for punitive damages law. It means that a given jury verdict regarding whether (and in what amount) to award punitive damages cannot realistically be deemed to constitute the collective views of the citizenry regarding the proper level of deterrence and punishment to be meted out in a given instance. It certainly confirms *Cooper Industries*'s determination that a jury's punitive damages award in no way represents a finding of fact by the jury. *Cooper Industries*, 532 U.S. 427. A jury may reach a reproducible consensus regarding the defendant's blameworthiness and even regarding the monetary penalty necessary to deter future misconduct, but the empirical researched cited above demonstrates that there is little if any correlation between such findings and a jury's actual punitive damages award.

The research confirms the need for courts to carefully monitor all punitive damages awards, which – in the absence of careful monitoring – impose on defendants "an acute danger of arbitrary deprivation of property." *State Farm*, 538 U.S. at 417. That danger is particularly severe when, as here, the defendant is a large, out-of-state corporation being sued by local plaintiffs. *Honda Motor*, 512 U.S. at 431-32. As noted above, federalism concerns counsel restraint in invoking federal law as the basis for overturning punitive damages awarded on the basis of state law. No such restraint is warranted when, as here, the award is based on federal law. When as here, the evidence demonstrates that a punitive damages award imposed under federal law furthers no legitimate federal interest in either punishment of wrongdoing or deterrence of future misconduct, federal courts should not hesitate to overturn such awards.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the judgment of the court of appeals.

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